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Charles Leininger

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By Charles Leininger*

I. INTRODUCTION

Next time you walk into your favorite community coffee shop, take a moment to observe your surroundings. Steaming coffee is being served in dozens of aromatic flavors to students, would-be philosophers, out-of-work actors, and working people simply seeking to wake up before their daily shift. A few friends sit around a table laughing over childhood stories. Two elderly men are deeply engaged in an epic game of chess. On the walls are paintings by as yet unknown local artists. A ficus tree in the corner adds the feeling of the outdoors. Hanging from the ceiling are tracks of soft lighting warmly glowing the room.

Now, focus your ears on the sounds you hear. Listen beyond the idle chitchat of fellow coffee shop regulars. Listen beyond the grinding sounds of blended cappuccinos. Listen to the music being played over speakers placed above your head. Maybe you are kicking back to some light jazz or grooving to Motown classics. This music adds to the atmosphere and makes your experience much more pleasurable. Maybe you will stay a little longer for another cup of coffee or even a tasty pastry. Whether it is a conscious decision or not, one of the reasons you are a regular at this particular coffee shop is because of the music.

As you nod your head in rhythm, consider one question: Who is

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* J.D. candidate, 2006, Pepperdine University School of Law. B.S., 2003, University of Southern California. I wish to thank all my family and friends for their generous support and endless patience given during the writing of this article.

paying for this? No tickets are being sold. There is no cover charge at the door. Like the whipped cream on your cappuccino, the music you hear is provided at no additional charge to you, the customer. But are the artists who performed the music being compensated for their creative endeavors? Are the songwriters collecting royalties for the public performance of their works? If there is no direct charge to you, the customer, is the owner of the coffee shop paying for the privilege of playing music for her customers? Should she be required to pay anything at all? Under United States copyright law, there is a good chance the answer is "No". While the exclusive right to publicly perform a copyrighted work lies solely with its author, there is an exception provided under 17 U.S.C. § 110(5) of the Copyright Act. This exception is divided into two parts commonly called the "homestyle exemption" and the "business exemption."

In 2000, the European Communities ("EC") brought a claim against the United States alleging that both the "homestyle" and "business" exemptions of § 110(5) of the Copyright Act violated provisions of the Berne Convention on copyright as incorporated into the Trade-Related Aspects of Intellectual Property Rights ("TRIPS") agreement.[1] A World Trade Organization ("WTO") Dispute Panel found that the United States had violated its international treaty obligations under the Agreement on TRIPS because of the "business exemption" enacted under the Fairness in Music Licensing Act of 1998 ("FMLA"), which amended § 110(5) of the Copyright Act of 1976, but not the homestyle exemption.[2] It found the business exemption greatly expanded the scope of the original homestyle exemption, which protected small businesses, such as restaurants, from requirements that forced them to pay license fees to performing rights organizations for performances of copyrighted works over small "homestyle" stereo systems.[3]

The Dispute Panel recommended that the United States amend or repeal the legislation to bring it in compliance with the TRIPS Agreement.[4] Until the matter could be further resolved, an

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1. Panel Report, *United States – Section 110(5) of the U.S. Copyright Act*, WT/DS160/K (June 15, 2000) (adopted July 27, 2000) [hereinafter Panel Report].

2. Panel Report, *supra* note 1, at ¶ 69.

3. Panel Report, *supra* note 1, at ¶¶ 6.131, 6.145. *See* discussion *infra* Part V.B.1(a-b) and accompanying notes.

4. *Id.*

arbitration award of approximately $1.1 million per year was given to the European Communities as compensation.[5] Congress has successfully delayed making a final decision as to what it will do to correct the issue. The United States will face increasing antipathy from its trading partners, however, if nothing is done to resolve the matter, especially in the realm of intellectual property protections. This paper will review the historical development of the § 110(5) exemptions, analyze the WTO Dispute Panel's decision, and explore the various options available to Congress as it seeks to find a solution.

II. PRE-1976 COPYRIGHT HISTORY

Each time a song is played over the radio, there are several underlying performances of the work: the original recorded performance by the artist, the performance of the record over the air by a radio station, and the performance of the radio signal reproduced by the user's stereo system. Under the 1909 Copyright Act, either the performance by the radio station or by the stereo owner would be deemed an infringement of the copyright held by the original performer in their recorded work if the performance was unauthorized, public, and for profit. This concept of having several "performances" contained in each rebroadcast of a radio signal originated as the doctrine of multiple performances in the 1931 Supreme Court case *Buck v. Jewell-LaSalle Realty Co.*.[6]

In that case, Jewell-LaSalle Realty Co. operated a hotel in Kansas City, Missouri, that broadcasted music over a master radio receiver wired to loudspeakers in public and private rooms.[7] Having no contractual or other arrangement with any broadcasting stations, the hotel picked up radio signals from the air and re-played them for its

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5. Award of the Arbitrators, *United States—Section 110(5) of the U.S. Copyright Act – Recourse to Arbitration under Article 25 of the DSU*, WT/DS160/ARB25/1 (Nov. 9, 2001) [hereinafter Award of the Arbitrators]. The Dispute Settlement Body elected to not consider music broadcast through the Internet in its calculation. *Id.* at ¶ 4.35. *See* discussion *infra* note 238 and accompanying text.

6. Buck v. Jewell-LaSalle Realty Co., 283 U.S. 191 (1931).

7. *Id.* at 195.

patrons.[8] Without permission, a local radio station broadcasted several popular songs, which were in turn re-broadcast by the hotel.[9] Gene Buck, president of the American Society of Composers, Authors and Publishers ("ASCAP"), and the owners of the copyrighted songs sued Jewell-LaSalle for copyright infringement.[10]

The Court of Appeals for the Eighth Circuit certified to the Supreme Court the question of whether these facts constituted a performance under the Copyright Act.[11] Writing for the Court, Justice Brandeis answered that nothing in the Act limited a work's rendition to a single performance by a ratio station; therefore, the rebroadcast of the work by the hotel constituted an additional, secondary performance.[12] The concept that both primary and secondary performances of a single work could exist simultaneously became known as the multiple performances doctrine.

Furthermore, Justice Brandeis argued that, while radio waves are not themselves audible, the act of converting them into an audible frequency is "essentially a reproduction" of the original rendition of the work and so constitutes a secondary performance under the Act.[13] Brandeis' analysis is problematic, however, because the statutory language in the Copyright Act provides for separate rights of

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8. *Id.*

9. *Id.* The alleged copyright infringements were for the musical compositions "Just Imagine" and "I'm Winging Home (Like A Bird That Is On The Wing)". Buck v. Duncan, 32 F.2d 366 (W.D. Mo. 1929).

10. ASCAP held the exclusive non-dramatic performing rights in these compositions.

11. The question certified to the Supreme Court was:

> Do 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 copyrighted musical composition which has been broadcast from a radio transmitting station, constitute a performance of such a composition within the meaning of 17 [U.S.C.] Sec. 1(e)?

Jewell-LaSalle, 283 U.S. at 195-96.

12. *Id.* at 198.

13. *Id.* at 200. Justice Brandeis analogized using a mechanical device to reproduce sounds recorded on a phonorecord with a radio receiver used to reproduce sounds transferred in radio waves. *Id.* In both situations, reproduction amounts to a performance. *Id.* at 201.

reproduction and performance.[14] The reproduction of sound waves itself is not what constitutes a performance; rather, the copyright owner has the exclusive right to both "play" and "perform" a "record." The person receiving the radio broadcast therefore does not perform the record itself, but instead reproduces the transmission. While flawed in a technical sense, this was the rule until the 1960s when the advent of cable television raised the issue again.

In *Fortnightly Corp. v. United Artists Television, Inc.*, the Supreme Court held the functions of a cable television system did not constitute a "performance" within the meaning of Sections 1(c) and 1(d) of the 1909 Act as generally recognized in a conventional sense or as envisioned by Congress when it enacted the law.[15] Fortnightly Corporation, the owner and operator of community antenna television ("CATV") systems in West Virginia, broadcasted several movies whose copyrights were held by United Artists.[16] United Artists had granted licenses to five television stations to broadcast the movies, but not to Fortnightly Corporation to rebroadcast them over its CATV network.[17]

Disregarding the *Jewell-LaSalle* holding as "a questionable 35-year-old decision that in actual practice has not been applied outside its own factual context,"[18] the Court found that Fortnightly's system simply enhanced the viewer's ability to receive the broadcasters' signals and was therefore not a performance.[19] Thus, the audience is not completely passive because it must use television sets and receiving equipment to view the signal. This serves as an act performed by the private viewer rather than the cable system operator.[20]

Several years later, the holding in *Fortnightly* was challenged on grounds that cable television technology had greatly expanded and cable transmissions were now sent over greater distances using relay

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14. 17 U.S.C. § 106 (2005).
15. Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390 (1968).
16. *Id.* at 391.
17. *Id.* at 393.
18. *Id.* at 401 n.30.
19. *Id.* at 400-01.
20. *Id.* at 400.

technology.[21] In *Columbia Broadcasting System, Inc. v. Teleprompter Corp*, the Court of Appeals for the Second Circuit held that because Teleprompter's CATV system was intercepting CBS broadcasts from television stations some distance away and then channeling them to its subscribers, it was no longer merely enhancing the viewer's capacity to receive signals. As such, the court held it should be treated as any other display to a public audience otherwise unable to view a work.[22]

However, the Supreme Court reversed this decision by holding "the reception and re-channeling of these signals for simultaneous viewing [was] essentially a viewer function," regardless of distance between broadcaster and viewer.[23] As applied to cable television transmissions, the multiple performances doctrine was effectively replaced by a test focusing on the dichotomy between broadcaster and viewer "functions."[24] Thus, *Fortnightly* and *Teleprompter* effectively limited the doctrine of multiple performances to the realm of radio transmissions as originally applied in *Jewell-LaSalle.* In 1975, the Supreme Court all but eliminated the doctrine in *Twentieth Century Music Corp. v. Aiken.*[25]

In that case, George Aiken owned a fast-food restaurant in downtown Pittsburgh, Pennsylvania called "George Aiken's Chicken," where he played music for customers' enjoyment through a radio wired to four speakers installed in the restaurant's ceiling.[26] ASCAP demanded that he pay performing rights license fees on the basis that he was playing multiple performances under *Jewell-*

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21. Columbia Broad. Sys., Inc. v. Teleprompter Corp., 476 F.2d 338 (2d Cir. 1973), *rev'd*, 415 U.S. 394 (1974). *See also* infra note 23 and accompanying text for the Supreme Court's reversal.

22. *Id.*

23. *Teleprompter Corp. v. Columbia Broad. Sys., Inc.*, 415 U.S. 394 (1974). The Court also rejected the plaintiff's contention that cable television operators should be considered "broadcasters" and therefore performers of programming they did not create. *Id.* at 410.

24. One criticism of this distinction is that placing the burden of investing in the complex and costly technology required to import signals from great distances solely on the viewer side of the dichotomy is unrealistic and overly restrictive. NIMMER ON COPYRIGHT, § 8.18(A) (Matthew Bender & Co., Inc. 2004).

25. Twentieth Century Music Corp. v. Aiken, 422 U.S. 151 (1975).

26. *Id.* at 152.

