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Not So Fair After All--International Aspects of the Fairness in Music Licensing Act of 1998

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I. INTRODUCTION

Music is embedded in our society. Due to the availability of television, radio, and the Internet, society often forgets that an individual creates every song and each song has rights attached to it.[1] These rights exist because an artist has shared creativity and imagination with the world and is therefore entitled to payment for these ideas.[2] Artists also share their music with others who use it for their own economic gain, and artists are entitled to payment when their ideas are used.[3]

"The importance of music has been demonstrated by the billions of dollars spent each year on CDs and stereo equipment."[4] CDs and stereo equipment are used in public places because music strongly affects people's emotions and moods.[5] For example, the business world saturates office workstations, elevators, and telephones with music-on-hold, in the hopes of creating a more enjoyable working environment.[6] Music influences the buying decisions of consumers and promotes sales, creates a desirable atmosphere in retail stores, and encourages repeat visits to restaurants.[7] Music is also used in conjunction with marketing campaigns to help create the desired image of a business.[8]

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1. *See Frequently Asked Questions About Licensing, at* http://www.ascap.com/licensing/licensingfaq.html (last visited Oct. 13, 2000) (copy on file with *The Transnational Lawyer*) (giving explanations to questions about broadcast licensing, radio licensing, television licensing, and other general licensing questions).

2. *See id.*; *see also* 17 U.S.C. §§ 101-120 (1999) (establishing the subject matter and scope of United States copyright law); *see also infra* Parts II.A, II.B (explaining that a United States artist is entitled to international copyright protection because the United States works together with performing rights organizations located overseas and because international treaties establish international protection for such artists).

3. *See ASCAP Licensing, at* http://www.ascap.com/licensing/licensing.html (last visited Oct. 13, 2000) (copy on file with *The Transnational Lawyer*) (describing the function of an ASCAP license). "ASCAP licenses the right to perform songs and musical works created and owned by songwriters, composers, lyricists and music publishers who are ASCAP members and members of foreign performing rights organizations who are represented by ASCAP in the United States." *Id.*

4. Steve Ernst, *AEI Capitalizes on Mix of Music and Marketing,* PUGET SOUND BUS. J. (June 25, 1999), *available at* http://seattle.bcentral.com/seattle/stories/1999/06/28/focus16.html (copy on file with *The Transnational Lawyer*) (quoting Michael Malone).

5. *See id.; see also* WILLIAM KRASILOVSKY AND SIDNEY SHEMEL, THIS BUSINESS OF MUSIC: THE DEFINITIVE GUIDE TO THE MUSIC INDUSTRY 3 (8th ed. 2000) (explaining how large of an impact the music industry has made in society). For example, "the average American twelve years old and older listens to about twenty-five hours of radio per week, much of it as background music in restaurants, hotel lobbies, elevators and factories." *Id.*

6. *See* Lydia Pallas Loren, *Paying the Piper,* 3 J. SMALL & EMERGING BUS. L. 231, 232 (1999) (discussing generally the impact of the changes to Section 110(5) of the United States Copyright Act).

7. *See ASCAP Licensing, supra* note 3 (explaining the positive impact that music has on people).

8. *See* Ernst, *supra* note 4 (advocating the belief that music has become a major tool in establishing the particular image a business would like to portray).

Copyright law protects individual musical works. The protection extends to the artists, composers, publishers, and other copyright owners. The copyright does not come from the physical property itself, but is based on the authorship of the creative work.[9] The drafters of the United States Constitution recognized the need to protect this right when they vested Congress with the power to "promote the Progress of Science, and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[10] Providing copyright owners with the exclusive right to control the exploitation of their creative works encourages the generation of more creative works.[11] In addition, without copyright law, a songwriter's financial incentive to create new works would diminish, depriving society of the positive benefits of music.[12]

Once an artist or composer creates a musical work, copyright issues arise. A copyright holder has the exclusive right to publicly perform a work to which he holds a copyright.[13] For anyone other than the copyright owner who wants to perform a song in public, such as in a restaurant, bar, or nightclub, the copyright owner's permission is required and that permission can be obtained through a license from a performing rights organization.[14] The main function of performing rights organizations is to monitor the hundreds of thousands of establishments playing music, to collect licensing fees, and to then distribute the fees directly to members.[15] Due to the internationalization of popular music through television,[16]

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9. *See* KRASIKOVSKY & SHEMEL, *supra* note 5, at 95. "For example, someone who purchases a collection of letters written by a famous person owns the letters but not the right to publish copies of the letters; the right belongs to the person who owns the copyright." *Id.* Ideas themselves are free for anyone to take and cannot be copyrighted because of the belief that society will benefit from their free dissemination. *See id.* at 329.

10. U.S. CONST. art. I, § 8, cl. 8; *see also* DONALD S. PASSMAN, ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS 207 (1994) (explaining that the purpose of copyright law is to "promote the progress of science and useful arts by giving creators exclusive rights to their works for a while").

11. *See* Laurence R. Helfer, *World Music on a U.S. Stage: A Berne/TRIPS and Economic Analysis of the Fairness in Music Licensing Act*, 80 B.U. L. REV. 93, 106 (2000).

12. *See id.* at 106 (explaining that "once a copyrighted work is created, its owner's profit maximizing incentives will encourage the transfer of the right to exploit that work to users who value it most highly, with values determined by the market's pricing system").

13. *See* 17 U.S.C. § 101 (stating that "perform" means "to recite, render, play, dance, or act it, either directly or by means of any device or process or, in the cause of a motion picture or other audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible").

14. *See ASCAP Licensing*, *supra* note 3.

15. *See* Loren, *supra* note 6, at 233-34 (outlining how performing rights organizations work by explaining that copyright owners enter into agreements with performing rights organizations which allow the organizations to license public performances of the copyright owners works).

16. *See* JEFFREY BRABEC & TODD BRABEC, MUSIC, MONEY, AND SUCCESS 117-18 (1994) (reporting that because there are over "1,000 commercial television stations operating in the United States, thousands of broadcast outlets out of the United States, and the presence of many cable systems and services," music that is played on television generates billions of dollars in revenues the United States alone). "And with technology expanding the broadcast spectrum at an increasing rate each year in addition to the increasing proliferation of broadcast stations in the foreign marketplace, the demand for product for these station to air continues at an all-time high." *Id.* at 118.

international tours of music performers, music over the Internet,[17] and the decrease in overseas shipping costs, it has become increasingly important to ensure that all artists receive copyright protection.[18]

Section 110(5) of the United States Copyright Act[19] governs whether businesses and other establishments are required to pay a licensing fee to a performing rights organization based upon the square footage of the establishment and the type of equipment used to transmit the music.[20] If the establishment meets the exemption requirements set forth under the Section, the establishment does not have to pay licensing fees to play the music.[21] This holds true even though the music is entertaining the customers who eat, drink and shop in the establishment, potentially creating appeal for a repeat visit and generating more revenue for the establishment.[22] This exemption creates problems for performing rights organizations that are obligated to collect royalty fees on behalf of both the United States and foreign copyright owners, but are unable to do so, despite the fact that the works have been performed.[23]

This Comment explores Section 110(5) of the United States Copyright Act and the dispute it caused between the European Community and the United States, which leads to the determination of a United States violation of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). Part II explains the history of United States copyright law, the basic function of performing rights organizations, and Section 110(5) of the Copyright Act. Part III discusses the scope of international performing rights organizations and the role of international agreements pertaining to copyright issues. Part IV analyzes the conflict between the European Community and the United States sparked by an amendment to Section 110(5) of the Copyright Act which, according to the European Community, violates the TRIPS Agreement. In addition, Part IV reveals the recommendations and rulings from the World Trade Organization Dispute Settlement Body determining that the United States is, in fact, in violation of the TRIPS Agreement. Part V explains the

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17. *See* CRAIG JOYCE ET AL., COPYRIGHT LAW § 1.05, 51 (5th ed. 2000) (pointing out the rapid growth of the number of Internet users). Fifteen years ago, only a small number of users utilized the Internet. *Id.* Estimates now show that by the end of 2000, there were 320 million Internet users worldwide. *Id.*

18. *See* KRASILOVSKY & SHEMEL, *supra* note 5, at 233.

19. *See* 17 U.S.C. § 110(5) (1999). As developments in copyright law have occurred, the requirements of Section 110(5) of the United States Copyright Act were broadened by Congress through the enactment of the Fairness in Music Licensing Act of 1998. *See* Helfer, *supra* note 11, at 95 (explaining that in 1998, Congress made several changes to United States copyright law, which included extending the law into cyberspace, the duration of copyright protection, and the enactment of the Fairness in Music Licensing Act of 1998).

20. *See infra* Part II.C and accompanying text (detailing the terms of Section 110(5) of the Copyright Act).

21. *See* 17 U.S.C. § 110(5)(B); *see also infra* note 88 (detailing the exact requirements an establishment must have in order to be exempted from paying licensing fees).

22. *See* Laurence R. Helfer, *Fairness in Music Licensing Act Challenged at the World Trade Organization*, 20 NO. 11 ENT. L. REP. 4 (1999) (copy on file with *The Transnational Lawyer*) (analyzing the attack on the Fairness in Music Licensing Act by the World Trade Organization and whether there has been a violation of the Berne Convention).

23. *See id.*

United States' attempt to comply with the TRIPS Agreement within a "reasonable period of time" through discussions with the European Community. Part VI concludes that international copyright standards need to be streamlined to achieve stronger international protection for copyright holders' rights.

II. BACKGROUND HISTORY OF UNITED STATES COPYRIGHT LAW

To understand how United States copyright law clashes internationally within the World Trade Organization due to the changes made in Section 110(5) of the Copyright Act, the law as a whole must first be explored.[24] An understanding of how performing rights organizations function and what role they play within the music industry is also crucial to understanding the impact of these amendments.[25] Finally, Section 110(5) of the Copyright Act is examined in order to determine how the violation of the TRIPS agreement occurred.[26]

A. Origins of Copyright Law in the United States

Modern United States copyright law traces back to England's Statute of Anne, enacted by Parliament in 1710.[27] This statute was primarily concerned with books, and was the first copyright act to legally grant works copyright protection.[28] The United States first recognized the need to protect a property right in an artist's creative work in the Constitution in 1787.[29] Congress was authorized "to Promote the Progress of Science and Useful Arts by securing for limited Times, to authors and Inventors, the exclusive Right to their respective Writings and Discoveries."[30] Accordingly, Congress has enacted statutes to expand the scope of a copyright

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24. *See infra* Part II.A (establishing the background and history of United States copyright law).

25. *See infra* Part II.B (explaining the function and purpose of performing rights organizations in the United States).

26. *See infra* Part II.C (discussing in detail Section 110(5) of the Copyright Act and the changes made to the Act in recent years).

27. *See* Patricia Brennan, *Timeline: A History of Copyright in the United States, at* http://arl.cni.org/info/frn/copy/timeline.html (last visited Oct. 13, 2000) (copy on file with *The Transnational Lawyer*) (recognizing milestones in United States copyright law, including case law and amendments to the Copyright Act); *see also* KRASILOVSKY & SHEMEL, *supra* note 5, at 95 (explaining that the meaning of the term copyright "refers to that body of exclusive rights granted by law to authors for the protection of their writings" and that "*copyright* literally means 'the right to copy'").

28. *See* Joyce, *supra* note 17, at § 1.03, 15-16 (adding that Parliament passed the first copyright act, the Statute of Anne, as a result of the creation of the printing press, which for the first time allowed for mass reproduction of books); *see also* KRASILOVSY & SHEMEL, *supra* note 5, at 95 (indicating that the Copyright Act also "created a 'public domain' for literature by requiring the creation of a new work in order to obtain a copyright, by limiting the length of term of a copyright, and by limiting the rights granted to the copyright owner so that once purchased the copyright owner does not control the use of the work").

29. *See* BRABEC & BRABEC, *supra* note 16, at 350 (describing the history of copyright law in the United States); *see also* U.S. CONST. art. I § 8.

30. U.S. CONST. art. I. § 8.

owners' exclusive rights, to create limited exceptions to those rights, to change the duration of a copyright, and to adjust to new technologies.[31]

The First Congress enacted the first United States copyright law on May 31, 1790.[32] Congress' goal in passing the Act was the "encouragement of learning, by securing the copies of maps, charts, and books, to the authors and proprietors of such copies, during the times" mentioned within the Act.[33] In 1831, the Twenty-First Congress made another general revision to the copyright law to include musical compositions among the protected works and to extend the copyright duration from fourteen years to twenty-eight years.[34]

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31. *See* Ralph Carter, *The Erosion of American Copyright Protection: The Fairness in Music Licensing Act*, 792 J. MARSHALL COMPUTER & INFO. L 791, 792 (2000) (explaining that "since the inception of federal copyright protection, Congress has progressively and systematically broadened the scope and number of rights granted to authors and expressly limited exceptions to their exclusive rights"); *see also* Brennan, *supra* note 27 (summarizing the protections and limitations that the Statute of Anne supplied to copyright holders).