LaSalle; Aiken refused.[27] In a seven-to-two ruling, the Supreme Court affirmed the circuit court's ruling that *Fortnightly*, not *Jewell-LaSalle*, controlled.[28] It held the act of picking up radio signals out of the air and re-transmitting them through stereo speakers was not a performance and so did not require a license.[29] Aiken fell on the "viewer's" side under *Fortnightly* and so there was no performance separate from and in addition to the original radio broadcast.

In its decision, the Court determined that it would be highly impractical to require strict enforcement of a law labeling the large number of proprietors of small establishments such as Aiken's "copyright infringers" for their failure to pay license fees.[30] Furthermore, it would be inequitable to rule that someone listening to the radio "performs" every broadcast he or she receives.[31] Someone in Aiken's position could have no way of determining whether the primary broadcaster held proper licensing to broadcast copyrighted works, nor would he have the ability to foresee or control a broadcast of works licensed through performing rights societies or individuals

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27. ASCAP is a membership association that licenses and distributes royalties for the non-dramatic public performances of the copyrighted works held by over 200,000 U.S. composers, songwriters, lyricists, and music publishers. ASCAP.com, About ASCAP, http://www.ascap.com/about/ (last visited Sept.27, 2005). Broadcast Music, Inc. ("BMI") and Society of European Stage Authors and Composers ("SESAC") are similar performing rights organizations that collect license fees on behalf of their members. *See* BMI, The BMI Backgrounder, http://www.bmi.com/about/backgrounder.asp (last visited Sept. 27, 2005) *and* SESAC, About Us, http://www.sesac.com/aboutsesac/about/html (last visited Sept. 27, 2005). Both the petitioners and the radio stations in question were members of ASCAP. Aiken was not, however, a member. *Aiken*, 422 U.S. at 153. The ASCAP license agreement with the radio station contained a provision limiting the radio station from granting to third parties the right to reproduce or perform publicly for profit ASCAP licensed musical compositions, or to authorize a third party receiver to perform or reproduce a radio broadcast to the public for profit. *Id.* at 153. Note that Aiken did not directly charge customers for listening to his radio.

28. *See Aiken*, 422 U.S. 151. Chief Justice Burger and Justice Douglas dissented. *Id.*

29. *Id.*

30. *Id.* at 162. The Court noted that ASCAP reported some 5,150 registered establishments nationwide, but as a matter of "policy" or "practice" did not make any attempts to exact licensing from commercial establishments using radios with a single speaker. *Id.* at 162 n.12.

31. *Id.* at 162-63.

other than ASCAP.[32] Additionally, the Court felt it was inequitable to allow copyright owners to require licenses from a great number of establishments for what is effectively a single public rendition of the copyrighted work (i.e., a single broadcast to a large area by one radio station), and thus would go beyond what is necessary to ensure their economic protection.[33]

However, the Court refused to subject *Jewell-LaSalle's* fate to the history books by overruling it. Instead, it made the factual distinction that the radio broadcaster in *Jewell-LaSalle* did not hold the required performance license, whereas the broadcaster in *Aiken* did.[34] A finding of multiple performances could still be found under *Jewell-LaSalle* if the broadcaster was unlicensed, but not under *Aiken* if the broadcaster *was* licensed.[35] This decision is problematic, however, because the owner of an establishment such as Aiken's generally will not know whether the radio broadcaster holds proper licensing to play copyrighted works; thus, the owner could still be held liable for infringement under the Copyright Act if the original broadcaster of the transmission does not hold proper licensing. Nevertheless, the *Aiken* holding became the basis for an exemption under the Copyright Act of 1976 given to business proprietors who broadcast works in their establishments using equipment similar to what might be found in a common household.

III. The Copyright Act of 1976 and the § 110(5) Exemption

A. Copyright Act of 1976

Shortly after the *Aiken* ruling, Congress vastly overhauled U.S. copyright law with the passage of the Copyright Act of 1976.[36] Partly in response to *Aiken*, Congress defined a "performance" to

32. *Id.* at 163.

33. *Id.* at 162. The Court noted that such a result would "be wholly at odds with the balanced congressional purpose behind 17 U.S.C. § 1(e)." *Id.* at 163.

34. *Id.* at 160.

35. The *Aiken* decision thus deprived *Jewell-LaSalle* of much of its meaning, with the result that *Jewell-LaSalle* only applies "if the broadcast being retransmitted was itself unlicensed." 17 U.S.C. § 110 (quoting H.R. REP. NO. 94-1476 (1976)).

36. The Copyright Act of 1976 went into effect January 1, 1978.

include those works played on devices such as a radio.[37] Although the Act did not introduce express rights in secondary transmissions, it gave definitions for primary and secondary transmissions.[38] The House Report accompanying the 1976 Copyright Act explained that what makes a transmitter "secondary" is the process of picking up and retransmitting signals produced by a "primary" transmitter.[39] For a secondary transmission to be considered a copyright infringement, it must be a performance separate from and in addition to the performance by the primary transmitter.

The Act did not, however, specifically include secondary transmissions within the definition of a performance.[40] Neither did it include secondary transmissions in the definition of a "public" performance.[41] Because of this omission, both definitions might be read to apply solely to primary transmissions. Despite this textual

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37. Cass County Music Co. v. Vasfi Muedini, 55 F.3d 263, 266 (7th Cir. 1995).

38. A "primary transmission" is defined as "a transmission made to the public by the transmitting facility whose signals are being received and further transmitted by the secondary transmission service, regardless of where or when the performance or display was first transmitted." 17 U.S.C. § 111(f) (2004). A "secondary transmission" is defined as "the further transmitting of a primary transmission simultaneously with the primary transmission." *Id.*

39. H.R. REP. NO. 98-934 (1984), *as reprinted in* 1984 U.S.C.C.A.N. 465, 4658.

40. Under the Act:

> to perform a work means to recite, render, play, dance, or act it, either directly or by means of any device or process or, in the case of a motion picture or other audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible.

17 U.S.C. § 101 (2004).

41. To perform or display a work "publicly" means:

> (1) to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or
>
> (2) to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.

Id.

ambiguity, however, in examining House Report No. 98-934, Congress appears to have intended that secondary transmissions should constitute additional performances: "[A] cable television system is performing when it retransmits the broadcast to its subscribers."[42]

By making secondary transmissions "performances" under the Copyright Act of 1976, Congress implicitly reintroduced the doctrine of multiple performances. This established that, in order to play music for their patrons, operators of public establishments must obtain proper authorization through licensing or some other means, with a few exceptions such as the one found in § 110(5) of the Act.

Section 110(5) of the 1976 Act, commonly referred to as the "homestyle" or "Aiken" exemption, exempts "small commercial establishments whose proprietors merely bring onto their premises standard radio or television equipment and turn it on for their customers' enjoyment."[43] Congress intended this provision to deal with situations like Aiken's to "exempt from copyright liability anyone who merely turns on, in a public place, an ordinary radio or television receiving apparatus of a kind commonly sold to members of the public for private use."[44] It reasoned that:

> [T]he secondary use of the transmission by turning on

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42. H.R. REP. NO. 98-934. *See also* the Congressional reference to secondary transmissions as "something extra (which) could be considered as a 'performance,' or as an alternative to a performance." NIMMER ON COPYRIGHT, *supra* note 24, at § 8.18(B) n.55 (citing 122 CONG. REC. H10,904 (daily ed. Sept. 22, 1976) (statement of Rep. Danielson)). Although unlikely, a court might still follow *Fortnightly* despite the House Report because the Act fails to expressly designate a secondary transmission as a performance. *Id.* at § 8.18(B).

43. H.R. REP. NO. 94-1476 (1976). "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." *Id.*

44. *See id.* By including an exemption for small commercial establishments, Congress

> acknowledged its practical wisdom in exempting the playing of a single radio: The § 110(5) exemption will allow the use of ordinary radios and television sets for the incidental entertainment of patrons in small businesses or other professional establishments, such as taverns, lunch counters, hairdressers, dry cleaners, doctors' offices, etc.

Cass County, 55 F.3d at 266-67 (quoting S. REP. NO. 983 (1974)).

> an ordinary receiver in public is so remote and minimal that no further liability should be imposed. In the vast majority of these cases no royalties are collected today, and the exemption should be made explicit in the statute. This clause has nothing to do with cable television systems and the exemptions would be denied in any case where the audience is charged directly to see or hear the transmission.[45]

Although the *Aiken* holding served as the model for the § 110(5) exemption, the Committee considered it to represent the "outer limit of the exemption, and believe[d] that the line should be drawn at that point."[46] While it would "exempt small commercial establishments whose proprietors merely bring onto their premises standard radio or television equipment and turn it on for their customers' enjoyment," the statute would "impose liability where the proprietor has a commercial 'sound system' installed or converts a standard home receiving apparatus into the equivalent of a commercial sound system."[47]

Furthermore, the Committee indicated that factors to be considered should include: (1) the "size, physical arrangement, and noise level" of areas where the transmission could be heard or seen; and (2) the "extent to which the receiving apparatus is altered or augmented for the purpose of improving the aural or visual quality of the performance for individual members of the public using those areas."[48] In subsequent litigation, courts relied heavily on *Aiken* in resolving various issues such as what types of sound systems fell within the statute[49] and what sizes of establishments could qualify for

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45. H.R. REP. NO. 94-1476 (1976).

46. *Id.* Namely, the exception is limited to the use by a small commercial establishment of a home receiver with four ordinary loudspeakers positioned relatively close together with the receiver. *Id.*

47. *Id*

48. *Id.*

49. *See* Little Mole Music v. Mavar's Supermarket, 12 U.S.P.Q.2d 1209, 1213-14 (N.D. Ohio 1989); Gnossos Music v. DiPompo, 13 U.S.P.Q.2d 1539, 1542 (D. Me. 1989); Merrill v. County Stores, Inc., 669 F. Supp. 1164, 1170 (D.N.H. 1987); Merrill v. Bill Miller's Bar-B-Q Enters., Inc., 688 F. Supp. 1172, 1175 (W.D. Tex. 1988) (denying exemption to ceiling-mounted speakers located thirty feet apart); Int'l. Korwin Corp. v. Kowalczyk, 665 F. Supp. 652 (N.D. Ill. 1987), *aff'd*, 855

the exemption,[50] as well as whether the purpose for the usage[51] and the ability to pay licensing fees[52] should be considered.[53]

For example, in *Broadcast Music, Inc. v. Claire's Boutiques, Inc.*,[54] the Court of Appeals for the Seventh Circuit addressed the issue of whether "a store manager (or corporate owner) perform[s] a work publicly when she merely receives and plays those radio signals for the benefit of her customers."[55] Claire's Boutiques owned and operated a chain of retail stores,[56] which used small sound systems to

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F.2d 375 (7th Cir. 1988) (denying exemption when eight speakers used); Rodgers v. Eighty Four Lumber Co., 617 F. Supp. 1021, 1023 (W.D. Pa. 1985). *But see* Springsteen v. Plaza Roller Dome, Inc., 602 F. Supp. 1113 (M.D.N.C. 1985) (six speakers placed on poles at outdoor miniature golf course found inferior to most home systems and scarcely audible, even at close range).

50. *See* Sailor Music v. Gap Stores, Inc., 668 F.2d 84 (2d Cir. 1981) (the average size of establishments of 3,500 square feet was enough to justify withholding the exemption even if the nature of the apparatus did not).

51. *See Rodgers* 617 F. Supp. at 1022 (store's contention that it used music primarily to muffle industrial noise rather than for workers' enjoyment held to be irrelevant).

52. For example, in *Broadcast Music, Inc., v. Claire's Boutiques*, the Seventh Circuit refused to hold Claire's financial ability to pay license fees irrelevant because to do so would possibly contradict several other cases, but viewed the ability as at most an alternative basis for reaching a decision. Broad. Music, Inc. v. Claire's Boutiques, Inc., 949 F.2d 1482, 1494 (7th Cir. 1991). *See also* Crabshaw Music v. K-Bob's of El Paso, Inc., 744 F. Supp. 763, 767 (W.D. Tex. 1990) (noting that the restaurant grossed between $800,000 and $900,000 in revenues); *Bill Miller's Bar-B-Q Enters.*, Inc., 688 F. Supp. at 1176 (defendants were of a sufficient size to justify a subscription to a commercial background music system); *County Stores, Inc.*, 669 F. Supp. at 1170 (defendant's $2.5 million revenue stream shows it is not a small commercial establishment). *But see* Edison Bros. Stores, Inc. v. Broad. Music, Inc., 954 F.2d 1419, 1424 (8th Cir. 1992) ("[Congress] did not even qualify the exemption by limiting its availability to a 'small commercial establishment,' the language of the legislative history. The statute focuses on the equipment being used, and so must we.").

53. NIMMER ON COPYRIGHT, *supra* note 24, at § 8.18(C)(2)(a).

54. *Claire's*, 949 F.2d at 1482.

55. *Id.* at 1486.

56. Claire's owned and operated 719 stores under the name "Claire's Boutiques" and thirty stores under the name "Arcadia." The Claire's stores ranged from 458 square feet to 2,000 square feet in size with an average size of 861 feet, with 628 stores smaller than 1,055 square feet in size. The Arcadia stores averaged 2,022 square feet in size. *Claire's*, 949 F.2d at 1484-85.

broadcast radio music to customers.[57] After Claire's refused to purchase a performance license from Broadcast Music, Inc. ("BMI"), the performing rights organization sued the retail chain for copyright infringement.[58] In its analysis, the court reviewed each element of the § 110(5) exemption to determine whether Claire's conduct satisfied its requirements. The court stated that "the exemption is available only if (1) a single receiving apparatus is used, (2) the receiving apparatus is of a kind commonly used in private homes, (3) the transmission is provided free of charge, and (4) the transmission is not 'further transmitted' to the public."[59]

First, the court looked at whether the phrase "single receiving apparatus" applied to each store individually, or whether it could be applied to all stores in the aggregate as BMI suggested.[60] Because the statute referred to a single performance of a single work, the court reasoned its analysis should be limited to each performance in stores individually rather than the total number of performances at all stores taken together.[61] Therefore, by using a single receiving device in each of its stores, Claire's satisfied that element of the exemption.[62]

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57 Claire's supplied the following stereo components to each store: one Radio Shack Optimus STA-20 5-watt stereo receiver, two Realistic Minimus 7 speakers, an indoor antenna, and speaker wire. Each system was installed according to company specifications. *Id.* at 1485.

58. BMI offered to issue Claire's a license at $240 for the first location and $45 to $60 for each additional location. The annual license fee would have amounted to $40,385 with an average of $53.92 per store. *Id.* at 1486. In response, Claire's counter-offered to license only stores exceeding 1,055 square feet in size if BMI agreed to not seek licenses for smaller stores. BMI rejected the counter-offer and brought suit against Claire's alleging eighty-eight counts of copyright infringement, claiming that, while these smaller stores would on their own fall within the exemption, they should be licensed when taken together in the aggregate. *Id.* at 1489. The district court granted Claire's motion for summary judgment and dismissed the complaint. BMI v. Claire's Boutiques, Inc., 754 F. Supp. 1324 (N.D. Ill. 1990). BMI then appealed to the Court of Appeals for the Seventh Circuit. *Claire's*, 949 F.2d at 1482.

59. *Claire's*, 949 F.2d at 1489.

60. *Id.* at 1489-91. The court noted that whereas other exemptions granted under the Copyright Act specified who might be covered, § 110(5) omitted any such designation. *Id.* at 1490. Therefore, anyone, including corporations, could benefit from the exemption. *Id.*

61. *Id.* at 1490-91.

62. *Id.* The court further noted that, had Claire's itself broadcast music to each

Next, the court addressed whether a business's size and ability to pay background music license fees should preclude coverage under the exemption.[63] It reasoned this issue of economic equity was irrelevant, because the statutory language and surrounding legislative history only dealt with the physical size of the establishment and the size and type of sound equipment used.[64] Therefore, any rule taking into account a company's financial strength would run contrary to the legislative intent behind § 110(5).[65]

The court then examined each sound system component separately, as well as the system overall, to determine whether it fell within the exemption.[66] Judge Cummings explained that "the important considerations in determining whether a system is home-type are the type and sophistication of the equipment used, the size of the area in which the broadcast is audible, and whether the equipment has been altered, augmented, or integrated in some fashion."[67] He found Claire's sound systems satisfied these requirements because they were comprised of small components broadcasting over a small area and were not augmented or improved in any way.[68]

Finally, the court looked at whether Claire's had further transmitted the radio broadcasts it received by using "some device or process that expands the normal limits of the receiver's capabilities."[69] Employing no such device, Claire's was found to satisfy this requirement.[70]

In its decision, the court determined that Congress "was not so much concerned with whether an establishment could afford a license but rather with whether the nature of the sound system was such that the performance it renders is more justly considered public in the

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store rather than allowing them to individually choose which radio stations to rebroadcast, the company would become more akin to a radio station or broadcaster and would lose protection under the exemption. *Id.* at 1490.

63. *Id.* at 1491-92.

64. *Claire's*, 949 F.2d at 1491. The court noted other cases where the fiscal issue was addressed, but were ultimately decided on other grounds. *See id.* at 1492.

65. *Id.*

66. *Id.*

67. *Id.* at 1494.

68. *Id.*

69. *Id.* at 1495.

70. *Id.*

common-sense, if not technical copyright, notion of that term."[71] It found the sound system employed by Claire's to fall within the proper usage intended by Congress for exemption under § 110(5).[72]

Finding itself unsuccessful in the Seventh Circuit, BMI turned to the Eighth Circuit with the case of *Edison Brothers Stores, Inc. v. Broadcast Music, Inc.* in the hopes of obtaining a more favorable ruling.[73] For the 220 of its 2,500 retail clothing and shoe stores that contained sophisticated audio and video equipment, Edison paid license fees to BMI and other performing rights organizations for music played in those stores.[74] It refused to pay license fees for the other stores in the retail chain, claiming an exemption under § 110(5) because those establishments used a single radio receiver with two attached shelf speakers pursuant to Edison company policy.[75] The Eighth Circuit affirmed the district court's ruling that radio systems used in these stores fell within the homestyle exemption.[76]

BMI raised many of the same claims it made in *Claire's*. First, in deciding whether the exemption applies, the court asserted that it would "consider the equipment of any one owner *in toto*, and not on a per-store basis."[77] Choosing to focus on whether each store satisfied the homestyle exemption on its own, the court rejected this argument saying:

> [S]ection 110(5) does not say that a person, company, or other entity must own or operate only a single receiver to qualify for the exemption; it refers to "the communication of *a* transmission embodying *a* performance . . . of *a* work." We think it obvious that the language refers to a single location.[78]

71. *Id.* at 1495-96.

72. *Id.*

73. Edison Bros. Stores, Inc. v. Broad. Music, Inc., 954 F.2d 1419 (8th Cir. 1992).

74. *Id.* at 1420-21.

75. *Id.* at 1420. The policy required use of "[o]nly simple, low grade radio-only receivers" with two attached portable box speakers placed within fifteen feet of the receiver. *Id.*

76. *Id.* at 1421.

77. *Id.*

78. *Id.* at 1422 (emphasis in original).

Second, BMI asserted that because the physical size of Edison's stores exceeded that of Aiken's store (1,055 square feet), the chain lost protection under the exemption.[79] For support, BMI pointed to the House Report on the 1976 Copyright Act, which considered the factual situation in *Aiken* to "represent the outer limit of the [homestyle] exemption."[80] It also asserted that Edison's financial ability to pay license fees for all its stores should preclude it from asserting protection under the exemption.[81]

Rejecting both arguments, the court found nothing in either the statutory language or the legislative and judicial history that suggested Congress intended to include a "size-and-financial-means test" as part of the exemption.[82] Nothing in the exemption required an establishment to be smaller than Aiken's store, nor was the ability to pay license fees relevant.[83] As support, the court noted that neither the applicable factual situation described in the House Report nor the *Aiken* case made any mention of a specific minimum square footage requirement.[84] In looking at other cases on the issue, the court similarly found that establishment size was never the determining factor in applying the homestyle exemption.[85] Not even the original § 110(5) text itself made mention of specific physical size requirements, which easily could have been included had Congress intended it to be a determinative factor.[86]

Finally, BMI contested the district court's decision on the grounds that it violated the United States' international obligations

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79. *Edison*, 954 F.2d at 1422.

80. *Id.* at 1423 (citation omitted). *See supra* notes 45-46 and accompanying text.

81. *Id.* at 1424.

82. *Id.* at 1425.

83. *Id.*

84. *Id.* at 1423. The court further noted that the physical size of Aiken's shop was not given in a published opinion until Sailor Music v. Gap Stores, Inc., 516 F. Supp. 923, 924 (S.D.N.Y. 1982).

85. *Edison*, 954 F.2d at 1424. House Report 94-1476 focused on "the quality of the sound system used, and not to the square footage of the establishment using it." *Edison*, 954 F.2d at 1424 (citation omitted).

86. *Id.*

under Article 11*bis* of the Berne Convention.[87] In rejecting this argument, the court noted that the district court had not expanded the scope of § 110(5); rather it simply followed the exemption's statutory language, which Congress had declared to comply with international treaty obligations.[88]

While BMI failed to convince the circuit courts in *Claire's* and *Edison Brothers* that the defendants should be denied the homestyle exemption, ASCAP was somewhat more successful in *Cass County Music Company v. Muedini,* which was brought on appeal before the Seventh Circuit Court.[89] In that case, Vasfi Muedini owned the Port Town Family Restaurant in Racine, Wisconsin, where he played radio broadcasts for customers.[90] Muedini refused to pay the yearly $327 fee ASCAP required.[91] Unlike the systems used in *Claire's* and *Edison,* Muedini's system was found to be more substantial than the typical home stereo system and therefore did not qualify for the homestyle exemption.[92] Because of the implementation of transformers, the receiver was able to power forty speakers, thirty-six more than what it was designed to handle.[93] However, the court refused to decide whether a certain limit on the number of speakers should be read into § 110(5) by noting that what is considered "'a single receiving apparatus of a kind commonly used in private homes' must be determined on a case-by-case basis."[94] Thus, the extent to which an audio system is augmented should be a deciding factor in the outcome of each dispute.[95]

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87. *Id.* at 1425-26. BMI also argued the district court's opinion expanded the scope of the homestyle exemption intended by Congress. The circuit court rejected this argument on grounds that the district court simply followed the statutory language. *Id.* at 1425.

88. *Id.* at 1426.

89. Cass County Music Co. v. Muedini, 55 F.3d 263 (7th Cir. 1995). After the defendant failed to respond to the complaint, the plaintiffs moved for default judgment, which the district court granted. *See* Cass County Music Co. v. Muedini, 821 F. Supp. 1278 (E.D. Wis. 1993).