32. *See* THE FIRST COPYRIGHT LAW OF THE UNITED STATES OF AMERICA § 1 (1790), *reprinted in* 8 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT 7 app. at 41 (1993).

> Section 1. Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled. That from and after the passing of this act, the author and authors of any map, chart, book or books already printed within these United States, being a citizen or citizens thereof, or resident within the same, his or their executors, administrators, or assigns, who hath or have not transferred to any other person the copyright of such map, chart, book or books, share or shares thereof; and any other person or person, being a citizen or citizens of these United States, or residents therein, his or their executors administrators or assigns, who hath or have purchased or legally acquired the copyright of any such map, chart, book or books, in order to print, reprint, publish or vend the same, shall have the sole right and liberty of printing, reprinting, publishing and vending such map, chart, book or books, for the term of fourteen years from the recording the title thereof in the clerk's office, as is herein after directed: And that the author and authors of any map, chart, book or books already made and composed, and not printed or published, or that shall hereafter be made and composed, being a citizen or citizens of these United States, or resident therein, and his or their executors, administrators or assigns, shall have the sole right and liberty of printing, reprinting, publishing and vending such map, chart, book or books, for the like term of fourteen years from the time of recording the title thereof in the clerk's office as aforesaid. And if, at the expiration of the said term, the author or authors, or any of them, be living, and a citizen or citizens of these United States, or resident therein, the same exclusive right shall be continued to him or them, his or their executors, administrators or assigns, for the further term of fourteen years: Provided, he or they shall cause the title thereof to be a second time recorded and published in the same manner as is herein after directed, and that within six months before the expiration of the first term of fourteen years aforesaid.

Id.

33. *Id.*

34. *See* AN ACT TO AMEND THE SEVERAL ACTS RESPECTING COPYRIGHTS (1831), *reprinted in* 8 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT 7 app. at 49 (1993). The Amendment included:

> Be it enacted by the Senate and House of Representatives of the United States of America, in congress assembled. That from and after the passing of this act, any person or persons, being a citizen or citizens of the United States, or resident therein, who shall be the author or authors of any book or books, map, chart, or musical composition, which may be now made or composed, and not printed and published, or shall hereafter be made or composed . . . shall have the sole right and liberty of printing, reprinting, publishing, and vending such book or books, map, chart, musical composition . . . in whole or in part, for the term of twenty-eight years from the time of recording the title thereof.

Id.

In 1905, change was again on the horizon in the United States when President Theodore Roosevelt prepared a complete overhaul of copyright law.[35] In order to gain input about possible changes to the law, President Roosevelt held meetings and conferences to speak with composers, publishers, and photographers.[36] The Copyright Act of 1909 resulted. The 1909 Act simplified the language of the 1831 version of the Copyright Act and was considered a great achievement because it provided broader protection for copyright owners.[37] Major changes in the Act included "a broadening of the scope of categories protected to include all works of authorship, and an extension of the number of years in a renewal term (14-28) for a total of 56 years of protection."[38] Another important addition to the Act was the right to perform a copyrighted work publicly.[39]

While the 1909 Act was useful, as time progressed, it once again became apparent that the Act was in need of amendment. In 1976, in an effort to respond to judicial decisions handed down after the enactment of the 1909 Copyright Act, Congress again began discussions for another major revision to copyright law.[40]

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35. *See* JOYCE, *supra* note 17, § 1.03, at 20 (explaining that President Roosevelt wanted to amend the copyright law to "meet modern conditions").

36. *See* Carter, *supra* note 31, at 797 (showing what President Roosevelt did to determine what changes should be made to United States copyright law).

37. *See id.* at 797, 797 n.41.

38. Brennan, *supra* note 27 (noting that "[w]ith this legislation, the attention is focused away from regulating the marketplace to proprietary rights"). Congress also addressed "the difficulty of balancing the public interest with proprietor's rights" because of the new categories of materials available for copyright. *Id.* at 2. The House report stated:

> The main object to be desired in expanding copyright protection accorded to music has been to give the composer an adequate return for the value of his composition, and it has been a serious and difficult task to combine the protection of the composer with the protection of the public, and to so frame an act that it would accomplish the double purpose of securing to the composer an adequate return for all use made of his composition and at the same time prevent the formation of oppressive monopolies, which might be founded upon the very rights granted to the composer for the purpose of protecting his interests.

Id.

39. *See* AN ACT TO AMEND THE SEVERAL ACTS RESPECTING COPYRIGHTS (1909) § 1(e), *reprinted in* 8 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT 6 app. at 3-4 (1992) (noting that "[a]ny person entitled thereto, upon complying with the provisions of this title, shall have the exclusive right . . . to perform the copyrighted work publicly for profit if it be a musical composition; and for the purpose of public performance for profit").

40. *See* Buck v. Jewell-LaSalle Realty Co., 283 U.S. 191, 201 n.10 (1931); *see also* Carter, *supra* note 31, at 798 (holding that "a hotel's retransmission of received radio broadcasts to its patrons' individual rooms was a 'performance' under the 1909 Act"). The importance of the *Jewell-LaSalle* holding is the birth of the "multiple performance doctrine." *Id.* at 799.

> Before the advent of radio, a single live performance of a song could not generate another licensable performance. Suddenly, through the magic of radio waves, a single broadcast performance could be re-transmitted in many locations, creating thousands (today, millions) of potentially infringing performances. The *Jewell-LaSalle* Court firmly established that each of theses multiple performances deserves the courts' protection under the copyright laws of the United States.

Id.

Cf. Twentieth Century Music Corp. v. Aiken, 422 U.S. 151 (1975); *see also* Carter, *supra* note 31, at 802, 802 n.83 (challenging the *Jewell-LaSalle* decision that the 1909 Copyright Act included the "retransmission of radio broadcasts in its definition of 'perform'"). The Supreme Court overruled *Jewell-LaSalle* by deciding that the 1909

After numerous alterations, the U.S. Copyright Revision Act of 1976, which enacted rights still in place today, bestows five exclusive rights to copyright owners to: (1) reproduce the copyrighted work in copies or phonorecords,[41] (2) prepare derivative works based upon the copyrighted work,[42] (3) distribute copies or phonorecords of the copyrighted work,[43] (4) perform the copyrighted work publicly,[44] and (5) display the copyrighted work publicly.[45] A sixth exclusive right granting a digital performance right in sound recordings was later created by the Digital Performance Right in Sound Recording Act of 1995 and applies to digital audio transmissions.[46]

The Copyright Revision Act of 1976 also extended the duration of a copyright to the life of the author plus fifty years after the author's death and expanded the previous definition of the term "perform."[47] Under the 1976 Act, "to 'perform' a work means to recite, render, play, dance, or act it, either directly or by means of

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Copyright Act did not extend to cover retransmission of radio broadcasts within a business establishment, such as a small fast-food restaurant similar to George Aiken's Chicken restaurant. *Id.* at 802.

41. *See* 17 U.S.C. § 106(1) (1976). "[T]he owner of copyright under this title has the exclusive rights . . . to reproduce the copyrighted work in copies or phonorecords." *Id.*

42. *See id.* § 106(2). "[T]he owner of copyright under this title has the exclusive rights . . . to prepare derivative works based upon the copyrighted work." *Id.*

43. *See id.* § 106(3). "[T]he owner of copyright under this title has the exclusive rights . . . to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending." *Id.*

44. *See id.* § 106(4). "[T]he owner of copyright under this title has the exclusive rights . . . in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly." *Id.*

45. *See id.* § 106(5). "[T]he owner of copyright under this title has the exclusive rights . . . in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly." *Id.*

46. *See* 17 U.S.C. § 106(6) (1995). "[T]he owner of copyright under this title has the exclusive rights . . . in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission." *Id. See also* EDMUND W. KITCH & HARVEY S. PERLMAN, INTELLECTUAL PROPERTY AND UNFAIR COMPETITION 606 (5th ed. 1998) (analyzing the digital performance right in sound recordings). For example, an Internet site must have the permission of the copyright owner before it allows the downloading of the recording. *Id.*

47. *See* 17 U.S.C. § 302 (1976) (amended 1998), *reprinted in* HARRY G. HENN, HENN ON COPYRIGHT LAW 511 (3rd ed. 1991)

> (a) In General. Copyright in a work created on or after January 1, 1978, subsists from its creation and, except as provided by the following subsections, endures for a term consisting of the life of the author and fifty years after the author's death.
>
> (b) Joint Works. In the case of a joint work prepared by two or more authors who did not work for hire, the copyright endures for a term consisting of life of the last surviving author and fifty years after such last surviving author's death.
>
> (c) Anonymous Works, Pseudonymous Works, and Works Made for Hire. In the case of an anonymous work, pseudonymous work, or a work made for hire, the copyright endures for a term of seventy-five years from the year of its first publication, or a term of one hundred years from the year of its creation, which ever expires first. If, before the end of such term, the identity of one or more of the authors of an anonymous or pseudonymous work is revealed in the records of a registration made for that work under subsection (a) or (d) of section 408, or in the records provided by this subsection, the copyright in the work endures for the term specified by subsection (a) or (b), based on the life of the author or authors whose identity has been revealed.

Id.

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."[48] The expansion of the definition "perform" is significant because it codifies what is now known as the "multiple performance doctrine" established in *Buck v. Jewell-LaSalle Realty Co.*[49] This 1931 United States Supreme Court case interpreted the meaning of "multiple performance" to mean that a single broadcast, when retransmitted to different locations, created multiple, potentially infringing, performances, and held that each single broadcast performance transmitted through radio deserved protection under United States copyright law.[50] The doctrine "recognize[d] that via broadcast signal[s], the same initial performance generate[d] an infinite number of possible simultaneous performances," each of which needed copyright protection from possible infringement.[51]

48. 17 U.S.C. § 101 (1976).

49. 283 U.S. 191 (1931); *see also* Carter, *supra* note 31, at 799 (interpreting the meaning of "multiple performance doctrine"); *see also* Helfer, *supra* note 11, at 124 (supporting the holding of *Buck v. Jewell-LaSalle Realty Co.*) "The decision endorsed a 'multiple performance' approach to the Copyright Act, granting copyright owners the right to control and collect royalties not only for an initial broadcast by a radio station, but also for any retransmissions of that broadcast by the commercial establishments receiving it." *Id.*

50. 283 U.S. 191, 195-96 (1931) (holding that "the acts of a hotel proprietor, in making available to his guests, through the instrumentality of a radio receiving set and loud speakers installed in his hotel and under his control and for the entertainment of his guests, the hearing of a copyright musical composition which has been broadcast from a radio transmitting station, constitutes a performance of such composition with the meaning of" the Copyright Act).

51. Carter, *supra* note 31, at 799 n.53.

The 1976 Act also established the "homestyle exemption" in an attempt to clarify when small businesses are exempt from paying licensing fees for public performances of music.[52] The clause exempts small commercial establishments that use standard radio and television equipment to transmit music or television. However, if a standard home entertainment system has been altered or a commercial sound system is installed into the establishment, the proprietor is not exempt from paying licensing fees.[53] "The basic rationale of this clause is that the secondary use of the transmission by turning on an ordinary receiver in public is so remote and minimal that no further liability should be imposed."[54] Factors taken into consideration for this exemption are largely based on the United States Supreme Court case *Twentieth Century Music Corp v. Aiken,* decided in 1975.[55] In *Aiken,* the Court excused a small fast food restaurant owner from liability for playing music through a radio with outlets to four speakers in the ceiling.[56] "The House Report describes the factual situation in *Aiken* as representing the 'outer limit of the exemption' contained in the original Section 110(5)."[57] The Copyright Revision Act of 1976 also exempts "fair use,"[58] uses by libraries,[59] non-profit educational

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52. *See* 17 U.S.C. §110 (1976) (amended 1998); *see also* Carter, *supra* note 31, at 804 (examining the Copyright Act of 1976).

53. *See* Carter, *supra* note 31, at 804 n.104 (analyzing the development and the scope of Section 110).

54. WTO Secretariat, *United States—Section 110(5) of the United States Copyright Act, Report of the Panel,* WT/DS160/R, at 4 (June 15, 2000) [hereinafter *Report of the WTO Panel*] (citing from the Report of the House Committee on the Judiciary, H.R. Rep No. 94-1476, Congress, 2nd Session 87 (1976)).