90. *Cass County,* 55 F.3d at 264-65.

91. *Id.* at 265.

92. *Id.* at 269.

93. *Id.* at 268 (quoting Broad. Music, Inc. v. U.S. Shoe Corp., 678 F.2d 816, 817 (9th Cir. 1982)). For a complete description of the system, *see id.* at 268-69.

94. *Id.* at 268-69.

95. *See id.*

B. Fairness in Music Licensing Act of 1998

In 1998, Congress once again overhauled U.S. copyright law with the Fairness in Music Licensing Act ("FMLA").[96] The FMLA re-codified the original exemption of § 110(5) in the 1976 Act as § 110(5)(A)[97] – the "homestyle exemption" – and added specific requirements regarding non-dramatic musical works under § 110(5)(B) – the "business exemption."

The current business exemption under § 110(5)(B) is limited in scope to non-dramatic musical works and to those performances "intended to be received by the general public, originated by a radio or television broadcast station . . . or, if an audiovisual transmission, by a cable system or satellite carrier."[98] The statute further separates food service and drinking establishments from "other establishments."[99] Food service and drinking establishments qualify

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96. Act of Oct. 27, 1998, Pub. L. No. 105-298, 112 Stat. 2827 (1998). The Act took effect Jan. 25, 1999. *Id.* at § 207, 112 Stat. at 2833 ("shall take effect 90 days after the date of the enactment"). The FMLA was passed as a concession to the restaurant lobby after it held up passage of the Sonny Bono Copyright Term Extension Act of 1998. *See* NIMMER ON COPYRIGHT, *supra* note 24, § 8.18(C)(2)(b). Although neither the House nor the Senate resisted, various legislators and the executive branch criticized it for various reasons, including fears that it would result in violations of international obligations. *See id.*

97. The only change from the original § 110(5) was the addition of the words "except as provided in subparagraph (B)." *Compare* 17 U.S.C. § 110(5)(A) (2000) *with* 17 U.S.C. § 110(5) (1976 & Supp. III).

98. 17 U.S.C. § 110(5)(B) (2000).

99. *Id.* A "food service or drinking establishment" is defined as:

> a restaurant, inn, bar, tavern, or any other similar place of business in which the public or patrons assemble for the primary purpose of being served food or drink, in which the majority of the gross square feet of space that is nonresidential is used for that purpose, and in which non-dramatic musical works are performed publicly.

§ 101.

An "establishment" is defined as:

> a store, shop, or any similar place of business open to the general public for the primary purpose of selling goods or services in which the majority of the gross square feet of space that is nonresidential is used for that purpose, and in which non-dramatic musical works are performed publicly.

Id.

if smaller than 3,750 gross square feet of space; if the establishment is larger, it may have no more than six loudspeakers, of which no more than four may be in any one room or adjoining outdoor space, and a maximum of four audiovisual devices no larger than fifty-five inches across diagonally may be used with no more than one such device in a single room.[100] For other establishments, the exemption applies where the space is less than 2,000 gross square feet, or if it satisfies the same equipment specifications as for restaurants.[101]

In addition, no direct charge may be made to see or hear the transmission; it may not be retransmitted beyond the establishment and must be licensed by the copyright owner of the material being performed or displayed.[102]

Within days of the FMLA's enactment, the European Communities filed a complaint with the WTO alleging the revision to § 110(5) of the 1976 Act violated United States commitments under the Berne Convention on copyright as incorporated into the TRIPS Agreement. In 2000, a WTO dispute resolution panel issued its report on the matter.[103]

IV. BRIEF HISTORY OF INTERNATIONAL AGREEMENTS RELATED TO COPYRIGHT PROTECTION

Before analyzing the WTO Panel Report on § 110(5), this article will briefly summarize historical developments in the administration of international copyright law. In 1886, the Berne Convention for the

100. § 110(5)(B)(ii). Square footage excludes space used solely for customer parking. If the performance is by audio means only, a maximum of six loudspeakers may be used, of which at most four speakers may be used in any one room or adjoining outdoor space. If the performance is by audiovisual means, no more than four audiovisual devices may be used in total, with no more than one in each room and with a maximum diagonal size of fifty-five inches. Any audio portion of the performance or display must fall within the same loudspeaker limitations as for those performances that are only by audio means. *Id.*

101. § 110(5)(B)(i).

102. 17 U.S.C. § 110(5)(B)(iii)-(v) (2000). This last requirement means that the operator of the establishment could be held liable for copyright infringement should the broadcaster transmit the work without a proper license.

103. 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, 99 (2000).

Protection of Literary and Artistic Works ("Berne Convention") became the first major international copyright agreement to focus on helping nationals of member states "obtain international protection of their rights to control, and receive payments for, the use of their creative works."[104] The United International Bureaux for the Protection of Intellectual Property ("BIRPI"), originally founded in 1893 to administer the Berne Convention, later formed the basis for the World Intellectual Property Organization ("WIPO") in 1970.[105] WIPO was later named an agency of the United Nations ("UN") and given the mandate to administer intellectual property matters, including copyrights, among UN member States.[106]

The General Agreement on Tariff and Trade ("GATT"), formed in 1948, provides rules governing international trade between member States.[107] It has undergone several revisions since its inception, with the most recent being the Uruguay Round Agreements concluded at Punta del Este, Uruguay in 1994.[108] The Uruguay Round also led to the creation of the World Trade Organization ("WTO") in 1995 as a system to deal not only with issues regarding trade in goods as covered by GATT, but also with those involving trade in services and intellectual property.[109]

The Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS") was also negotiated at the Uruguay Round.[110] TRIPS has the ultimate goal of ensuring that intellectual property protection will contribute to technical innovation and technology transfer, and that the economic and social welfare of member States will be enhanced as producers and users benefit from that

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104. WIPO, Treaties and Contracting Parties: General Information, http://www.wipo.int/treaties/en/general/ (last visited September 9, 2005).

105. *Id.*

106. *Id.*

107. WTO, What is the World Trade Organization?, http://www.wto.org/English/thewto_e/whatis_e/tif_e/fact1_e.htm (last visited September 9, 2005).

108. *Id.*

109. *Id.*

110. WTO, Intellectual Protection: Protection and Enforcement, http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm7_e.htm (last visited September 9, 2005).

protection.[111] Underlying its framework are the basic principles that national treatment and most favored nation ("MFN") status are required among member States as a deterrent to discrimination against foreign nationals.[112] TRIPS incorporates the Berne Convention, as administered by WIPO, as the starting point for determining what treaty obligations are required to meet these goals.[113]

In 1996, the WTO and WIPO entered into a cooperation agreement with the aim of establishing a mutually supportive relationship for the administration of copyright protections among nations.[114] It is under this framework of trade agreements, treaties, and cooperative arrangements that the dispute between the European Communities and the United States over § 110(5) was brought before a WTO Dispute Panel.

V. WORLD TRADE ORGANIZATION PANEL REPORT

In response to a complaint filed against the United States by the European Communities on behalf of the Irish Music Rights Organization,[115] a WTO Dispute Panel ruled in 2000 that § 110(5)(B) of the U.S. Copyright Act violates Articles 9 and 13[116] of the TRIPS

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111. *Id.*

112. *Id.*

113. *Id.*

114. WIPO, Treaties and Contracting Parties: General Information, http://www.wipo.int/treaties/en/general/ (last visited September 9, 2005).

115. The European Communities and their member states held consultations with the United States on March 2, 1999 on TRIPS regarding § 110(5) as amended by the FMLA. *See* TRIPS Agreement, *infra* note 117. After failing to reach an agreement, the European Communities requested that a dispute resolution panel be established under Article 6 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU") and Article 64.1 of the TRIPS Agreement. The requested panel met with the parties on November 8-9, 1999 and December 7, 1999. It also met with third parties on November 9, 1999. On December 22, 1999, WIPO responded to a request by the Panel for factual information on the provisions of the Paris Act of 1971 of the Berne Convention, as incorporated into the TRIPS Agreement, Article 9.1. The parties provided additional comments by letter on January 12, 2000. The Panel submitted its interim report to the parties on April 14, 2000 and its final report on May 5, 2000. Panel Report, *supra* note 1.

116. "Articles 9-13 of Section 1, Part II of the TRIPS Agreement entitled

provisions of the WTO/GATT Agreement.[117] The Panel found that § 110(5)(B) proved to be too broad an exception to the public performance right in musical compositions as guaranteed under Article 9.1[118] of TRIPS.[119] However, it rejected arguments made by the European Communities that § 110(5)(A) similarly violated TRIPS; the Panel found that its scope was sufficiently narrow to grant an exemption because it did not unreasonably prejudice the rights of copyright holders.[120] The Panel concluded by recommending that the Dispute Settlement Body of the WTO request

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'Copyright and Related Rights' deal with the substantive standards of copyright protection." Panel Report, *supra* note 1, at ¶ 6.17.

117. Agreement on Trade-Related Aspects of Intellectual Property Rights, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments – Results of the Uruguay Round, vol. 31; 33 I.L.M. 1197, 1201 (1994) [hereinafter TRIPS Agreement]. The E.C. argued that §§ 110(5)(A)-(B) violated not only the United States' obligations under the TRIPS Agreement (particularly Article 9.1), but also Articles 11(1)(ii) and 11*bis*(1)(iii) of the Berne Convention of 1971; as such, these sections could not be allowed under any implied or express exception or limitation under either agreement. Panel Report, *supra* note 1, at ¶ 3.1. It argued that the measures "cause prejudice to the legitimate rights of copyright owners, thus nullifying and impairing the rights of the European Communities." *Id.* The United States countered that the exemptions fell within the allowance by the Berne Convention for minor limitations on the exclusive rights of copyright owners, and thus satisfied the standard set forth in Article 13 of the TRIPS Agreement. Panel Report, *supra* note 1, at ¶ 3.3. The Panel placed the burden of proof on the E.C. to establish a prima facie violation of the basic rights provided by the TRIPS copyright provisions. Panel Report, *supra* note 1, at ¶ 6.16. Once established, the burden then transferred to the United States to show what exceptions or limitations should be found applicable and whether the conditions set forth in these exceptions or limitations were satisfied. *Id.*

118. Article 9.1 requires WTO members to comply with Articles 1-21 of the Berne Convention of 1971. TRIPS Agreement, *supra* note 117, at 1201. The only provision that does not apply is the Article 6*bis* provision on moral rights. *Id.*

119. Panel Report, *supra* note 1, at ¶ 7.1. The TRIPS Agreement requires all WTO members to guarantee this right to copyright owners. Limitations and exceptions to such exclusive rights are confined "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." TRIPS Agreement, *supra* note 117, at 1201.

120. Panel Report, *supra* note 1, at ¶ 6.271. In its argument before the WTO, the United States argued that the enactment of 110(5)(B) further narrowed the scope of 110(5)(A) to works other than "non-dramatic musical works." Panel Report, *supra* note 1, at ¶ 2.7.

that the United States bring § 110(5)(B) into conformity with its obligations under the TRIPS Agreement.[121]

Article 9.1 of the TRIPS Agreement adopts the copyright protections afforded under the first twenty-one Articles of the Berne Convention, except for those provisions contained in Article 6*bis* regarding moral rights.[122] Regardless of whether signatories to TRIPS are also members of the Berne Convention, they must comply with Articles 1-21.[123] Article 11(1)(ii) of the Berne Convention protects authors' exclusive right to authorize "any communication to the public of the performance of their works," namely dramatic, dramatic-musical, and musical works.[124] Regarding broadcasting rights, Article 11*bis*(1) of the Berne Convention allows authors of literary and artistic works[125] the exclusive right to authorize public performances of those works.[126] Article 11*bis* states:

> (1) Authors of literary and artistic works shall enjoy the exclusive right of authorizing:
> (i) the broadcasting of their works or the communication thereof to the public by any other means of wireless diffusion of signs, sounds or images;
> (ii) any communication to the public by wire or by rebroadcasting of the broadcast of the work, when this communication is made by an organization other than the original one;
> (iii) the public communication by loudspeaker or any other analogous instrument transmitting, by signs,

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121. Panel Report, *supra* note 1, at ¶ 7.1.

122. TRIPS Agreement, *supra* note 117, at 1201.

123. World Intellectual Property Organization [WIPO], WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment, SCCR/9/7, April 5, 2003 [hereinafter WIPO Study].

124. Berne Convention for the Protection of Literary and Artistic Works art. 11(1)(ii), Sept. 28, 1979, S. TREATY DOC. NO. 99-27, K.A.V. 2245 [hereinafter Berne Convention].

125. Article 2 of the Berne Convention includes dramatic and dramatic-musical works within the definition of "literary and artistic works." Berne Convention, *supra* note 129, art. 2(1).

126. *Id.* at art. 11*bis*(1).

sounds or images, the broadcast of the work.[127]

In addition to the protections afforded by the Berne Convention, Article 13 of the TRIPS Agreement allows member States to create limitations or exceptions to exclusive rights so long as they are confined 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."[128] The primary issue disputed in this case was whether the § 110(5) exemptions were allowed under the "minor exceptions" doctrine of the Berne Convention,[129] and, if so, whether they satisfied the three-step test provided under Article 13.[130]

A. Applicability of the Minor Exceptions Doctrine

Rather than include a specific provision in the text of the Berne Convention that would allow nations to preserve pre-existing legislative exceptions to exclusive rights, the drafters of the Convention chose to include a statement in the General Report allowing nations to create so-called "minor exceptions" to the overall rule.[131] Their fear was that if its text expressly allowed them to do so, nations that had not previously recognized such exceptions would incorporate them into their national laws before signing the Berne Convention.[132] The drafters intended that any exceptions to granted rights would be of minimal significance to authors, and thus

127. *Id.*

128. TRIPS Agreement, *supra* note 117, at 1201.

129. *See infra* Part V.A. and accompanying notes.

130. *See infra* Part V.B. and accompanying notes.

131. WIPO Study, *supra* note 123, at 34. The Panel chose to refer to the doctrine as "minor exceptions" rather than "minor reservations," as the General Report calls them, to avoid confusion arising from meaning of the word "reservation" under Articles 19-23 of Section 2 of the Vienna Convention, which deals specifically with "Reservations." Section 110 Panel Report, *supra* note 1, at ¶ 6.49. Additionally, it sought clarity due to requirements placed on Berne Convention and TRIPS members seeking to make certain "reservations." *See id.* This paper will also refer to both terms as the "minor exceptions" doctrine for purposes of clarity. *See* WIPO Study, *supra* note 123, at 34-37 for a historical analysis of the development of the minor exceptions doctrine.

132. WIPO Study, *supra* note 123, at 34.

determined that a de minimus standard was applicable.[133] Thus, the minor exceptions doctrine became part of the "context" of the Berne Convention for purposes of interpreting certain Articles, including 11 and 11*bis*.[134]

The WTO Panel determined that the context of Articles 11(1)(ii) and 11*bis*(1)(iii) of the Berne Convention allows for certain minor exceptions to exclusive rights granted under those articles, and that the minor exceptions doctrine has been incorporated into the TRIPS Agreement under Article 9.1 for the purposes of allowing de minimus uses.[135] It inferred that, because Article 9.1 did not expressly exclude the inclusion of the minor exceptions doctrine within the text of the TRIPS Agreement, the possibility of providing minor exceptions was incorporated into TRIPS as part of the "entire *acquis*," or "context," of Articles 11 and 11*bis* of the Berne Convention.[136] It further held that Article 13 of TRIPS could be used to define and articulate the minor exceptions doctrine; thus, any such exceptions to rights afforded under the Berne Convention as incorporated into TRIPS would have to meet the three-step test of Article 13.[137]

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133. *Id.* at 36. The WIPO Study contends this is supported by the fact that both the Brussels and Stockholm Conferences rejected the inclusion of a specific minor exceptions provision in the Berne Convention. *Id.*

134. *Id.*

135. Panel Report, *supra* note 1, at ¶ 6.92.

136. Panel Report, *supra* note 1, at ¶ 6.63. Regarding the limitation of the minor exceptions doctrine to de minimus uses, the WIPO Study questioned whether the WTO Panel correctly applied the three-step test under Article 13 as part of that doctrine. WIPO Study, *supra* note 123, at 53. The Study argued that, while the doctrine is not precise, it would certainly be possible that exceptions going beyond a de minimus standard could still satisfy Article 13. *Id.* For example, certain exceptions going beyond a de minimus level that are of a non-economic nature would satisfy the second requirement; exceptions granting remuneration satisfy the third requirement. *Id.* at 53-54. These minor exceptions would be allowed under Article 13, thereby effectively making such de minimus uses a subset of that Article. *Id.* While the business exemption failed to satisfy the three-part test, the WIPO study contended that the Panel interpreted Article 13 too broadly. *Id.* at 54.

137. Panel Report, *supra* note 1, at ¶¶ 6.81-.82. The Panel noted that although Article 11*bis*(2) of the Berne Convention allows members to substitute various forms of equitable remuneration, such as a compulsory license, for existing rights granted under 11bis(1), that provision was irrelevant since § 110(5) of the U.S. Copyright Act provided for no such right. Panel Report, *supra* note 1, at ¶ 6.95.

B. Application of Article 13 to § 110(5)

Article 13 of the TRIPS Agreement imposes a three-step test regarding limitations and exceptions to exclusive rights: they (1) must be confined to certain special cases, (2) cannot conflict with a normal exploitation of the work, and (3) cannot unreasonably prejudice the legitimate interests of the right holder.[138] These conditions are to be applied on a cumulative basis; if any one step is not met, the exemption in question will fail the test and be found to violate the TRIPS Agreement.[139] For each step, the Panel analyzed the business exemption and the homestyle exemption separately. It began its analysis with the requirement that exceptions should be confined to certain special cases.

1. Certain Special Cases

The condition that an exception must be limited to certain special cases requires that the exception is clearly defined and narrow in its scope and reach.[140] In its analysis, the Panel examined whether subparagraphs (A) and (B) of § 110(5) were clearly restricted to "certain special cases," and whether their scope was sufficiently narrow in reach regarding what percentage of establishments fell

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See WIPO Study, *supra* note 123, at 50 for further discussion of the interrelation of the minor exceptions doctrine and other Berne Convention and TRIPS provisions.

138. TRIPS Agreement, *supra* note 117, at 1201.

139. Panel Report, *supra* note 1, at ¶ 6.97.

140. Panel Report, *supra* note 1, at ¶ 6.112. The Panel defined "certain" to require that legislative exceptions or limitations must be clearly defined. Panel Report, *supra* note 1, at ¶ 6.108. The Panel reasoned that "there is no need to identify explicitly each and every possible situation to which the exception could apply, provided that the scope of the exception is known and particularized. This guarantees a sufficient degree of legal certainty." Panel Report, *supra* note 1, at ¶ 6.108. While stated public policy objectives may be used for ascertaining its scope, a limitation or exception may still fulfill this condition regardless of the law's legitimacy. Panel Report, *supra* note 1, at ¶ 6.112. "Special" requires that an exception limitation "should be narrow in quantitative as well as a qualitative sense." Panel Report, *supra* note 1, at ¶ 6.109. Finally, "case" was termed to include descriptions of "beneficiaries of the exceptions, equipment used, types of works or by other factors." Panel Report, *supra* note 1, at ¶ 6.110. For arguments by the United States and the European Communities on the meaning of this first condition, see Panel Report, *supra* note 1, at ¶¶ 6.102-.106.

within their confines.[141] The Panel found it helpful to look at whether any inferences could be drawn from statements by U.S. legislators regarding the intended reach of the exemptions.[142] The Panel began its analysis by reviewing subparagraph (B): the "business exemption."

a) The Business Exemption

While the United States claimed that the policy objective behind the business exemption was to foster small businesses and prevent abusive tactics by performing rights organizations,[143] the European Communities contended that the exemption's scope was too broad given the potentially large number of benefited establishments.[144] Finding it to be sufficiently specific in terms of permissible area, size, and type of equipment, the Panel focused on the issue of whether the exception could be considered a "special" case or whether it was the de facto rule.[145] The Panel referred to the following studies in its factual inquiry:[146]

1. The Congressional Research Service ("CRS") prepared a study in November, 1995 for the Senate Judiciary Committee that found 65.2% of eating establishments and 71.8% of drinking establishments were smaller than 3,500 square feet in size, and 27% of retail establishments were smaller than 1,500 square feet in size.[147]

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141. Panel Report, *supra* note 1, at ¶ 6.113.

142. *Id.*

143. The Panel Report generally refers to performing rights organizations as collective management organizations, or CMOs, which it defines to have the same meaning. *See* Panel Report, *supra* note 1, at ¶ 2.17. For consistency within this paper and to follow general U.S. custom, I will refer to both terms as "performing rights organizations."

144. Panel Report, *supra* note 1, at ¶ 6.116.

145. *See* Panel Report, *supra* note 1, at ¶ 6.117.

146. Although there was some disagreement between the parties as to the scope of these studies, the Panel determined it should include all potential users, even if some establishments might be excluded for various reasons, because the potential impact on the use of other substitutable sources of music was relevant. Panel Report, *supra* note 1, at ¶ 6.127.

147. Panel Report, *supra* note 1, at ¶ 6.118. The United States confirmed these figures for eating and drinking establishments. Because the establishment size

2. ASCAP requested Dun & Bradstreet, Inc. ("D&B") to update CRS data after the 1998 Amendment. D&B found that 70% of eating establishments and 73% of drinking establishments were smaller than 3,750 square feet, and 45% of retail establishments were smaller than 2,000 square feet in size.[148]
3. The National Restaurant Association ("NRA") found 36% of table service restaurants with sit-down waiter service, and 95% of quick service restaurants, were smaller than 3,750 square feet in size.[149]

Concluding from these studies that the statute exempted a substantial majority of eating and drinking establishments and almost half of all retail establishments, the Panel "fail[ed] to see how a law that exempts a major part of the users that were specifically intended to be covered by the provisions of Article 11*bis*(1)(iii) could be considered as a *special* case in the sense of the first condition of Article 13 of the TRIPS Agreement."[150] Based on this comment, it seems that, had the statute required physical dimensions such that a substantially lower percentage of establishments would qualify for the exemption, the Panel may have found in favor of the U.S. Ultimately, however, it found the business exemption did not qualify as a "certain special case" within the meaning of Article 13.[151]

Next, the Panel reviewed whether the homestyle exemption of subparagraph (A) fulfilled the "certain special cases" requirement.