55. 422 U.S. 151 (1975) (holding that a radio broadcast of copyrighted music did not constitute a "performance" when a restaurant owner played the music over loudspeakers which were located on the restaurant ceiling, thus finding no copyright infringement); *see also* Carter, *supra* note 31, at 802-804 (explaining that although *Buck v. Jewell-LaSalle Realty Co.* had been overruled by *Aiken,* the Copyright Revision Act of 1976 included the expanded definition of "perform," which originally developed from *Buck v. Jewell-LaSalle Realty Co.*).

56. *See Aiken,* 422 U.S. at 152.

57. *Report of the Panel, supra* note 54, at 5.

58. 17 U.S.C. § 107 (1976).

> Notwithstanding the provision of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is fair use the factors to be considered shall include:
>
> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
>
> (2) the nature of the copyrighted work;
>
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
>
> (4) the effect of the use upon the potential market for or value of the copyrighted work.
>
> The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors. *Id.*

59. *See id.* § 108.

> (a) Notwithstanding the provisions of section 106, it is not an infringement of copyright for a library or archives, or any of its employees acting within the scope of their employment, to reproduce no more than one copy or phonorecord of a work, or to distribute such copy or phonorecord, under the conditions specified by this section . . . .
>
> *Id.*

entities,[60] government,[61] and churches[62] from the exclusive rights of copyright holders.

Although the 1976 Act made severe changes to the Section, still more changes were made in the 1990s. In 1995, the Digital Performance Right in Sound Recording Act was enacted to protect against unauthorized performances of works via digital audio transmission.[63] In 1998, the "Sonny Bono Copyright Term Extension Act" expanded the term of copyright protection by an additional twenty years, making the duration of protection to be the life of the author plus seventy years after death for works created after January 1, 1978.[64] Additionally, the Fairness in Music Licensing Act of 1998 also rendered changes to be discussed in detail in a subsequent section.[65]

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60. *See id.* § 110(1).

Notwithstanding the provisions of section 106, the following are not infringements of copyright:

(1) performance or display of a work by instructors or pupils in the course of face-to-face teaching activities of a nonprofit education institution, in a classroom or similar place devoted to instruction, unless, in the case of a motion picture or other audiovisual work, the performance, or display of individual images, is given by means of a copy that was not lawfully made under this title, and that the person responsible for the performance knew or had reason to believe was not lawfully made . . .

Id.

61. *See id.* § 110(2).

Notwithstanding the provisions of section 106, the following are not infringements of copyright:

(2) performance of a non-dramatic literary or musical work or display of a work, by or in the course of a transmission, if

(A) the performance or display is a regular part of the systematic instructional activities of a governmental body or a non-profit educational institution; and

(B) the performance or display is directly related and of material assistance to the teaching content of the transmission; and

(C) the transmission is made primarily for

(iii) reception by officers or employees of governmental bodies as a part of their official duties or employment.

Id.

62. *See id.* § 110(3). "Performance of a nondramatic literary or musical work or of a dramatic musical work of a religious nature, or display of a work, in the course of services at a place of worship or other religious assembly." *Id.*

63. *See* 17 U.S.C. § 106(6) (1995); *see also* Joyce, *supra* note 17, § 1.03 at 25 (clarifying that Congress created a sixth exclusive right, "the right to perform publicly a sound recording by means of a digital transmission;" this was the first right of its kind to give protection to performances that used specific new technologies).

64. 17 U.S.C. § 302(a) (1998).

In General. Copyright in a work created on or after January 1, 1978, subsists from its creation and, except as provided by the following subsections, endures for a term consisting of the life of the author and 70 years after the author's death.

Id.; see also ASCAP Legislative Matters, at http://www.ascap.com/legislative/legis_qa.html (last visited Oct. 13, 2000) (copy on file with *The Transnational Lawyer*) (explaining on its website the term of the new duration and why the amendment was created to ASCAP members and others who visit their site). "[The Act] was designed to bring domestic copyrights into line with those of United States trading partners in the European Community." *Id.*

65. *See infra* Part II.C and accompanying text; *see also* Joyce, *supra* note 17, § 1.03 at 26 (summarizing that the Fairness in Music Licensing Act amended the exemption that allowed certain businesses and establishments to broadcast music and television).

B. The Basic Role of Performing Rights Organizations in the United States

Since United States copyright law gives the owner of a copyrighted work the exclusive right to perform the work publicly,[66] establishments publicly performing the work must obtain a license from a performing rights organization[67] unless subject to a statutory exception.[68] The reason for this procedure is clear: the task of individual copyright owners monitoring their own music is too burdensome and it would generate an enormous amount of searching for and bargaining with owners of rights of both recognized and obscure songs.[69] Thus, performing rights organizations monitor, in a uniform manner, the hundreds of thousands of establishments that play music, collect licensing fees, and distribute the fees directly to their members.[70] Essentially, the copyright owner's right to perform is transferred to and administered by one of the performing rights organizations.[71] There are three main organizations that grant the necessary permission from the copyright owner in the form of a license for the performing rights of musical works in the United States: the American Society of Composers, Authors and Publishers (ASCAP) , Broadcast Music Incorporated (BMI), and the Society of European State Authors and Composers (SESAC).[72]

Performing rights organizations were established in the United States in the early to mid-1900s.[73] They were originally formed to collect compensation for a public performance of music because the music user was often unaware of the

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66. *See supra* notes 24-65 and accompanying text (establishing that the United States Copyright Act grants exclusive rights to copyright holders).

67. *See* Loren, *supra* note 6, at 233-34 (explaining the purpose of performing rights organizations).

68. *See id.* at 231 (stating that a business will require a license from a performing rights organization "unless the business can avail itself of an exemption contained in the Copyright Act").

69. *See* Stephanie Haun, *Musical Works Performance and the Internet: A Discorance of Old and New Copyright Rules,* 6 RICH. J.L. & TECH. 3, 18 (1999) (noting that individual copyright owners could not "effectively enforce their copyrights worldwide or domestically"); *see also* KRASILOVSKY & SHEMEL, *supra* note 5, at 152; *see also* Helfer, *supra* note 11, at 110 (adding that [performing rights organizations] are financially cost-reducing in several ways: (1) they act as a clearinghouse of those seeking licenses, (2) they collect and distribute monies on behalf of their member songwriters, composers and publishers, and (3) they examine licensees establishment and provide "enforcement action" if necessary to defend their members' rights).

70. *See ASCAP Since 1914 the Leader in Music Licensing, at* http://www.ascap.com/licensing/licensing.html (last visited Oct. 13, 2000) (copy on file with *The Transnational Lawyer*) (giving the history of ASCAP and answers to general licensing questions).

71. *See* Carter, *supra* note 31, at 800. (clarifying the purpose of performing rights organizations and background information on how the organizations were started).

72. *See* Passman, *supra* note 10, at 233-34 (noting that the major performing rights organizations in the United States are ASCAP, BMI and SESAC).

73. *See ASCAP Since 1914 the Leader in Music Licensing, supra* note 70. "Founded in 1914, and still owned by and managed for its writer and publisher members, ASCAP grants businesses the permission they need to perform music publicly."; *see also BMI Music World News, at* http://www.bmi.com/musicworld/news/ archive/200 012/20001213a.asp (last visited Dec. 18, 2000) (copy on file with *The Transnational Lawyer*). "Founded in 1940, BMI is a United States performing rights organization that represents the copyright interests of more than 250,000 songwriters, composers and music publishers in all genres of music." *Id.*

performance fee.[74] Performing rights organizations were founded to generally control the free music use that was previously taken advantage of by commercial copyright users in the United States.[75]

However, these organizations are more than mere collection agencies. Today, many music users, such as restaurant and bar owners, still find it difficult to understand why they must pay a fee before publicly performing copyrighted music. In response, performing rights organizations provide the necessary education to these users.[76] Through various avenues, ASCAP explains the concept of blanket licenses and the annual rates a business must pay for this type of license.[77] If licenses are not obtained, performing rights organizations explain to the establishment the consequences of failing to obtain a license.[78] Explaining that inaction violates federal law is usually enough to convince the bar or restaurant owner of the need to obtain a license.[79]

Performing rights organizations also help reduce the costs of individual licensing in several ways. First, the organizations provide a "clearinghouse for users seeking licenses."[80] Second, they "collect and distribute revenues to [their member]

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74. *See* Haun, *supra* note 69, at 12 (providing historical background for the need to collect for compensation).

> Because the 1909 Copyright Act added a 'for-profit' requirement to the musical works performance right, there existed a general perception that, unless an admission fee was charged to hear a performance, no performance license was required. In fact, sheet music copies often carried a printed notice allowing the music user to perform the work in public. Therefore, it was not unusual for a music user to expect that, if he had a copy of the music, then he was entitled to perform it. Many musicians were unaware of the need fo separate compensation for the performance royalty.

Id.; *see also* Helfer, *supra* note 11, at 96. "According to the [performing rights organizations], commercial establishments entertained their customers with broadcast music and thus derived significant financial benefit for which their members were entitled to seek compensation." *Id.*

75. *See* Helfer, *supra* note 11, at 122.

76. *See ASCAP Since 1914 the Leader in Music Licensing, supra* note 70 (answering general licensing questions and explaining on its website the general role of what a performance rights organization does).

77. *See Frequently Asked Questions About Licensing, supra* note 1 (explaining that a "blanket license is intended for stations which broadcast music frequently" and that the "annual rate depends on the type of business"); *see also* KRASILOVSKY & SHEMEL, *supra* note 5, at 153 (explaining that performing rights organizations make money by issuing blanket licenses for their entire catalog and the licence fee is based on the licensee's gross receipts).

78. *See* Loren, *supra* note 6, at 234; *see also* Helfer, *supra* note 11, at 96 (reiterating that performing rights organizations "brought infringement suits against non-exempt establishments who refused to purchase licenses").

79. *See* Loren, *supra* note 6, at 233 (summarizing the sequence of events when an establishment was found not to have a license).

> Until last year, many business owners learned the hard way that playing music required a license accompanied by the payment of a license fee: they were approached by representative from the music licensing industry. These representatives, toting surveillance data of the music recently played in the establishment, would explain the dire consequences of failing to obtain a license. The business manager or owner would be told that playing music is a public performance of a copyrighted work and, without authorization from the copyright owner, constitutes a violation of federal law. Penalties of $100,000 for each song played might be mentioned. Naturally, many businesses complied and paid the license fees.

Id. at 232-33.

80. Helfer, *supra* note 11, at 110.

songwriters, composers, and publishers."[81] Third, "they monitor the activities of licensees and they take enforcement action where necessary to vindicate their members' rights."[82] Finally, the biggest cost savings come from blanket licenses, which "authorize licensees to perform all of the songs within the [performing rights organization's] repertory for a fixed fee."[83]

C. *The Controversy Begins: Section 110(5) of the Copyright Act*

Since 1976, Section 110(5) "has exempted public performances of works, typically by bars, restaurants, and retail stores, that occur by the use of audio and video receiving apparatus of a type commonly found in private homes."[84] This "homestyle" exemption, based upon the type of receiving apparatus used, allows bars and restaurants to watch and listen to televisions and radios without having to pay the copyright owners for the use of these works.[85]

In 1998, Congress decided once again that the United States Copyright Act would be amended. The Fairness in Music Licensing Act of 1998 amended Section 110(5) of the Copyright Act, subparagraph (A), which is commonly referred to as the "homestyle" exemption, to include even more exemptions.[86] Section 110(5) was amended to include subparagraph (B), which is commonly referred to as the Fairness in Music Licensing Act of 1998 or the "business" exemption.[87] This new subparagraph exempts bars and restaurants almost "four times the size of the largest restaurant or bar previously exempted" from paying licensing fees.[88] It also creates

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81. *Id.*

82. *Id.*

83. *Id.*

84. Graeme B. Dinwoodie, *The Development and Incorporation of International Norms in the Formation of Copyright Law*, 62 OHIO ST. L.J. 733, 748-49 (2001).

85. *See id.* at 749; *see also Report of the WTO Panel, supra* note 54, at 4 (addressing that "[t]he basic rationale of this clause is that the secondary use of the transmission by turning on an ordinary receiver in public is so remote and minimal that no further liability should be imposed"). Subparagraph (A) of Section 110(5) is most commonly referred to has the "homestyle" exemption, but it is also known as the "home system exemption" and the "homestyle receiver exemption."

86. *See* Helfer, *supra* note 11, at 95 (noting that the enactment of the Fairness in Music Licensing Act of 1998 made an "amendment to Section 110(5) of the Copyright Act, a provision of the law that, since 1978, has authorized restaurants, bars and retail stores using 'homestyle' audio and video equipment to play broadcast music without paying licenses fees").

87. *See Report of the WTO Panel, supra* note 54, at 5 (mentioning that subparagraph (B) of Section 110(5) is referred to as the "business" exemption).

88. 17 U.S.C. § 110(5) (1999).