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limits in subparagraph (B) are greater than those in the CRS study (3,750 and 2,000 square feet, respectively), the Panel assumed these percentages would be higher in reality. Panel Report, *supra* note 1, at ¶ 6.120.

148. Panel Report, *supra* note 1, at ¶ 6.117. D&B claimed to use the same methodology in its 1999 study as was used to prepare the 1995 CRS report. The Panel commented, however, that, although the 1999 study's methodology was vague, it was largely consistent with the 1995 CRS study. Panel Report, *supra* note 1, at ¶ 6.124. The EC noted these figures left out service providers such as hotels, financial services outlets, estate property brokers, and other types of exempted establishments. Panel Report, *supra* note 1, at ¶ 2.12 n.17.

149. Panel Report, *supra* note 1, at ¶ 6.121. Due to a lack of information on NRA membership, the Panel noted it could not reconcile the NRA and CRS figures. Instead, it simply stated the NRA figures did not appear to contradict the CRS estimates. *Id.*

150. Panel Report, *supra* note 1, at ¶ 6.131.

151. Panel Report, *supra* note 1, at ¶ 6.133.

b) The Homestyle Exemption

By reviewing the *Aiken* decision[152] and other case history following the homestyle exemption's enactment in the Copyright Act of 1976, the Panel compiled a list of factors commonly used by courts to determine whether the exemption would apply to a particular establishment, including:

> (i) [the] physical size of an establishment in terms of square footage (in comparison to the size of the *Aiken* restaurant); (ii) extent to which the receiving apparatus was to be considered as one commonly used in private homes; (iii) distance between the receiver and the speakers; (iv) number of speakers; (v) whether the speakers were free-standing or built into the ceiling; (vi) whether, depending on its revenue, the establishment was of a type that would normally subscribe to a background music service; (vii) noise level of the areas within the establishment where the transmissions were made audible or visible; and (viii) configuration of the installation.[153]

The Panel also reviewed the legislative history behind the homestyle exemption. It agreed with the United States' argument that the policy behind the homestyle exemption was to protect small "mom and pop" businesses that "play an important role in the American social fabric;" Congress meant to create an exception that was narrow in scope.[154]

The European Communities contended that the statutory language was too ambiguous because "the expression 'a single receiving apparatus of a kind commonly used in private homes' is in itself imprecise and a 'moving target' due to technological development."[155] The United States countered that the language of the 1998 amendment was essentially the same as that found in the

152. *See supra* notes 25-35 and accompanying text.

153. Panel Report, *supra* note 1, at ¶ 6.139. *See* Panel Report, *supra* note 1, at ¶¶ 6.140-.141 for arguments by both parties regarding these factors.

154. Panel Report, *supra* note 1, at ¶¶ 6.156-.157.

155. Panel Report, *supra* note 1, at ¶ 6.137.

1976 Copyright Act, and that American courts had found this language to be sufficiently clear and narrow for a reasonable and consistent application of the exception.[156] The application of various factors by judges interpreting the statute in slightly different ways was merely the result of a common law system.[157]

The European Communities further argued that what constitutes "homestyle equipment" would have different meanings in various countries, would differ according to consumer demands of those countries, and would evolve because of technological developments.[158] Thus, there could be no consistent application across international boundaries without a more precise description.[159]

The Panel rejected the European Communities' arguments by referring to the meaning of the term "*certain* special case," which connotes a "known and particularized, but not explicitly identified" meaning.[160] While technology will change over time, it explained, Article 13 does not require a detailed specification of allowable equipment and it would be unnecessary to speculate on future advancements.[161] The Panel thus found that the homestyle exemption's language was sufficiently clear regarding what types of equipment it covered.[162]

Furthermore, the CRS study showed that, "from a quantitative perspective, the reach of subparagraph (A) in respect of potential users is limited to a comparably small percentage of all eating, drinking and retail establishments in the United States."[163] In

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156. Panel Report, *supra* note 1, at ¶ 6.136.

157. *Id.*

158. Panel Report, *supra* note 1, at ¶ 6.145.

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.*

163. Panel Report, *supra* note 1, at ¶ 6.143. The Panel again referred to the 1995 CRS study, which found that 16% of all U.S. eating establishments, 13.5% of all U.S. drinking establishments, and 18% of all U.S. retail establishments were the same size or smaller than the Aiken restaurant (1,055 square feet), and so would benefit from the homestyle exemption. Panel Report, *supra* note 1, at ¶ 6.142; *see also supra* note 149 and accompanying text. The United States confirmed these figures regarding eating and drinking establishments. Panel Report, *supra* note 1, at ¶ 6.142; U.S. Reply to Question 9(a) by the Panel to the United States and Letter from the NRA of Nov. 18, 1999, confidential exhibit U.S.-18.

response to the European Communities' concern that the judiciary was moving towards a broader interpretation of the statute, the Panel acknowledged that while it was possible such expansion of the scope of the homestyle exemption might foreseeably occur, there was no need to decide the issue "[g]iven the sufficiently consistent and narrow application practice of the homestyle exemption" by U.S. courts since 1976.[164]

Regarding musical works covered under the homestyle exemption, the Panel found that the enactment of subparagraph (B) narrowed the homestyle exemption's scope to non-dramatic works and thus resulted in the practical consequence that virtually all music played on radio and television would fall under subparagraph (B), not subparagraph (A).[165]

The Panel also acknowledged that the homestyle exemption does not distinguish between analog and digital transmissions, but felt it was not presented with sufficient evidence to show the exemption had been applied to Internet transmissions.[166] Therefore, any such potential uses would not immediately affect its conclusion.[167]

Taking all these factors into account, the Panel found that the homestyle exemption complied with the first requirement of Article 13 that it be limited to "certain special cases."[168]

Because subparagraph (B) did not comply with the first condition of Article 13, the Panel found it in violation of the TRIPS Agreement.[169] For purposes of a thorough resolution of the dispute, however, the Panel examined the business exemption under other Article 13 criteria.[170]

2. Does Not Conflict With a Normal Exploitation of the Work

The Panel first analyzed the second Article 13 requirement by

164. Panel Report, *supra* note 1, at ¶ 6.144.
165. Panel Report, *supra* note 1, at ¶¶ 6.146-.148.
166. *See* Panel Report, *supra* note 1, at ¶¶ 6.149-.153.
167. *See id.*
168. Panel Report, *supra* note 1, at ¶ 6.159.
169. Panel Report, *supra* note 1, at ¶ 6.160.
170. *Id.*

determining what constitutes "normal exploitation" of a "work".[171] It defined "normal" as "constituting or conforming to a type or standard; regular, usual, typical, ordinary, conventional . . . ."[172] "Exploitation" was defined as "the activity by which copyright owners employ the exclusive rights conferred on them to extract economic value from their rights to those works."[173] A "work" under Article 13 includes "all the exclusive rights relating to it."[174] Thus, the Panel adopted an interpretation focusing on a literal meaning of the language as applied to common industry custom and standards.

It next established guidelines for how a particular use may be designated as a "normal exploitation of the exclusive rights provided under Articles 11bis(1)(iii) and 11(1)(ii) of the Berne Convention (1971)."[175] It accepted the United States' argument that an economic "market displacement" analysis that looks at "whether there are areas of the market in which the copyright owner would ordinarily expect to exploit the work, but which are not available for exploitation because of [the § 110(5)] exemption" should be applied.[176] Under this empirical test, "uses from which an owner would not ordinarily expect to receive compensation are not part of the normal exploitation [of the work]."[177]

According to the Panel's reasoning, not every use under an exception or limitation of a work involving commercial gain would

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171. Panel Report, *supra* note 1, at ¶ 6.163. For a discussion of each party's arguments regarding what constitutes a "normal exploitation of a work," *see* Panel Report, *supra* note 1, at ¶¶ 6.168-.169.

172. Panel Report, *supra* note 1, at ¶ 6.166 (citation omitted).

173. Panel Report, *supra* note 1, at ¶ 6.165.

174. Panel Report, *supra* note 1, at ¶ 6.171.

175. Panel Report, *supra* note 1, at ¶ 6.176.

176. Panel Report, *supra* note 1, at ¶ 6.177.

177. *Id.* Concerning the "conforming to a type or standard" requirement, the Panel looked to the "Swedish/BIRPI Study Group" for guidance. Panel Report, *supra* note 1, at ¶ 6.179 (citation omitted). Representatives of the Swedish government and the United International Bureaux for the Protection of Intellectual Property comprised a group organized to study the issue prior to the 1967 Revision Conference in Stockholm. *Id.* The Group said that, in order to measure the level of normal exploitation at issue, those forms of exploitation that could potentially gain economic or practical importance should be taken into account in addition to other currently significant forms of exploitation. *See* Panel Report, *supra* note 1, at ¶¶ 6.179-.181.

necessarily conflict with the normal exploitation of that work:

> [A]n exception or limitation to an exclusive right in domestic legislation rises to the level of a conflict with a normal exploitation of the work . . . if uses, that in principle are covered by that right but exempted under the exception or limitation, enter into economic competition with the ways that right holders normally extract economic value from that right to the work (i.e., the copyright) and thereby deprive them of significant or tangible commercial gains.[178]

Thus, the Panel determined that the normal exploitation of a work is affected by those who, under an exception or limitation, use it without proper authorization, as well as by those who decide to use the work once that use becomes "free of charge" because of the exception or limitation.[179] Again, the Panel first addressed the business exemption of subparagraph (B).

a) The Business Exemption

The United States gave three arguments for why the business exemption does not conflict with the normal exploitation of copyrighted works. First, performing rights societies would have a considerably difficult time administering licenses to the multitude of small eating, drinking, and retail establishments.[180] Because this market was never significantly exploited by performing rights societies, Congress simply codified the status quo of their historical licensing practices.[181] Second, many of the establishments that

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178. Panel Report, *supra* note 1, at ¶ 6.183.

179. Panel Report, *supra* note 1, at ¶ 6.186. The Panel decided to limit itself to those commercial and technological conditions existing at the time of its report (2000) and in the near future in assessing whether the § 110(5) exemption conflicted with a normal exploitation in the U.S. market. *See* Panel Report, *supra* note 1, at ¶¶ 6.187-.189.

180. Panel Report, *supra* note 1, at ¶ 6.190.

181. *Id.* The NRA estimated that 16% of table service restaurants and 5% of fast food restaurants, or an average of 10.5% of restaurants, were licensed by performing rights organizations at the time the 1976 Copyright Act was enacted. Panel Report, *supra* note 1, at ¶ 6.193; *see also* supra note 149 and accompanying

would qualify under the business exemption were already exempted under the old homestyle exemption; therefore, copyright owners of non-dramatic musical works would not expect to receive fees from those small establishments before the FMLA was passed.[182] Third, had the business exemption never been enacted, many eligible establishments would nevertheless have been exempted under a similar group licensing agreement between the National Licensed Beverage Association ("NLBA"), ASCAP, BMI, and SESAC; as such, rights holders would not have expected to obtain fees from these establishments before the 1998 Amendment was passed.[183] Furthermore, a relatively small number of establishments would be exempted under subparagraph (B) that were not previously exempted under the homestyle exemption or the NLBA Agreement.[184] The Panel rejected this last argument as not pertinent to the dispute.[185]

The European Communities countered the United States' practical argument with a more legalistic one: "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."[186] Furthermore, it argued that performing rights organizations in the EC had been successful in licensing large numbers of small establishments, whereas U.S. organizations had failed to do so because there was no legal pressure on them to develop methods of licensing enforcement.[187]

Although the Panel agreed with the United States that there was a relatively low proportion of restaurants licensed by performing rights organizations, whether these establishments were licensed was not

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text. The United States estimated, based on ASCAP data, that ASCAP licensed no more than 19% of restaurants in 1997. Panel Report, *supra* note 1, at ¶ 6.194. The United States also estimated that 74% of all restaurants play some kind of music for their customers. Panel Report, *supra* note 1, at ¶ 6.195.

182. Panel Report, *supra* note 1, at ¶ 6.190.

183. *Id.* *See* Panel Report, *supra* note 1, at ¶ 6.204 for a discussion on similarities and differences between subparagraph (B) and the NLBA agreement. The NLBA was one of the initial proponents behind the 1998 amendment to § 110(5).

184. Panel Report, *supra* note 1, at ¶ 6.190.

185. Panel Report, *supra* note 1, at ¶ 6.205.

186. Panel Report, *supra* note 1, at ¶ 6.191.

187. *Id.*

fully indicative of the "normal exploitation" of their exclusive right to do so.[188] For the establishments that did not fall under the homestyle exemption, it found that the fact that many were licensed did not alter the exclusive rights of owners of copyrighted works and should not affect those rights holders' expectation of remuneration.[189] To hold otherwise would liken "normal exploitation" with existing "normal remuneration" practices, with the result that the current state of rights exploitation would be "frozen."[190] It would therefore be erroneous to conclude that licensing practices of performing rights organizations at a given time should set the minimum standard of national legislative protection under the TRIPS Agreement.[191]

The Panel found that a substantial majority of eating and drinking establishments and almost half of all retail establishments were eligible for the business exemption, thus constituting a major potential source of royalty income to rights holders for exploitation of their works under Articles 11bis(1)(iii) and 11(1)(ii) of the Berne Convention of 1971.[192] These rights holders would normally expect to have the ability to authorize and receive compensation for the performance of their works in many of the establishments covered by the exemption.[193] The Panel felt that an exemption of such broad scope as subparagraph (B) would hinder this expectation and therefore violated Article 13 because it conflicted with the normal exploitation requirement.[194]

b) The Homestyle Exemption

In reviewing the homestyle exemption, the Panel again applied the Article 13 condition that an exemption should not conflict with the normal exploitation of a work. It explained that Congress

188. Panel Report, *supra* note 1, at ¶ 6.196. The fact that the 1998 Amendment did not substantially affect the licensing practices of performing rights organizations of those establishments eligible under the homestyle exemption was not found to be relevant. *Id.*

189. Panel Report, *supra* note 1, at ¶ 6.198.

190. *Id.*

191. *Id.*

192. Panel Report, *supra* note 1, at ¶ 6.206.

193. Panel Report, *supra* note 1, at ¶ 6.210.

194. Panel Report, *supra* note 1, at ¶ 6.211.

intended to define the borderline between situations clearly outside the scope of copyright laws (e.g., listening to the radio at home), and those situations where someone creates a new public performance of music broadcast over the air.[195] This line was established at the point where an establishment merely turns on an ordinary receiver although members of the public may also hear the transmission.[196]

The original homestyle exemption under the 1976 Act was limited to "establishments not . . . large enough to justify a subscription to a commercial background music service," and "would merely codify the licensing practices already in effect."[197] Using legislative history behind the exemption, the United States argued that rights holders did not have an expectation of remuneration for the use of their works from small establishments prior to the statute's enactment because owners of those establishments were unlikely to have obtained licenses anyway. As such, there was no conflict with the normal exploitation of their works after the statute's passage.[198] The United States further argued that rights holders had no reasonable expectation to exploit "dramatic" musical works performed in small establishments because no licensing mechanism was in place.[199]

Accepting the United States' arguments as sound, the Panel found the homestyle exemption did not violate the normal exploitation of works within the meaning of Article 13.[200] "[W]e fail to see how the homestyle exemption, *as limited to works other than nondramatic musical works in its revised form*, could acquire economic or practical importance of any considerable dimension for the right

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195. Panel Report, *supra* note 1, at ¶ 6.214. The Panel referred to House Report No. 94-1576 in making its finding. Panel Report, *supra* note 1, at ¶¶ 6.212-.213; *see* H.R. REP. NO. 94-1576 (1976).

196. Panel Report, *supra* note 1, at ¶ 6.214.

197. Panel Report, *supra* note 1, at ¶ 6.212. The Panel noted that the number of such establishments intended to fall within the homestyle exemption was relatively small according to the 1995 CRS study. Panel Report, *supra* note 1, at ¶ 6.215. It found that 16% of all eating establishments, 13.5% of drinking establishments, and 18% of retail establishments were as big as or smaller than the Aiken restaurant (1,055 square feet of total space). Panel Report, *supra* note 1, at ¶ 6.215 n.197.

198. Panel Report, *supra* note 1, at ¶ 6.212.

199. *See* Panel Report, *supra* note 1, at ¶ 6.216.

200. Panel Report, *supra* note 1, at ¶ 6.219.

holders of musical works."[201] It appears the Panel at least partially based its ruling on the further limitation of the homestyle exemption to works other than non-dramatic musical works. Should Congress choose to repeal the business exemption without altering the homestyle exemption, it remains unclear whether the latter will revert back to its original application and once again include non-dramatic musical works. If it does, the issue of whether the homestyle exemption satisfies Article 13 will remain unresolved because of the limited nature of the Panel's ruling.

3. Does Not Unreasonably Prejudice the Legitimate Interests of the Rights Holder

The third condition of Article 13 requires that an exception or limitation should not unreasonably prejudice the legitimate interests of the rights holder.[202] The United States argued that the test for this condition should focus on whether the economic impact caused by § 110(5) exemptions would unreasonably prejudice copyright holders.[203] In applying a looser standard, the European Communities asserted that the test should instead be based on whether the exemptions could potentially prejudice rights holders regardless of any actual financial losses suffered.[204] The Panel adopted neither view outright and determined that "prejudice to the legitimate interests of right holders reaches an unreasonable level if an exception or limitation causes or has the potential to cause an unreasonable loss of income to the copyright owner."[205]

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201. Panel Report, *supra* note 1, at ¶ 6.218 (emphasis added).

202. TRIPS Agreement, *supra* note 117, at 1201.

203. Panel Report, *supra* note 1, at ¶ 6.220.

204. Panel Report, *supra* note 1, at ¶ 6.221.

205. Panel Report, *supra* note 1, at ¶ 6.229. In reaching this interpretation, the Panel first sought to define what "interests" are at stake and which attributes make those interests "legitimate." It then interpreted the term "prejudice" and determined at what level it becomes "unreasonable." *See* Panel Report, *supra* note 1, at ¶¶ 6.222-.229. The term "interest" is defined by the Panel to "encompass a legal right or title to a property or to use or benefit of a property (including intellectual property)," and "may also refer to a concern about a potential detriment or advantage, and more generally to something that is of some importance to a natural or legal person." Panel Report, *supra* note 1, at ¶ 6.223. The term is "not necessarily limited to actual or potential economic advantage or detriment." *Id.*

a) The Business Exemption

The Panel began its analysis with the business exemption of subparagraph (B) by examining whether any actual or potential prejudice caused by the exemptions had reached an unreasonable level.

Both parties accepted the European Communities' figures that 73% of all drinking establishments, 70% of all eating establishments, and 45% of all retail establishments were covered by the business exemption.[206] While the European Communities argued that this was enough to show that the exemption had become the rule rather than the exception, the United States used these figures as a starting point from which to further reduce the number of covered establishments.[207] While conceding exact figures would be impossible to calculate, the United States subtracted establishments that:

> (i) do not play music at all;
> (ii) rely on music from some source other than radio or TV (such as tapes, CDs, commercial background music services, jukeboxes, or live music);
> (iii) were not licensed prior to the passage of the 1998 amendment and which the [performing rights organizations] would not be able to license anyway;

"Legitimate" refers to both lawfulness and legitimacy in regards to "calling for the protection of interests that are justifiable in the light of the objectives that underlie the protection of exclusive rights." Panel Report, *supra* note 1, at ¶ 6.224. "Prejudice" suggests "damage, harm or injury." Panel Report, *supra* note 1, at ¶ 6.225. Finally, "not unreasonable" is somewhat stricter than the term "reasonable," which means "proportionate," "within the limits of reason, not greatly less or more than might be thought likely or appropriate," or "of a fair, average or considerable amount or size." *Id.* Agreeing there was no question as to the "legitimacy" of a rights holder's interest in exploiting a work for economic gain, the parties chose to focus on the "prejudice" element. Panel Report, *supra* note 1, at ¶ 6.226. The Panel further determined that assessment of prejudice to rights holders by § 110(5) was not limited to rights holders from the European Communities. Panel Report, *supra* note 1, at ¶ 6.235. For the Panel's discussion on who may enforce legitimate interests of rights holders of various WTO members within the framework of the WTO dispute settlement system, *see* Panel Report, *supra* note 1, at ¶¶ 6.230-.235.

206. Panel Report, *supra* note 1, at ¶ 6.237.

207. Panel Report, *supra* note 1, at ¶¶ 6.237-.238.

> (iv) would take advantage of the NLBA agreement, whose terms are practically identical to subparagraph (B), if the statutory exemption were not available; and
> (v) would prefer to simply turn off the music rather than pay the fees demanded by the [performing rights organizations].[208]

The Panel considered each of these factors in its analysis of the business exemption; however, it noted that the United States bore the burden of proving the statute met the requirements of Article 13.[209] It also addressed these factors presented by the United States as comprising categories representing establishments that would choose to adopt "no music or music from another source" rather than pay license fees, and those "establishments not licensed before the 1998 Amendment and the NLBA Agreement."[210] The Panel thus considered the factors in a slightly different order than that given by the United States' submission.

The first, second, and fifth factors given by the United States addressed an establishment's choice of opting to have no music played or to choose another source of music rather than pay licensing fees. The Panel concluded that "[t]he fact that one source of music is free of charge while another triggers copyright liability may have a significant impact on which source of music the operators of establishments choose, and on how much they are willing to pay for protected music."[211] Not only would rights holders lose revenue from users newly exempted under the business exemption, it is likely they would lose pre-existing revenue streams from establishment owners who do not choose to switch to recorded music or commercial background music services.[212]

The third factor concerned establishments that were unlicensed prior to the 1998 Amendment and the NLBA Agreement. The European Communities argued that figures presented by the United States regarding licensing of establishments before the 1976 Act, the

208. Panel Report, *supra* note 1, at ¶ 6.238.
209. Panel Report, *supra* note 1, at ¶ 6.239.
210. *See* Panel Report, *supra* note 1, at ¶ 6.242.
211. Panel Report, *supra* note 1, at ¶ 6.241.
212. *Id.*

1995 CRS study regarding the pre-1998 Amendment period, and those reported by ASCAP could not be relied on for accuracy because past royalty collection practices were not representative of the otherwise measurable losses suffered by current copyright holders.[213] The Panel was concerned that, if only actual losses were accounted for, new exceptions might be enacted for newly introduced exclusive rights that previously were not effectively or affordably enforceable, or were not enforced because the rights holder had not developed an adequate collective management system.[214] Thus, the Panel took into account:

> not only the actual loss of income from those restaurants that were licensed by the performing rights organizations at the time that the exemption [became] effective, but also the loss of potential revenue from other restaurants of similar size likely to play music that were not licensed at that point.[215]

Regarding the fourth factor, the Panel dismissed it as non-determinative for the same reasons found in analyzing the second condition of Article 13.[216]

Thus, the Panel cautioned against giving too much weight to the U.S.'s factors, but also recognized the difficulty of quantifying the economic value of potential prejudice.[217] After acknowledging that potential revenues would be affected by any exemption and so should be considered generally, the Panel turned to the actual figures given by each party.