> 5(A) except as provided in subparagraph (B), 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 homes, unless—
>
> (i) a direct charge is made to see or hear the transmission; or
>
> (ii) the transmission thus received is further transmitted to the public;
>
> (B) 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, originated by a radio or television broadcast station licensed as such by the Federal Communications

bright-line requirements based upon square footage of the establishment and the type of equipment used in order to determine whether the radio or television can be played without having to pay a license fee.[89] Due to the addition of the subparagraph, "seventy percent of bar and restaurants formerly required to pay blanket licensing fees are allowed, free of charge and for the enjoyment of their customers, to perform copyrighted songs via retransmission of radio and television broadcasts."[90]

Commission, or, if an audiovisual transmission, by a cable system or satellite carrier, if

(i) in the case of an establishment other than a food service or drinking establishment, either the establishment in which the communication occurs has less than 2,000 gross square feet of space (excluding space used for customer parking and for no other purpose), or the establishment in which the communication occurs has 2,000 or more gross square feet of space (excluding space used for customer parking and for no other purpose) and

(I) if the performance is by audio means only, the performance is communicated by means of a total of not more than 6 loudspeakers, of which not more than 4 loudspeakers are located in any 1 room or adjoining outdoor space; or

(II) if the performance or display is by audiovisual means, any visual portion of the performance or display is communicated by a means of a total of not more than 4 audiovisual devices, of which not more than 1 audiovisual device is located in any 1 room, and no such audiovisual device has a diagonal screen size greater than 55 inches, any audio portion of the performance or display is communicated by means of a total of not more than 6 loudspeakers, of which not more than 4 loudspeakers are located in any 1 room or adjoining outdoor space;

(ii) in the case of food service or drinking establishment, either the establishment in which the communication occurs has less than 3,750 gross square feet of space (excluding space used for customer parking and for no other purpose), or the establishment in which the communication occurs has 3,750 gross square feet of space or more (excluding space used for customer parking and for no other purpose) and

(I) if the performance is by audio means only, the performance is communicated by means of a total of not more than 6 loudspeakers, of which not more than 4 loudspeakers are located in any 1 room or adjoining outdoor space; or

(II) if the performance or display is by audiovisual means, any visual portion of the performance or display is communicated by means of a total of not more than 4 audiovisual devices, of which not more than one audiovisual device is located in any 1 room, and no such audiovisual device has a diagonal screen size greater than 55 inches, and any audio portion of the performance or display is communicated by means of a total of not more than 6 loudspeakers, of which not more than 4 loudspeakers are located in any 1 room or adjoining outdoor space;

(iii) no direct charge is made to see or hear the transmission or retransmission;

(iv) the transmission or retransmission is not further transmitted beyond the establishment where it is received; and

(v) the transmission or retransmission is licensed by the copyright owner of the work so publicly performed or displayed.

Id.; *see also Report of the WTO Panel*, *supra* note 54, at 4 (explaining that subparagraph (a) of Section 110(5) basically reprints the text of Section 110(5) of the Copyright Act of 1976 and only adds reference to Section (b)).

89. Loren, *supra* note 6, at 235 (demonstrating that the bright-line rule depends upon the specific square footage and equipment type requirements); *see also* Helfer, *supra* note 11, at 96 (clarifying that the Act did not "repeal the home-style exemption," but added an exemption that was not based on equipment, "but rather on the size of the establishment and the number of speakers or television sets used to transmit the music").

90. Carter, *supra* note 31, at 810-11; *see also* Helfer, *supra* note 11, at 138 (citing that, more specifically, "the Congressional Research Service reported that adopting these requirements would exempt 65.2% of all eating establishments and 71.8% of all drinking establishments form any licensing obligations").

Before Section 110(5) was amended, the "homestyle" exemption was the only exemption found in the Section. After the amendment, the "homestyle" exemption became subparagraph 110(5)(A), which allows an establishment to turn on the radio or television as long as three requirements are met: (1) transmission is on a single receiving apparatus of a kind commonly used in a private home, (2) no direct charge is made to see or hear the transmission, and (3) the transmission received is not further transmitted to the public.[91] This exemption does not apply to music played from tapes or CDs, even when the above requirements are met.[92]

Subparagraph (A) also contains two critical characteristics. First, the language of subparagraph (A) is not limited to a specific type of copyrighted work.[93] Second, subparagraph (A) does not differentiate between particular types of establishments. In contrast, subparagraph (B) breaks down specific requirements according to the type of establishment seeking exemption under the Copyright Act.[94] In effect, this means that anyone, not only businesses, can enjoy musical works, movies, or other audiovisual works without obtaining a license if the specific requirements of the exemption are met.[95]

Prior to the amendment, the Section 110(5) "exemption was characterized by vague rules requiring that the equipment used be the type commonly used in a home."[96] However, Congress' enactment of the Fairness in Music Licensing Act of 1998 expanded the exemption specifications to include all restaurants and bars less than 3,750 gross square feet and other retail establishments that are less than 2,000 gross square feet, which retransmit radio and television broadcasts containing copyrighted songs.[97] In addition, businesses that are larger than the square footage requirements still qualify for the exemption if they use six or less speakers with no

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91. *See* 17 U.S.C. § 110(5)(A).

92. *See* Loren, *supra* note 6, at 238 (adding that the rationale for exempting radio broadcast, but not exempting the playing of a CD, is because the radio station had already paid a licensing fee to broadcast the song, whereas music from a CD will not result in a licencing fee until or unless the business owner pays licensing fees); *see also* 17 U.S.C. § 110(5) (explaining that the basis of the "homestyle exemption" stems from the statute itself: " 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 . . .").

93. *See* 17 U.S.C. § 110(5)(A); *cf. id.* § 110(5)(B). The only limitation in subparagraph (A) is "except as provided in subparagraph (B)." *Id.* § 110(5)(A). Subparagraph (A) also uses "work," whereas subparagraph (B) specifically indicates for the subparagraph to apply to only "nondramatic musical work." *Id.* § 110(5)(A), (B).

94. *See* 17 U.S.C. § 110(5)(B); *see also* Loren, *supra* note 6, at 239 (comparing subparagraph 110(5)(A) to subparagraph 110(5)(B) and finding that subparagraph 110(5)(A) "is not limited to businesses at all; anyone can take advantage of the exemption, so long as its conditions and requirements are met").

95. *See* Helfer, *supra* note 11, at 98 (explaining that when subparagraph (A) and subparagraph (B) are read together, the new amendment makes it "significantly easier for business establishments to avoid paying license fees to performing right societies for playing radio and TV broadcasts of copyrighted music to entertain their customers and employees").

96. Loren, *supra* note 6, at 231.

97. *See* 17 U.S.C. § 110(5)(B); *see also* Helfer, *supra* note 11, at 97 (clarifying that the new Amendment did not repeal the homestyle exemption, but that it actually "adds a new and additional exemption for performances of nondramatic musical works that is based not on the use of homestyle receiving equipment but rather on the size of the establishment and the number of speakers or television sets used to transmit the music").

more than four speakers in any one room or no more than four televisions total, with one in each room with screens no bigger than fifty-five inches diagonally.[98] In effect, the new Act ended over one hundred years of "protection from the commercial exploitation of a copyrighted song without remuneration to the songwriter."[99] This was good news for bar and restaurant owners because seventy percent of establishments once paying licensing fees are now exempt from that cost.[100]

Initially, the amendment of Section 110(5) may not appear to have a significant impact, but, in fact, it does for two reasons. First, "it is at odds with a long-standing trend in United States law toward expanding the rights of copyright owners and narrowing the free use exemptions applicable to users of copyrighted works."[101] Second, the Section was found to violate international copyright treaty obligations,[102] as ruled by the Dispute Settlement Body Panel of the World Trade Organization.[103]

Performing rights organizations are strongly opposed to The Fairness in Music Licensing Act.[104] Acting on behalf of their members, performing rights organizations have historically fought for rigorous enforcement of copyright laws.[105]

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98. *See* 17 U.S.C. § 110(5)(B) (citing the exact requirements establishments need in order to exempted); *see also ASCAP Legislative Matters, supra* note 64 (explaining what the Fairness in Music Licensing Act means to businesses).

99. *See* Carter, *supra* note 31, at 809.

100. *Id.* at 810 (explaining that bars and restaurants that were "formerly required to pay blanket licensing fees are allowed, free of charge and for the enjoyment of their customers, to perform copyrighted songs via retransmission of radio and televison broadcasts"); *see also* Christina Howard, *The U.S. Congress Should Not Undo Key Reforms in Music Licensing Laws, at* http://www.restaurant.org/government/music.html (last visited Mar. 19, 2001) (copy on file with *The Transnational Lawyer*) (reporting the National Restaurant Association's position on the dispute within the WTO over United States copyright law, and its hope that U.S. law will not change so they may still be exempt from paying licensing fees if qualified).

> The Association strongly supports the current U.S. music licensing law and believes it was a long-overdue change to an unfair and confusing statute. The law represents a reasonable exemption, as allowed under international intellectual property treaties to allow countries to make reasonable exemptions. The Association urges Congress to oppose any changes to the law.

Id.

101. Helfer, *supra* note 11, at 97; *see* discussion *infra* Part II.A. (detailing the history of United States copyright law).

102. *See* Helfer, *supra* note 11, at 97; *see* discussion *infra* Part III.B & Part IV (explaining treaty obligations of the United States and how the Fairness in Music Licensing Act of 1998 has violated those obligations).

103. *See Report of the WTO Panel, supra* note 54, at 69 (determining that "subparagraph (B) of Section 110(5) of the US Copyright Act does not meet the requirements of Article 13 of the TRIPS Agreement and is thus inconsistent with Articles 11*bis*(1)(iii) and 11(1)(ii) of the Berne Convention (1971) as incorporated into the TRIPS Agreement by Article 9.1 of that Agreement"); *see also infra* Part III.B.

104. *See* Helfer, *supra* note 11, at 96 (claiming that the Amendment of Section 110(5) was a "thorn in the side of performing rights organizations" because it is their function to "issue licenses on behalf of both domestic and foreign songwriters, composers, and music publishers;" the businesses and establishments who obtained licences had brought substantial financial gain to their members); *see also* Loren, *supra* note 6, at 235 (noting that the National Federation of Independent Businesses supported the passage of the Act and performing rights organizations were opposed to the Act).

105. *See* Carter, *supra* note 31, at 802.

For example, in response to the enactment and as part of its commitment to educating its members, ASCAP released a Special Legislative Report on its website.[106] The website explains that the "objectionable" Fairness in Music Licensing Act bill was signed into law and provides general information on what the Act means to the music industry.[107] The Special Legislative Report explains that "more than seventy percent of restaurants and bars will be exempt from paying music license fees for radio and music that is played on the television."[108] The Report also broke the news that, unless action is taken to change the effect of the Act, copyright owners in both the United States and abroad will lose millions of dollars annually.[109] In addition, the Report expressed the serious impact made on foreign governments and foreign performing rights organizations, noting that the European Community already filed a complaint alleging at least two different international trade treaty violations.[110]

Performing rights organizations also continue their effort to educate businesses on the benefits of obtaining a license if they do not qualify for an exemption under the Fairness in Music Licencing Act. New marketing campaigns and revisions of fee structures are used to make licensing more attractive for businesses.[111] The attempt to make licensing more attractive is in an effort to offset monetary losses caused by the Fairness in Music Licensing Act by collecting royalties from as many businesses as possible that are not exempt under the Act.[112] A second objective is to curb resistence from the non-exempt businesses and to help those businesses understand why they are paying license fees for music performances.[113]

United States businesses and establishments are not the only entities feeling the impact of the Fairness in Music Licensing Act. "Congress and the courts no longer have an entirely free hand to revise or interpret the Copyright Act when doing so clashes with the United States' treaty obligations."[114] Congress' change to its copyright law resulted in accusations of violations of international obligations because of the allowance of various copyrighted works to be performed in the United States without compensation to their copyright owners.[115]

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106. *See generally ASCAP Legislative Matters*, *supra* note 64.

107. *See id.*

108. *Id.*

109. *See id.*

110. *See id.* (explaining that the "European Commission had alleged violations of both the Berne Convention and certain provision of the TRIPS (trade) Agreement").

111. *See* Helfer, *supra* note 11, at 139.

112. *See id.*

113. *See id.*

114. *Id.*

115. *See* Loren, *supra* note 6, at 256 (addressing the fact that while deciding whether to enact the Fairness in Music Licensing Act, members of Congress thought that it might violate international treaty obligations); *see also infra* notes 158-227 and accompanying text (discussing the complaint filed against the United States by the European Community that alleged Section 110(5) violated international treaty obligations).

III. THE INTERNATIONAL PICTURE

The Fairness in Music Licensing Act of 1998 officially went under attack on January 26, 1999 at the World Trade Organization (WTO).[116] At issue was whether the Fairness in Music Licensing Act violated the Berne Convention for the Protection of Literary and Artistic Works, which is incorporated into the TRIPS Agreement.[117] To resolve this dispute, the different international organizations that alleged the violation, namely the European Community, followed the necessary rules and procedures of the WTO.

A. Performing Rights Organizations Within the European Community

United States copyrighted works are protected in most countries because the United States is a party to various treaties and agreements with domestic performing rights organizations and foreign performing rights organizations.[118] Because it would be extremely confusing for United States organizations to collect and monitor copyrighted works worldwide, they have affiliates in over forty countries.[119] In reciprocation, the United States performing rights organizations collect on behalf of foreign societies when foreign music is played in the United States.[120]

In 2001, international aspects of the music industry have made a major impact on the profit-and-loss figures of United States performing rights organizations.[121] United States performing rights organizations distribute foreign income to their members based on information and reports received from the overseas societies.[122] In 2000, reports indicated that ASCAP received over $200,000 per year from individual countries, including Australia, Austria, Belgium, Canada, Denmark, England, France, Germany, Holland, Italy, Japan, Spain, Sweden, and Switzerland.[123]

Performing rights organizations in Europe changed substantially in the 1990s. Since the creation of the European Union, any member-country that is home to a performing rights organization can license certain rights, regardless of the place of ultimate sale.[124] Performing rights organizations residing in the European

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116. *See Report of the WTO Panel, supra* note 54, at 1.

117. *See* Helfer, *supra* note 11, at 99; *see generally Report of the WTO Panel, supra* note 54.

118. *See* BRABEC & BRABEC, *supra* note 16, at 363.

119. *See* KRASILOVSKY & SHEMEL, *supra* note 5, at 170. "In terms of collections, the largest societies outside the United States and Canada are GEMA in Germany, JASRAC in Japan, the PRS/MCPS alliance in the United Kingdom, and SACEM/SDRM in France." *Id.* at 235.

120. *See id.* at 235.

121. *See id.* at 233.

122. *See id.* at 171.

123. *See id.*

124. *See* Pascal Fontaine, *Seven Key Days in the Making of Europe, at* http://europa.eu.int/abc/obj/chrono/40 years/7days/en.htm (last visited Feb. 26, 2000) (copy on file with *The Transnational Lawyer*) (explaining the history of the European Union). As of March 2001, there are fifteen counties that are members of the European Union but

Communities generally resemble the performing rights organizations in the United States. For example, Irish Music Rights Organization (IMRO)[125] has a website containing information about its organization.[126] The site explains IMRO's function: to "administer the performing rights in copyright music in Ireland on behalf of its members and on behalf of the members of the sixty-seven overseas societies affiliated to it."[127] Like United States performing rights organizations, IMRO is concerned with educating its members by raising awareness as to how licensing and royalty payments operate and educating music users in general.[128] Information is also available regarding what a member should do if his or her work is performed abroad.[129] IMRO suggests that members contact them and provide the dates and locations of concerts scheduled, and a list of songs scheduled to be played.[130] This enables IMRO to notify the proper performing rights organization of any royalties that should be collected on the members' behalf and send them back to IMRO.[131] The more detailed the information the IMRO member provides, the greater the possibility that accurate payments will be made in the future.[132]

B. The Berne Convention and its Place in the Music Industry

On March 1, 1989, the United States joined the Berne Convention for the Protection of Artistic and Literary Works, commonly known as the Berne

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more than ten countries have applied to join the Union. *See id.* "The European Union is open to any country which wants to join it and is prepared to take on all the commitments made in the founding treaties and to subscribe to the same fundamental objectives." *Id.*; *see also* KRASILOVSKY & SHEMEL, *supra* note 5, at 236. In 2001, "the fifteen member states in the European Union, Austria, Belgium, Denmark, England, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, and Sweden, have their member relations governed by the Treaty of Rome, which provides for the abolition of tariff barriers and the free and unrestricted movement of goods across state boarders." *Id.* at 244-45.

125. *See* Laura A. McCluggage, *Section 110(5) and the Fairness in Music Licensing Act: Will the WTO Decide the United States Must Pay to Play?*, 40 IDEA 1, 1-2 (2000) (defining the term IMRO as "a collecting society that administers, licenses and enforces the rights of its members, whose ranks include composers, arrangers, lyricists and publishers").

126. *See Irish Music Rights Organisation, at* http://www.imro.ie.about.html (last visited Feb. 5, 2001) (copy on file with *The Transnational Lawyer*) (explaining the functions of IMRO gives information on licensing, education and copyright legislation).

127. *Id.*; *see* discussion *infra* Part II.B (addressing the purpose and function of United States performing rights organizations and methods used to educate music users on proper application and compliance with United States copyright laws).

128. *See Irish Music Rights Organisation, supra* note 126 (explaining that IMRO works to educate the public "by helping in schools, sponsoring prizes and showcasing new bands").

129. *See Irish Music Rights Organisation Answers to Some of the Questions Most Frequently Asked by Members, at* http://www.imro.ie/Members/memfaq.htm (last visited Feb. 25, 2001) (copy on file with *The Transnational Lawyer*).

130. *See id.*

131. *See id.*

132. *See id.*

Convention.[133] The original purpose of this convention, which concluded its first meeting in 1886, was to "establish copyright protection internationally."[134]

The Berne Convention grants copyright owners the right to control the broadcast of their works over radio and television and the right to control the secondary uses of those same broadcasts.[135] There is a conflict between the United States' enactment of the Fairness in Music Licensing Act of 1998 and the terms of the Berne Convention. Under Section 110(5), restaurants and bars have the freedom to retransmit radio and television broadcasts of copyrighted songs without paying the copyright owner, leaving the copyright owner without control over his works, a direct violation of the Berne Convention.[136] The previous version of the Copyright Act provided narrower exemptions, allowing copyright owners more control over whether to perform their works publicly. [137]

Two articles of the Berne Convention govern the broadcast and performance of musical works. Article 11 grants authors of musical works an exclusive public performance right.[138] More specifically, Article 11*bis*(1) provides that

> [a]uthors 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; . . . (iii) the public communication by loud speaker or any other analogous instrument transmitting, by signs, sounds or images, that broadcast of the work.[139]

United States Copyright law and the Berne Convention embody the same concept as to what constitutes a "public" performance. The Fairness in Music Licensing Act freely allows United States establishments to participate in the exact

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133. *See* The Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, 828 U.N.T.S. 211 (last revised at Paris, July 24, 1971) [hereinafter Berne Convention].

134. Dinwoodie, *supra* note 84, at 737-38. (affirming that "countries participating in the discussions that led to the Convention sought to establish copyright protection internationally for the works of their nationals").

135. *See* Helfer, *supra* note 11, at 143; *see also* Carter, *supra* note 31, at 814 (summarizing that Articles 11 and 11*bis* "confer upon composers of musical works the exclusive right to control public performances of their songs and the broadcasting and retransmitting of broadcast performances").

136. *See* 17 U.S.C. § 110(5) (1976) (exempting certain establishments which have a direct impact on the copyright owner's exclusive rights to perform and control performances). *But see* Berne Convention arts. 11, 11*bis*, *supra* note 133 (mandating that member nations may not interfere with the owner's exclusive rights).

137. *See* 17 U.S.C. § 110(5); *see also* Helfer, *supra* note 11, at 95-96 (explaining how "in its original form, this homestyle exemption did not create a broad exception to music copyright owners' exclusive right to perform their works publicly"); *see also Report of the WTO Panel, supra* note 54, at 4-5 (clarifying that subparagraph (A) of Section 110(5) basically is a reproduction of the original "homestyle" exemption stated in Section 110(5) of the Copyright Act of 1976 and that the 1998 Amendment added subparagraph (B), which is sometimes referred to as the "business exemption" because it applies to "establishment[s] other than a food service or drinking establishment[s]" and to "food service or drinking establishment[s]").

138. *See* Berne Convention, *supra* note 133, at art. 11.

139. Berne Convention, *supra* note 133, at art. 11*bis*(i),(iii).

activity which the Berne Convention restricts to only the copyright owners: the exclusive right to authorize public communication and dissemination.[140] Under United States copyright law, to communicate to the "public" includes performances "at a place open to the public or at any place where a substantial number of persons outside of a normal circle of family and its social acquaintances is gathered."[141] The Berne Convention does not create a specific definition of "public," but does list examples of what it considers to be public. Such places include the cinema, restaurants, tea rooms, railway carriages and other "places where people work and conduct their business, such as factories, shops, and offices."[142] The Berne Convention does allow member countries some flexibility for exemptions concerning the exclusive rights, on the condition that the exemptions do not "unreasonably damage" the rights of the copyright holder.[143]

In addition to the Berne Convention, the United States has also entered into the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). The TRIPS Agreement establishes the WTO "as the governing body for international copyright disputes, and set[s] guidelines for all member countries regarding copyright, trademark, and patent protection."[144] The Berne Convention is still the leader in international agreements on copyright, but it does not provide dispute resolution and compliance for the rights that it grants.[145] Thus, the TRIPS Agreement incorporated the Berne Convention via Article 9.1 of the Agreement.[146]

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140. *See* Helfer, *supra* note 11, at 143.

141. 17 U.S.C. § 101.

142. Sam Ricketson, THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS: 1886-1986, 453 (1987); *see also* Helfer, *supra* note 11, at 144 (providing more examples of what locations are considered to be "public" under the Berne Convention).

143. *See* Carter, *supra* note 31, at 815; *see also* Loren, *supra* note 6 at 14-15 (explaining that "Article 11*bis*(2) expressly permits national legislation to determine the conditions under which the rights required by that article may be exercised; however, those conditions may not be 'prejudicial to the author's right to obtain equitable remuneration.'); *see also* Berne Convention, *supra* note 133, at art. 11*bis*(2).

> It shall be a matter for legislation in the countries of the Union to determine the conditions under which the rights mentioned in the preceding paragraph may be exercised, but these conditions shall apply only in the countries where they have been prescribed. They shall not in any circumstances be prejudicial to the moral rights of the author, nor to his right to obtain equitable remuneration which, in the absence of agreement, shall be fixed by competent authority.

Id.

144. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, The Results of the Uruguay Round Multilateral Trade Negotiations, 33 I.L.M 1197 (1994) [hereinafter TRIPS Agreement], *reprinted in* INTERNATIONAL CHAMBER OF COMMERCE, INTELLECTUAL PROPERTY AND INTERNATIONAL TRADE A GUIDE TO THE URUGUAY ROUND TRIPS AGREEMENT 83 (1996) [hereinafter GUIDE TO THE TRIPS AGREEMENT]; *see also* Carter, *supra* note 31, at 813 (citations omitted); *see also* Daphne Yong-d'Hervé, *Pre-TRIPS International Legal Framework; TRIPS Structure, in* Guide to the TRIPS Agreement, at 8 (explaining that the TRIPS Agreement is only one of the multilateral trade agreements annexed to the Agreement that established the World Trade Organization and that the Agreement forms part of the "package" that must be accepted by all WTO members).

145. *See* GUIDE TO THE TRIPS AGREEMENT, *supra* note 144; *see also* Carter, *supra* note 31, at 815.

146. *See* TRIPS Agreement, *supra* note 144, at art. 9.1. "Members shall comply with Articles 1 through 21 of the Berne Convention (1971) and the Appendix thereto. Members shall not have rights or obligations under this Agreement in respect of the rights conferred under Article 6*bis* of that convention or of the rights derived

The TRIPS Agreement has created a major impact on the international protection of intellectual property because, "by invoking the jurisdiction of the WTO, [it has] provide[d] a concrete dispute settlement process that yields enforceable decisions."[147]

While Article 13 of the TRIPS Agreement allows for some limitations and exceptions to exclusive rights of the copyright holder, exceptions are only allowed in limited instances that "do not conflict with the normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder."[148] The narrow language of this clause suggests that the Agreement would never allow establishments to avoid paying licensing fees, as allowed under United States law. Article 13 is often analyzed as a three-part test or referred to as the three conditions that an exemption must meet.[149] The three conditions are as follows: "[first,] that it is confined to a certain special case, [second,] that it does not conflict with a normal exploitation of the work, and [third,] that it does not unreasonably prejudice the legitimate interests of the right holder."[150] When the exemptions to the exclusive rights are allowed under the TRIPS Agreement, then the principles of the Berne Convention will apply.[151] If a member-country believes that another member is in violation of the Agreement, it can file a complaint with the WTO.[152] The complaint is then reviewed by the Dispute Settlement Body, where a panel may be created to examine the matters referred to in the complaint.[153] After an investigation, the panel issues a report to the Dispute Settlement Body containing recommendations and rulings and instructs the violating country to comply with its ruling.[154] The country allegedly in violation may appeal the findings of the panel only once.[155]

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therefrom." *Id.*

147. Carter, *supra* note 31, at 815; *see also* Loren, *supra* note 6, at 260. "TRIPS incorporates the substantive standards of the Berne Convention, thus permitting countries to utilize the WTO dispute settlement mechanism against countries not meeting those standards." *Id.*

148. *See* TRIPS Agreement, *supra* note 144, at art. 13. "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." *Id.*; *see also* Loren, *supra* note 6, at 260-63.

149. *See* Loren, *supra* note 6, at 261; *see also* Daniel Pruzin, *Intellectual Property: WTO Issues Final Ruling in Music Licensing Dispute,* BNA INTERNATIONAL BUSINESS & FINANCE DAILY, June 19, 2000 (copy on file with *The Transnational Lawyer*).

150. *See* Pruzin, *WTO Issues Final Ruling in Music Licensing Dispute, supra* note 149.

151. *See* Stefan Bernhard, *Copyright and Related Rights, in* GUIDE TO THE TRIPS AGREEMENT, *supra* note 144, at 27 (explaining Article 13).

> Where exceptions to the exclusive rights are made available in member countries, the article provides for the application of the general principles of the Berne Convention, which are that members' countries shall limit such exceptions to certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the rightholder. Thus, the Article establishes the basic principles for the use of compulsory licensing.

Id.

152. *See Report of the WTO Panel, supra* note 54.

153. *See id.* at 1; *see also* Carter, *supra* note 31, at 816-17.

154. *See Report of the WTO Panel, supra* note 54.

155. *See* Carter, *supra* note 31, at 817.

Shortly after the Fairness in Music Licensing Act became law in January 1999, allegations of international violations surfaced.[156] Member states of the European Community, after receiving complaints on behalf of the Irish Music Rights Organization, submitted a formal complaint to the WTO.[157]

IV. THE BATTLE BETWEEN THE EUROPEAN COMMUNITY AND THE UNITED STATES

The European Community led the battle in confronting the United States about its copyright law. Based upon complaints made by European composers and songwriters, the European Community took proper action by lodging a formal complaint with the WTO. The WTO then established a panel to review and determine whether the United States Copyright Act had in fact, violated the TRIPS Agreement and what, if any, the consequences of that violation would be.

A. European Community Allegations that Section 110(5) of the United States Copyright Act Violates the TRIPS Agreement

On January 26, 1999, the member states of the European Community requested a meeting with the United States under Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) and Article 64.1 of the TRIPS Agreement concerning Section 110(5) of the United States Copyright Act.[158] IMRO was the first to notice the conflict between the new United States law and the TRIPS Agreement and lodged a complaint with the European Community. IMRO claimed that European composers and songwriters were denied royalty payments when their music was played in bars and restaurants in the United States.[159] The European Community investigated the complaint and discovered that European artists could possibly lose as much as twenty-eight million dollars annually due to

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156. *See* Helfer, *supra* note 11, at 99 (specifying that "within days of the law's entry into force in January 1999, the fifteen-member European Community challenged both the Fairness in Music Licensing Act and the homestyle exemption under the dispute settlement procedures of the World Trade Organization").

157. *See id.* at 99 (setting forth that the Irish Music Rights Organization complaint alleged that the Fairness in Music Licensing Act was causing "its members to lose $1.36 million annually in licencing royalties"). Although the dispute of the Fairness in Music Licensing Act does have a financial impact, there are several other reasons as to why this conflict is important. First, this conflict arose at a time when the United States has "adopted an aggressive international trade enforcement policy" and in the past, the United States has been successful in winning conflicts within the WTO by threatening "trade sanctions to pressure other treaty parties to modify their national laws." *Id.* at 100-01. Second, this dispute reflects "Congress' willful refusal to follow international copyright law," which is an exception to the trend of Congress' general conformance with international copyright treaties. *Id.* at 102-03. Third, this dispute raises concern over "WTO jurists' interpretation of copyright treaty exceptions and limitations clauses." *Id.* at 103.

158. *See Report of the WTO Panel*, *supra* note 54, at 1.

159. *See* Tamara Conniff & Brooks Boliek, *Royalty Issue Awaits House*, THE HOLLYWOOD REP., Nov. 10, 2000, *available at* 2000 WL 28201572 (copy on file with *The Transnational Lawyer*).

the new United States law.[160] As a result of these findings, they submitted a formal complaint to the WTO.[161] The IMRO complaint also gained support from the European Group of the Societies of Authors and Composers (GESAC),[162] a European performing rights organization containing over 480,000 members.[163]

The European Community's complaint alleged that the exemptions provided in Section 110(5) of the Copyright Act are in violation of the United States' obligations under the TRIPS Agreement.[164] The complaint attacked all of Section 110(5) of the Copyright Act, but the European Community was most concerned with subparagraph (B), which broadened the already existing exemption that licenses were not needed for public performances made through the use of "a single receiving apparatus of a kind commonly used in private homes."[165] Specifically, the complaint contended that the Copyright Act is not compatible with Article 9.1 of the TRIPS Agreement together with Article 11(1)(ii) and 11*bis*(1)(iii) of the Berne Convention,[166] and that there is no exception under the TRIPS Agreement or the Berne Convention that will justify the United States' incompatibility.[167]

After failing to reach a mutually satisfactory solution, the European Community requested the establishment of a panel under the authority of Article 6 of the DSU and Article 64.1 of the TRIPS Agreement.[168] This panel is established by the Dispute Settlement Body, the entity that renders rulings on the issues provided in the European Community complaint.[169] On May 5, 2000 the Dispute Resolution Panel submitted its final report to the Dispute Settlement Body with recommendations and rulings on the allegations of the European Community.[170]

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160. *See id.*

161. *See id.*

162. *See* McCluggage, *supra* note 125, at 2 n.5 (explaining that GESAC stands for Groupment European des Societes d'Auteurs et Compositeurs, translated as European Group of the Societies of Authors and Composers).

163. *See id.* at 2.

164. *See Report of the WTO Panel, supra* note 54, at 7.

165. *See International Developments, Fairness in Music Licensing Act is Inconsistent with Berne Convention and TRIPS Agreement, WTO Panel Decides in Case Brought Against United States by European Communities at Request of Irish Performing Rights Organization,* 22 NO. 2 ENT. L. REP. 7 (2000) (copy on file with *The Transnational Lawyer*).

166. *See id.*

167. *See id.*

168. *See Report of the WTO Panel, supra* note 54, at 1.

169. *See* WTO Secretariat, *United States–Section 110(5) of the U.S. Copyright Act, Constitution for the Panel Established at the Request of the European Communities*, WT/DS160/6, at 1 (Aug. 6, 2000) *reprinted in Report of the WTO Panel, supra* note 54, at 73 Annex II. "The parties to the dispute agreed that the Panel should have standard terms of reference." *Id.*

> To examine, in light of the relevant provision of the covered agreements cited by the European Communities in Document WT/DS160/5, the matter referred to the DSB by the European Communities in that document and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.

Id.; *see also* Carter, *supra* note 31, at 817. The report of the Panel is of great significance because "the DSB will adopt the final report and can instruct the violating country to comply with the agreement and impose sanctions in the event of continued non-compliance." *Id.* (citations omitted).

170. *See Report of the WTO Panel, supra* note 54, at 1.

The WTO Dispute Resolution Panel agreed with the European Community in some respects and with the United States in other respects.[171] In favor of the European Community, the Dispute Resolution Panel found that the exemption added by the Fairness in Music Licencing Act does not satisfy the Article 13 requirements and thus the exemption is "inconsistent" with Articles 11 and 11*bis* of the Berne Convention.[172] The Panel also found, however, in favor of the United States, that "what remains of the 'homestyle receiver exemption' (the exemption now codified at Section 110(5)(A)) does satisfy the requirements of Article 13 of the TRIPS Agreement, and thus that exemption is consistent with Articles 11 and 11*bis* of [the] Berne [Convention]."[173] Although it appears a partial victory for the United States, the major issue was won by the European Community, as based on the Panel's interpretation of Section 110(5) that not much is left of the "homestyle receiver exemption."[174]

The United States had the option to appeal the decision but chose not to because "'a lot of the points the United States thought should be made were addressed' in the Panel's ruling" and that, though disappointed by the Panel's decision, overall the United States was "pleased with certain elements."[175] Because the United States did not appeal the Dispute Settlement Body Panel ruling, the WTO formally adopted the ruling.[176]

B. *The Panel Report Issued by the World Trade Organization Dispute Settlement Body*

The European Community's complaint explained that songwriters were given the right to exclusively authorize public performances of their songs, including performances broadcasted by loudspeaker, through Articles 11 and 11*bis* of the Berne Convention.[177] The complaint alleged that because of the exemptions in

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171. *See International Developments, supra* note 165.

172. *Id.*

173. *Id.*

174. *Id.*

175. Daniel Pruzin, *Intellectual Property: WTO Adopts Ruling Striking Down U.S. Law Excusing Bars, Shops from Music Copyright,* BNA INTERNATIONAL TRADE DAILY, July 28, 2000 (copy on file with *The Transnational Lawyer*).

176. *See International Developments, supra* note 165; *see also* Conniff & Boliek, *supra* note 159.

177. *See International Developments, supra* note 165; *see also Report of the WTO Panel, supra* note 54, at 13 (explaining the connection between Articles 11 and 11*bis*). "Regarding the relationship between Articles 11 and 11*bis*, we note that the rights conferred in Article 11(1)(ii) concern the communication to the public of performances in general." *Id.* Article 11(1) provides:

> Authors of dramatic, dramatic-musical and musical works shall enjoy the exclusive right of authorizing:
>
> (i) the public performance of their works, including such public performance by any means or process;
>
> (ii) any communication to the public of the performance of their works.

Id. Article 11*bis* (1)(iii) is a specific rule conferring exclusive rights concerning the public communication by loudspeaker or any other analogous instrument transmitting, by signs, sounds or images, the broadcast of a work.

Section110(5) of the Copyright Act, the United States was not in compliance with the Articles of the Berne Convention because songwriters lost their right to authorize or prohibit performances taking place in restaurants and establishments.[178] In response to the European Community's complaint, the United States argued that Article 13 of the TRIPS Agreement allowed minor limitations to be placed on the exclusive rights of copyright owners and that the exemptions within Section 110(5) fell within the standards of Article 13.[179]

While the Panel and both parties agreed that Article 13 permits exceptions to copyright owners' exclusive rights so long as all three conditions are met, they differed in opinion as to whether or not United States law covered the same ground in the exceptions allowed.[180] Regardless of the parties' views, if the Panel found that any one of the three conditions were not satisfied, the Article 13 exception would not be allowed.[181]

The first condition required in order to qualify for an exemption under Article 13 of the TRIPS Agreement is that the limitations or exceptions must be confined to "certain special cases."[182] The United States argued that both subparagraphs (A) and (B) of Section 110(5) are confined to "certain special cases" because the exceptions are "well-defined and of limited application."[183] The European Community defended its allegations by explaining that in order to meet the first condition, an exception must be well-defined and have a narrow scope.[184] The European Community contended that due to the mass number of establishments that are exempt from paying fees for the use of exclusive rights under Section 110(5), the exemptions created a rule rather than a narrow exception.[185]

The Panel examined the Oxford English Dictionary definitions to determine the ordinary meanings of the words "certain," "special," and "cases" to ascertain the

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See Report of the WTO Panel, supra note 54, at 13.

178. *See International Developments, supra* note 165; *see also Report of the WTO Panel, supra* note 54, at 13.

179. *See Report of the WTO Panel, supra* note 54, at 15.

180. *See* Dinwoodie, *supra* note 84, at 750-51; *see also Report of the WTO Panel, supra* note 54, at 27 (describing the procedure of Article 13). "The wording of Article 13 does not contain an express limitation in terms of the categories of rights under copyright to which it may apply. It states that limitations or exceptions to exclusive rights can only be made if three conditions are met: (1) the limitations or exceptions are confined to certain special cases; (2) they do not conflict with a normal exploitations of the work; and (3) they do not unreasonably prejudice the legitimate interests of the right holder." *Id.*

181. *See Report of the WTO Panel, supra* note 54, at 31 (explaining that the Panel and the parties all agreed that the three conditions are cumulative in nature and that failure of one condition would mean that Article 13 would not apply).

182. TRIPS Agreement, *supra* note 144, at art. 13; *see also Report of the WTO Panel, supra* note 54, at 32.

183. *Report of the WTO Panel, supra* note 54, at 32.

184. *See id.*

185. *See id.* (using the amount of establishments exempted in the United States in order to prove that the first condition has not meet fulfilled). "In the case at hand, such significant numbers of establishments are exempted from the duty to pay fees for the use of exclusive rights under subparagraph (A) and (B) of Section 110(5) that the exemptions contained therein constitute a rule rather than an exception." *Id.* at 32.

standard of the first condition.[186] From these meanings the Panel found that a limitation in United States copyright law must be defined to "guarantee a sufficient degree of legal certainty."[187]

The second condition that must be met to justify an exemption under Article 13 of the TRIPS Agreement is that the exemption must "not conflict with a normal exploitation of the work."[188] Again, the Panel turned to dictionary definitions to develop a standard for the second condition.[189] The Panel found that "exploitation" referred to how copyright owners used their exclusive rights to generate economic or monetary value from the rights attached to their works.[190] Conflicts with a "normal exploitation of the work" occurs when a work that is usually protected under copyright law is exempted under an exception or limitation, such as Section 110(5)(A) or (B), and the copyright holder is deprived of the usual methods to gain monetary value from that work; for example, receiving a fee for the use of the copyrighted work.[191]

The third condition that must be met in order to have an exemption under Article 13 of the TRIPS Agreement is that the exemption cannot "unreasonably prejudice the legitimate interests of the right holder."[192] The Panel again began the analysis with dictionary definitions of the terms "interests," "legitimate," "prejudice" and "unreasonable."[193] The Panel focused on the copyright holder's actual and potential economic interests and concluded that the standard of the third condition was that "prejudice to the legitimate interests of right holders reaches an

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186. *Id.* at 33 (defining the "ordinary meaning of 'certain' is known and particularized, but not explicitly identified, 'determined fix,' not variable; definitive, precise, exact"). "In other words, this term means that, under the first condition, an exception or limitation in national legislation must be clearly defined." *Id.* "The term 'special' connotes 'having an individual or limited application or purpose,' 'containing details; precise, specific'." *Id.* "This terms means that more is needed than a clear definition in order to meet the standard of the first condition." *Id.* The term "'case' refers to an 'occurrence,' 'circumstance' or 'event' or 'fact.'" *Id.* "For example, in the context of the dispute at hand, the 'case' could be described in terms of beneficiaries of the exceptions, equipment used, types of works or by other factors." *Id.*; *see also* Dinwoodie, *supra* note 84, at 751-52.

187. Dinwoodie, *supra* note 84, at 751-52; *see also Report of the WTO Panel, supra* note 54, at 34 (affirming that the first condition of Article 13 "should be clearly defined and should be narrow in its scope and reach").

188. *See* TRIPS Agreement, *supra* note 144, at art. 13.

189. *See Report of the WTO Panel, supra* note 54, at 44 (defining "exploit" as "'making use of' or 'utilizing for one's own ends'"). The Report also explained that "normal" exploitation had to mean "something less than full use of an exclusive right" because if "normal" exploitation meant "full use of all exclusive rights conferred by copyrights," then allowing exceptions under Article 13 would not have any meaning. *Id.*

190. *See id.*

191. *See id.* at 48.

192. *See* TRIPS Agreement, *supra* note 144, at art. 13.

193. *See Report of the WTO Panel, supra* note 54, at 57 (explaining the procedure of the analysis). "First, one has to define what are the 'interests' of right holders at stake and which attributes make them 'legitimate.' Then, it is necessary to develop an interpretation of the term 'prejudice' and what amount of it reaches a level that should be considered 'unreasonable.'" *Id.*

unreasonable level if an exception or limitation causes or has the potential to cause an unreasonable loss of income to the copyright [holder]."[194]

1. Analysis of Subparagraph (A) of Section 110(5)

Even though subparagraph (A) was ultimately found to be in compliance with the TRIPS Agreement, the Panel applied the same standards to examine both subparagraphs (A) and (B) to determine whether they were in accordance with Article 13 of the TRIPS Agreement.[195] Thus, a discussion of subparagraph (A) is important in order to gain a greater understanding of how the Panel found subparagraph (B) in violation.

The United States argued that the first condition of a "certain special case" in Article 13 of the TRIPS Agreement was met because the subparagraph's "scope is limited to the use involving a 'homestyle' receiving apparatus."[196] The European Community, however, contended that the requirements of the "homestyle" exemption did not meet the standard of the first condition because the subparagraph was "ambiguously worded" and "imprecise" since the phrase "a single receiving apparatus of a kind commonly used in private homes" did not have a solid definition.[197] The Panel agreed with the United States that subparagraph (A) was limited to "certain special cases" because of the narrow limitations and application of the subparagraph.[198] The Panel rejected the European Community's argument, holding that although an exemption must be limited to cases that are "known and particularized," they do not have to be "explicitly identified,"and that the definition of "homestyle" equipment was clear enough to meet the first condition of Article 13.[199]

The second condition under Article 13 mandates that the exemption cannot conflict with a normal exploitation of the work.[200] The United States argued that because there is no collective licensing mechanism for dramatic musical works in the United States and because there is almost no direct licensing by the individual rightholders of these establishments, the "homestyle" exemption does not conflict

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194. *Id.* at 59; *see also* Dinwoodie, *supra* note 84, at 760 (noting that although the Panel viewed a legitimate interest in this specific instance as having economic value, not all legitimate interests must center around something with economic value).

195. *See* McCluggage, *supra* note 125, at 3 (presenting the Panel's view that because the Article 13 exception had never been utilized by the Panel, its interpretation was extremely important in this case); *see also Report of the WTO Panel, supra* note 54, at 31 (clarifying that the Panel decided to discuss subparagraph (B) first because the majority of the arguments concern this section). After finding that subparagraph (B) did not meet the first condition, the Panel still went on to apply the second and third conditions to both subparagraphs (A) and (B). *Id.* at 31.

196. *Report of the WTO Panel, supra* note 54, at 38.

197. *Id*; *see also* 17 U.S.C. § 110(5)(A) (1999).

198. *See Report of the WTO Panel, supra* note 54, at 40-43 (explaining exactly how narrow subparagraph (A) truly is due to the fact that it is limited to musical works such as opera, operetta, or other dramatic works).

199. *See* Dinwoodie, *supra* note 84, at 753.

200. *See* TRIPS Agreement, *supra* note 144, at art. 13.

with a normal exploitation of the work.[201] The parties both agreed that copyright holders did not normally license public performances or transmissions of dramatic musical works.[202] Thus, the Panel concluded that the "homestyle" exemption does not have a considerable economic impact on copyright holders and thus, the exemption complies with the second condition.[203]

The third condition under Article 13 of the TRIPS Agreement mandates that the exemption cannot unreasonably prejudice the legitimate interests of the right holder.[204] Due to the narrow application of subparagraph (A) to dramatic works, the Panel again found that public transmissions of dramatic works do not have a substantial economic impact that would result in "unreasonable prejudice to the legitimate interests of the right holder."[205] Thus, the Panel concluded that subparagraph (A) of Section 110(5) of the United States Copyright Act met the requirements of Article 13 of the TRIPS Agreement and is therefore consistent with Articles 11*bis*(1)(iii) and 11(1)(ii) of the Berne Convention.[206]

2. *Analysis of Subparagraph (B) of Section 110(5)*

The Panel used the same three standards applied to subparagraph (A) to examine the exemption of subparagraph (B). The United States defended subparagraph (B) by claiming that the exemption is well-defined due to the use of square footage and equipment limitations.[207] The European Community pointed out that, although subparagraph (B) is "clearly defined in respect of the size limits of establishments and the type of equipment that may be used," it is much too large in scope given the amount of establishments that benefit by not having to pay licensing fees.[208] The Panel found that subparagraph (B) exempted too many users intended to be covered by provisions of Article 11*bis*(1)(iii) and that subparagraph (B) could not be considered a "certain special case," the first condition of Article 13, and therefore

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201. *See Report of the WTO Panel, supra* note 54, at 56; *see also* Dinwoodie, *supra* note 84, at 760 (showing that the exemption of subparagraph (A), which was limited to only dramatic works, was not very likely to have a severe economic impact on the copyright holders and thus complied with the second condition of Article 13).

202. *See Report of the WTO Panel, supra* note 54, at 57.

203. *See id.*

204. *See* TRIPS Agreement, *supra* note 144, at art. 13.

205. *Report of the WTO Panel, supra* note 54, at 68.

206. *See International Developments, supra* note 165 (supporting the Panel's decision by explaining that since almost no dramatic music, such as operas, operettas, or musicals are played on radios and televisions in restaurants, bars and retail establishments, "the 'homestyle receiver exemption' actually exempts little or nothing"). "That is why the panel concluded that the 'homestyle receiver exemption' qualifies as a 'special case' that does not conflict with the normal exploitation of the music it covers and does not unreasonably prejudice the legitimate interests of copyright owners." *Id.*

207. *See Report of the WTO Panel, supra* note 54, at 34.

208. *Id.* at 34-35; *see also id.* at 36 (outlining the estimated percentage of United States eating, drinking and retail establishments in 1999 that were subject to subparagraph (B) and who could play radios and televisions without the consent of copyright holders were 73% of all drinking establishments, 70% of all eating establishments, and 45% of all retail establishments).

concluded that subparagraph (B) did not comply with Article 13.[209] Thus, the Panel determined that subparagraph (B) is in violation of Article 11*bis*(1)(iii) and 11(1)(ii) of the Berne Convention.[210]

Despite the fact that the Panel concluded that subparagraph (B) violated the first condition of Article 13, it went on to consider the second and third conditions of Article 13 because the Panel felt that "the two subparagraphs are closely related and their respective fields of operation overlap in respects other than the categories of works covered."[211] The Panel also felt that it was important to address the other arguments that had been made by the parties in anticipation of determining the compliance of the second and third conditions under Article 13.[212]

The United States argued that subparagraph (B) does not conflict with "a normal exploitation of works" and thus had met the standards of the second condition of Article 13 for several reasons. First, the United States reasoned that because of the vast amount of eating, drinking and retail establishments, performing rights organizations and individual copyright holders were not able to license all of the establishments anyway; thus, this exemption was considered a normal exploitation.[213] Second, most of the establishments now exempt under subparagraph (B) were already exempt under the original "homestyle" exemption of 1976.[214] The European Community rebutted the United States' arguments by explaining that "administrative difficulties in licensing a great number of small establishments do not excuse the very absence of the right, because there can be enforcement of only such rights as are recognized by law."[215]

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209. *Id.* at 38; *see also* Dinwoodie, *supra* note 84, at 752 (recognizing that the Panel found the "business exemption applied to more than certain special cases" since "it was not limited in reach because of the large percentage of establishments that could potentially benefit from it" even though the language of subparagraph (B) was well-defined).

210. *See Report of the WTO Panel, supra* note 54, at 43; *see also International Developments, supra* note 165 (supporting the Panel's reasoning that the exemptions in subparagraph (B) could not be viewed as a "special case" due to the large amount of establishments that did not need licenses to play radios or televisions and that "moreover, the percentage of exempt businesses could be even grater, if large establishments limit the number of loudspeakers they use in each room and the size of their television screens").

211. *Report of the WTO Panel, supra* note 54, at 43; *see also* Dinwoodie, *supra* note 84, at 754 (noting that although the Panel had already established that subparagraph (B) was in violation of the TRIPS Agreement after not satisfying the first condition, it still reviewed the second and third conditions of the three-step test).

212. *See Report of the WTO Panel, supra* note 54, at 43 (deciding to examine the second and third conditions of Article 13 even though subparagraph (B) had already failed to meet the requirements of the first condition). "[I]n performing our task to examine the matter referred to the DSB and to make such findings as will assist the DSB in making recommendations or in giving rulings, it is appropriate to address the several other fundamental arguments made by the parties with respect to subparagraph (B) that relate to its consistency with the other two conditions of Article 13 of the TRIPS Agreement." *Id.*

213. *See Report of the WTO Panel, supra* note 54, at 50.

214. *See id.*

215. *Id.* at 51; *see also id.* at 52 (illustrating that the Panel agreed with the European Community's reasoning that current licensing practices and procedures of performing rights organizations "at a given time do not define the minimum standards of protection under the TRIPS Agreement that have to be provided under national legislation").

Using the same reasoning as in the first condition, the Panel held that subparagraph (B) did not comply with the standards of the second condition because of the large percentage of businesses and establishments that were exempt from paying fees to copyright holders.[216] Subparagraph (B) conflicted with "a normal exploitation of works" because the exemption interfered with the collection of a vast amount of potential royalties, a collection of monies which should be exercisable as an exclusive right granted under Articles 11*bis*(1)(iii) and 11(1)(ii) of the Berne Convention.[217] The Panel concluded that it was reasonable for copyright holders to "expect to be in a position to authorize the use of broadcasts of radio and television music by many of the establishments covered by the exemption and, as appropriate, receive compensation for the use of their works."[218] Thus, normal exploitation of the work is not available as a right under Articles 11*bis*(1)(iii) and 11(1)(ii) of the Berne Convention.

The third condition of Article 13 of the TRIPS Agreement considers the extent of injury to the copyright holder from the exemption, rather than the effect on the market.[219] The European Community again focused on the large percentage of businesses and establishments that are included within the United States' exemption.[220] It argues that "the unreasonableness of the prejudice caused to the right holder becomes fully apparent" when such as substantial amount of eating, drinking and retail establishments are covered by the "business" exemption.[221] The United States contended that several other factors must be considered when determining whether the right holder would be prejudiced by the exemption.[222] The United States suggested that there are some establishments covered under the exemption that only play or rely on music that does not come from a radio or television and thus should be subtracted when determining the percentage of businesses and establishments covered by the exemption.[223] The United States also suggested that other establishments would rather turn off their radio or televison than pay fees to performing rights organizations and should also be excluded from the figures.[224] Although the Panel considered some of the suggestions made by the

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216. *See* Dinwoodie, *supra* note 84, at 759.

217. *See id.*

218. *Report of the WTO Panel, supra* note 54, at 55; *see also International Developments, supra* note 165 (addressing the Panel's decision that "normal exploitation" could not exist where copyright owners would reasonably believe that under Article 11*bis* of the Berne Convention they would have the right to authorize the public performance of their works, but under subparagraph (B) those rights would be taken away and copyright holders authorization would not be needed in order to play the music).

219. *See Report of the WTO Panel, supra* note 54, at 57.

220. *See id.* at 61.

221. *Id.* (determining that when 73% of drinking establishments, 70% of eating establishments and 45% of retail establishments are exempt under the "business" exemption, "the denial of protection has been turned into the rule and protection of the exclusive right has become the exception").

222. *Id.*

223. *See id.* at 61 (addressing the possibility that establishments may not play any music or might play music from tapes, compact discs, or jukeboxes).

224. *See id.* at 61-62.

United States, it concluded that the United States was unable to demonstrate that the "business" exemption does not "unreasonably prejudice the legitimate interests of the right holder."[225]

Thus, finding that subparagraph (B) of Section 110(5) of the United States Copyright Act did not meet the conditions of Article 13 of the TRIPS Agreement, the Panel found it was inconsistent with Articles 11*bis*(1)(iii) and 11(1)(ii) of the Berne Convention.[226] The Panel recommended that the United States bring subparagraph (B) into compliance with the TRIPS Agreement in order to abide by its obligation to the Agreement.[227]

V. SOLVING PROBLEMS: COMPLIANCE FROM THE UNITED STATES

Although they did not agree with the Panel's decision that subparagraph (B) is in violation of the TRIPS Agreement, the United States chose not to appeal the WTO's decision because the Panel did address the points and issues the United States felt were most important.[228] The United States and the European Community, however, were not able to agree on the amount of time the United States should be granted to comply with the TRIPS Agreement.[229] The parties submitted a joint letter dated November 22, 2000, notifying the Dispute Settlement Body that they agreed that the duration of the "reasonable period of time" for implementation of TRIPS Agreement compliance by the United States should be determined through arbitration, pursuant to the terms of Article 21.3(c) of the DSU.[230]

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225. *Id.* at 67; *see International Developments, supra* note 165 (explaining that the European Community and the United States greatly disagreed on this condition).

> On this issue, the E.C. and the U.S. had very different estimates concerning the impact of the exemption on royalties paid to E.C. copyright holders. The U.S. estimated that the exemption reduces royalties payable to the E.C. by about $500,000 a year, while the E.C. estimated that the reduction comes to some $5 million a year. Ultimately, the burden of proof on this issue fell on the U.S., and the panel decided that the U.S. had not met its burden.

Id.

226. *See Report of the WTO Panel, supra* note 54, at 69.

227. *See id.*

228. *See* Pruzin, *supra* note 175, at 2 (addressing the most important points that the United States thought should be discussed by the Panel). For example, the United States was happy that the Panel was able to determine that Article 13 of the TRIPS Agreement was the proper standard to evaluate Section 110(5) of the Copyright Act. Also, the United States was happy that the "homestyle" exemption was found th be in compliance with Article 13 and thus the United States law was proper under the TRIPS Agreement.

229. *See* Conniff, *supra* note 159, at 2; *see also* Julio Lacarte-Muró, *United States—Section 110(5) of the U.S, Copyright Act, Arbitration Under Article 21.3(c) of the Understanding on Rules and Procedures Governing the Settlement of Disputes*, WT/DS160/12, at 2 (January 15, 2001) [hereinafter *Arbitration Report*] (explaining that United States suggested 15 months to comply with the Agreement, but that the European Community would like compliance within 12 months).

230. *Arbitration Report, supra* note 229, at 1.

A. *The Battle Over What Constitutes a "Reasonable Period of Time"*

The United States told the Dispute Settlement Body that it intended to comply with the "recommendations and rulings" of the Panel report but would need a "reasonable period of time" to implement a plan to come into compliance with the TRIPS Agreement.[231] Because the United States and the European Community were not capable of agreement on the duration of a "reasonable period of time," both parties agreed to binding arbitration to determine the duration.[232]

The European Community felt that the United States could bring its law into compliance with the TRIPS Agreement by simply repealing Section 110(5)(B) of the Copyright Act.[233] Given the "simplicity" of the measures that could be taken and the possibility of quick decision-making on the part of the United States legislative system, the European Community felt that ten months from the date of the Panel Report, July 27, 2000, would be an adequate "reasonable period of time."[234] In its argument for arbitration, the European Community cited the procedures of the United States' legislative process to support its ten month deadline. It noted that there is "no specific structural time-frame in the United States legislative system."[235] In other words, the United States sets no minimum period of time for a bill to be examined nor "any constitutional or regulatory obligation to consult certain parties within a predetermined time frame."[236] The European Community also noted that other United States legislation considered much more complex compared to a simple repeal was able to be pushed through the legislature in a small amount of time.[237] The European Community concluded that if left to its own devices, the United States could take an infinite amount of time to bring its copyright law into compliance with the Report Panel's ruling.[238]

The United States argued that a "reasonable period" to implement the recommendations and rulings of the Report Panel would be at least fifteen months

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231. *See id.*

232. *See id*; *see also International Developments, United States Must Repeal Fairness in Music Licensing Act by July 27, 2001, WTO Arbitrator Rules,* 22 Ent. L. Rep. 8 (2001) (copy on file with *The Transnational Lawyer*) (explaining that the United States told the WTO that it would carry out the rulings and recommendations of the Panel but that they would need a "reasonable period of time" to do so). "Because the United States and the European Communities were not able to agree on how long a time would be 'reasonable,' that issue was referred to arbitration (as permitted by WTO procedural rules)." *Id.*

233. *See Arbitration Report, supra* note 229, at 2.

234. *See id.*

235. *Id.*

236. *Id.*

237. *See id.* at 3 (noting that the United States has enacted "highly complex" legislation in "very short periods of time, ranging from 28 to 113 days").

238. *See id.* at 2; *see also* Pruzin, *supra* note 175, at 2 (explaining the reasons why the European Community requested a ten month period). The European Community argued "that 'simple' legislative changes were needed to amend Section 110(5) and that previous intellectual property measures were enacted by the United States in as little as three months." *Id.*

or until the first session of the 107th Congress adjourns.[239] The United States looked to the language of Article 21.3(c) of the DSU which states that "the 'reasonable period of time' should not exceed fifteen months from the date of the adoption of a panel or Appellate Body report;" the period may be longer or shorter, however, based on "particular circumstances."[240] Such factors that equate to "particular circumstances" include how implementation can take place, technical complexity of the action that the Member must take, and "the period of time in which the implementing Member can achieve the proposed form of implementation in accordance with its system of government."[241] The United States also points out that the November 2000 elections resulted in a new President, and a new Congress will have to decide this matter.[242] Thus, since the new Congress will have administrative matters to attend to in the beginning of the new sessions, *consideration* of compliance with the Panel Report would not be possible until February or March of 2001.[243] Due to these circumstances, the United States requested fifteen months from the date of the Panel Report or until the first session of the 107th Congress adjourns to begin implementation of the recommendations and rulings of the Panel Report.[244]

After considering the arguments of both parties, the arbitration proceedings determined that a "reasonable period of time" is twelve months from the date of the Panel Report adoption, July 27, 2000.[245] Arbitrator Julio Lacarte-Muro´ agreed with the European Community that the United States was not justified in requesting such a long period of time.[246] The arbitrator found that the United States Congress should use its "flexibility with regard to the amount of time it takes to enact legislation and must fulfill its international obligations created by the WTO Agreement as soon as possible."[247]

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239. *See Arbitration Report, supra* note 229, at 3.

240. *Id.*

241. *Id.*

242. *See id.* at 6; *see also International Developments, supra* note 232, at 2 (showing that the United States "justified its request by explaining the multi-step legislative process that is required to enact legislation, and by noting that since the United States has a new President and the 107th Congress will spend the first few months getting organized and confirming the President's appointments, the process was unlikely to begin until March or April of 2001").

243. *See id.*

244. *See id.* at 6.

245. *See id.* at 11.

246. *See International Developments, supra* note 232, at 2 (noting, however, that given Congress' schedule for 2001, the European Community's request of ten months was not enough time for the resolution of this matter under the circumstances).

247. *Arbitration Report, supra* note 229, at 9.

B. *Is there a Solution that Puts the United States in Compliance with the WTO?*

As the compliance deadline of July 27, 2001 approached, the parties decided to come to an agreement on how to handle the dispute.[248] They reached a "procedural agreement" to explore possible ways to compensate the European music industry for the losses encumbered as a result the enactment of subparagraph (B) of the United States Copyright Act.[249] The agreement is viewed as "constructive dialogue" to avoid trade disputes between the parties until the United States can change subparagraph (B) of the Act.[250] Compensation that is owed to European musicians will be determined by independent arbitrators.[251]

The WTO Dispute Settlement Body approved the United States' request to postpone the original July 27, 2001 deadline so that discussions with the European Community could take place.[252] The United States was granted until December 31, 2001, or until the adjournment of Congress' session, to comply.[253] "The parties will now have some extra time until the end of the U.S. Congressional session to negotiate a compensation deal."[254]

VI. CONCLUSION

International copyright law has been permanently changed by the possibility of resolving international copyright disputes with enforceable decisions through the WTO dispute settlement process. The United States' agreement with the European Community, supervised by the WTO, is the first of its kind for United States copyright law.[255] "Although the United States has been subject to a number of adverse WTO rulings, it has never been required to offer compensation or been subject to WTO-approved trade sanctions as a result of non-compliance."[256]

Although the United States is often viewed as an international leader, this decision could be the first step towards a level playing field for international copyright law. The Panel Report is a strong illustration of the need to protect the

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248. *See generally EU: EU/US Reach Procedural Agreement on WTO Copyright Dispute*, REUTERS ENG. NEWS SERV., July 25, 2001 (copy on file with *The Transnational Lawyer*).

249. *See id.*

250. *Id.* (quoting Pascal Lamy, EU Commissioner for Trade). "This agreement is in line with our determination to manage trade disputes in a professional and efficient manner. Instead of adopting a confrontational approach, we have started a constructive dialogue with a view to compensating European musicians until such time as the US Copyright Act is amended." *Id.*

251. *See id.* at 2.

252. *See EU's Lamy Welcomes EU-US Agreement on Procedures for Copyright Dispute*, WORLD NEWS CONNECTION, July 25, 2001, *available at* 2001 WL 25734934 (copy on file with *The Transnational Lawyer*).

253. *See WTO: U.S. Preparing to Rescind Antidumping Act, to Offer Compensation in Licensing Dispute*, INTERNATIONAL TRADE DAILY, July 26, 2001 (copy on file with *The Transnational Lawyer*).

254. *EU's Lamy Welcomes EU-US Agreement on Procedures for Copyright Dispute, supra* note 252.

255. *See WTO: U.S. Preparing to Rescind Antidumping Act, to Offer Compensation in Licensing Dispute, supra* note 253.

256. *Id.*

rights of all copyright owners, regardless of where geographically, the music was first created, and the last country it was publicly performed.[257] The Report also recognizes, however, that technology and social customs are varied between countries and, as time passes, it shows the laws that best protect United States copyright holders may not be the best law to protect each and every copyright holder internationally.[258] International copyright law must stay abreast with technological and cultural advances, but must accomplish this task while keeping in mind the importance and impact of cultural diversity within the countries of the world.

257. *See* Dinwoodie, *supra* note 84, at 732 (explaining that "the panel report is a strong and appropriate endorsement of the need to protect the rights of copyright owners and to hold WTO members to agreed-upon minimum standards").

258. *See id.* at 758 (expressing how the Panel believed that due to so many "possibilities and practices" from one country to the next, international copyright standards could not be frozen in a single place or time).

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