The United States estimated that the maximum annual loss suffered by European Communities rights holders administered by ASCAP would range from $294,113 to $586,332, and those administered by BMI would amount to $122,000.[218] In stark contrast, the European Communities estimated the annual loss to all

213. Panel Report, *supra* note 1, at ¶¶ 6.245-.246.

214. Panel Report, *supra* note 1, at ¶ 6.247.

215. Panel Report, *supra* note 1, at ¶ 6.249.

216. Panel Report, *supra* note 1, at ¶ 6.250

217. Panel Report, *supra* note 1, at ¶ 6.251.

218. Panel Report, *supra* note 1, at ¶ 6.252. See *id.* for the calculations formula used by the United States.

rights holders to be \$53.65 million.[219] Although the Panel showed some frustration over the fact that neither party provided very detailed or direct information in support of their estimates,[220] it nevertheless determined that, in light of the actual and potential prejudice caused by the business exemption, the United States failed to meet its burden of proof in showing the exemption did not unreasonably prejudice the legitimate interests of rights holders as required under Article 13.[221]

b) The Homestyle Exemption

Having found the business exemption to be in violation of the third step of Article 13, the Panel turned to whether the homestyle exemption of subparagraph (A) unreasonably prejudiced rights holders' interests.

The United States contended that the homestyle exemption targeted establishments that represented a small licensing market.[222] Therefore, it would not represent a sufficiently significant source of income for rights holders to justify imposing commercial licensing requirements on them.[223] These establishments were the least likely category of businesses to be aggressively sought after by performing rights organizations for licensing.[224] Additionally, any applicable

219. Panel Report, *supra* note 1, at ¶ 6.253. See *id.* for the calculations formula used by the European Communities. Note that their figures were for *all* rights holders, not just those administered within the European Communities. This is one explanation for the wide range separating the two estimates. Upon request by the Panel for figures for European Communities members, the European Communities only provided information from the Irish Music Rights Organisation ("IMRO"), which represented about 1% of the total European Communities population. It then multiplied that number by one-hundred to reach its final figure. The Panel did not find this calculation to be very meaningful nor useful for its purposes. *See* Panel Report, *supra* note 1, at ¶ 6.253 n.224.

220. *See* Panel Report, *supra* note 1, at ¶ 6.260.

221. Panel Report, *supra* note 1, at ¶ 6.266. The DSU Arbitrators ultimately favored the U.S. method of calculations using a "top-down" approach, although it did not accept all of the adjustments and deductions proposed by the U.S. *See* Award of the Arbitrators, *supra* note 5.

222. Panel Report, *supra* note 1, at ¶ 6.267.

223. *Id.*

224. *Id.* The Panel noted that the European Communities held the opposite view, but did not further argue the matter because it felt the aggressiveness of

license fees would be comparably quite low such that, in the absence of any exception, there would be no real economic detriment to rights holders if no licenses were sought or issued by performing rights organizations.[225] If license fees were sought, these businesses were more likely to turn off their equipment because of the incidental function of broadcasted works to their services rather than paying relatively high license fees.[226] Finally, the United States noted that the homestyle exemption's scope was greatly reduced when the 1998 Amendment's enactment limited its applicability to "dramatic" musical works.[227]

The European Communities pointed out that the judicial history before the 1998 Amendment showed that significant economic interests were at stake, and that, under *Aiken*, a large percentage of establishments were covered under the homestyle exemption.[228] It did not, however, address the impact on the number of exempted establishments following the 1998 Amendment, which limited the homestyle exemption's scope to "dramatic" musical works.

The Panel was unmoved by the European Communities' argument, given that the 1998 Amendment limited the homestyle exemption's applicability to "dramatic" works, especially because there was insufficient evidence to show that rights holders of such works had or would have attempted to license their broadcasts before or after the 1998 Amendment's enactment.[229] It could not see how broadcasts of "dramatic" works could "acquire such economic or practical importance that [they] could cause unreasonable prejudice to the legitimate interests of right holders."[230]

In further support of its opinion that the homestyle exemption's

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performing rights organizations in seeking license fees from small establishments was irrelevant to this particular issue. Panel Report, *supra* note 1, at ¶ 6.268 n.229.

225. Panel Report, *supra* note 1, at ¶ 6.267.

226. *Id.*

227. *Id.*

228. Panel Report, *supra* note 1, at ¶ 6.268. The Panel cited to the 1995 CRS study, which reported that 13.5%, 16%, and 18% of all U.S. drinking, eating, and retail establishments, respectively, were covered by the exemption. Panel Report, *supra* note 1, at ¶ 6.268 n.227.

229. Panel Report, *supra* note 1, at ¶ 6.270. The Panel noted that this was the common understanding of the parties at dispute. *Id.*

230. *Id.*

scope was sufficiently narrow to avoid prejudicing right holders' interests, the Panel looked to the committee reports behind the 1976 Act. The Conference Report intended to exempt a small commercial establishment "'which was not of sufficient size to justify, as a practical matter, a subscription to a commercial background music service.'"[231] Furthermore, the House Report noted that the exemption would impose liability where a proprietor installed a "commercial sound system," or augmented a "standard home receiving apparatus . . . into the equivalent of a commercial sound system."[232]

Finally, the Panel felt that both actual and potential losses were relevant in determining the existence of prejudice.[233] However, it was not persuaded that works covered by the homestyle exemption had ever been, or ever would be, a significant source of income for performing rights organizations, especially considering the limited scope of the exemption under the 1998 Amendment.[234] Thus, the Panel held that the homestyle exemption of subparagraph (A) satisfied the third requirement of Article 13 that it should "not cause unreasonable prejudice to the legitimate interests of the right holder."[235]

C. Panel Report Conclusion

The Panel concluded that the homestyle exemption of subparagraph (A) of § 110(5) of the United States Copyright Act complied with Article 13 requirements under the TRIPS Agreement, as interpreted to define and articulate the minor exceptions doctrine under the Berne Convention of 1971. As such, it did not violate Articles 11*bis*(1)(iii) and 11(1)(ii) of the Berne Convention of 1971 as incorporated into the TRIPS Agreement by Article 9.1 of that Agreement.[236] Conversely, the Panel found that the business

231. Panel Report, *supra* note 1, at ¶ 6.269 (quoting H.R. Rep. No. 94-1733 (1976)).

232. Panel Report, *supra* note 1, at ¶ 6.269 (citing H.R. Rep. No. 94-1476 (1976)).

233. Panel Report, *supra* note 1, at ¶ 6.271.

234. *Id.*

235. Panel Report, *supra* note 1, at ¶ 6.272.

236. Panel Report, *supra* note 1, at ¶ 7.1.

exemption of subparagraph (B) failed to meet those requirements, and recommended that the WTO Dispute Settlement Body request the United States bring that provision into conformity with its obligations under the TRIPS Agreement.[237] After arbitration to determine the level of trade sanctions that would be imposed on the United States if it failed to amend or repeal § 110(5)(B), the Dispute Settlement Body set the amount owed by the United States to the European Communities at approximately $1.1 million per year.[238] As of this writing, Congress has not yet made a decision as to whether it shall continue to pay damages or amend its legislation to conform to the TRIPS Agreement.[239]

VI. CRITIQUE

Congress has a number of solutions available to it in seeking to comply with the WTO Dispute Panel's ruling. One obvious method is to simply repeal the business exemption and keep the homestyle exemption in place, thereby conforming to the Panel's recommendations. In its arguments to the Panel, however, the United States has potentially dealt a lethal blow to the original homestyle exemption's scope. In its effort to save both exemptions from international scrutiny, the United States significantly narrowed the homestyle exemption from including both non-dramatic and dramatic musical works to only include the latter, with the result that the statute has very little practical applicability as the vast majority of works broadcasted to customers are non-dramatic. Without a business exemption in place, Congress's intent to protect small business owners from paying license fees will be severely undermined. The Panel's decision is not binding on American courts, and so the homestyle exemption's scope may simply be interpreted to revert back to its pre-1998 meaning and include both dramatic and non-dramatic musical works; however, this result is not

237. Panel Report, *supra* note 1, at ¶¶ 7.1-.2.

238. Award of the Arbitrators, *supra* note 5. The Dispute Settlement Body chose not to consider music broadcast through the Internet in its calculation. Award of the Arbitrators, *supra* note 5, at ¶ 4.35.

239. WTO, Status Report Regarding Implementation of the DSB Recommendations and Rulings in the Dispute, *United States – Section 110(5) of the U.S. Copyright Act*, WT/DS160/24/Add.10 (Sept. 15, 2005).

certain.

Another simple remedy is to leave both exemptions untouched and opt to pay damages indefinitely. However, the implication that the United States is more interested in enforcing copyright protections abroad than within its own borders could potentially send a damaging message of hypocrisy to its trading partners. While the approximately $1.1 million in annual damages is miniscule relative to the federal budget, it only adds to the aura of arrogance perceived by other nations that the United States thinks it can pay them rather than comply with international treaties. The result is that these nations may be much less willing to enforce the rights of U.S. copyright holders within their own borders, and may be less cooperative when it comes to honoring claims by American copyright plaintiffs, no matter their validity.

Failure to amend the exemption would also result in inequitable compensation between U.S. and European copyright holders. European copyright holders whose works are being performed alongside American works will generate more in performance royalties than U.S. holders for no other reason than a difference in citizenship. Additionally, while the initial damages set by the WTO are not great, they may be significantly increased by the WTO if Congress refuses to honor its request for conformity with international obligations. More WTO member States may also seek similar compensation, thus adding to the annual payout by the United States.

Another option available to Congress is to repeal § 110(5) in its entirety and create a completely new exemption that both protects small businesses and satisfies Article 13. In 1996, Senator Hank Brown made one such proposal with Senate Bill 1628, which exempted any:

> (5) communication within a commercial establishment of a transmission embodying a performance or display of a work by the reception of a broadcast, cable, satellite, or other transmission, if communicated –
> (A) in an area within the establishment where a transmission is intended to be received by the general public that is smaller than 5,000 square feet;
> (B) within an establishment whose gross annual income does not exceed 20 percent of the gross annual

> income of a small business under the applicable Standard Industrial Code as defined by the Small Business Administration;
> (C) by means of 10 or fewer loudspeakers, not including speakers in audiovisual devices; or
> (D) by means of speakers in audiovisual devices only, if no direct charge is made to see or hear the transmission, the reception of the transmission is authorized, and the transmission or retransmission is not further transmitted to the public beyond the premises of the retail establishment.[240]

While it might be a good starting point, Senator Brown's proposal would have to be modified in light of the Panel's rulings. The Panel found that the business exemption's size restriction of 2,000 to 3,750 square feet included too great a percentage of establishments, so this number would have to be reduced somewhat so that a smaller percentage of establishments would be covered.[241] The number of speakers allowed would have to be reduced as well. Most home stereo systems do not have more than two speakers, six if a typical "surround sound" system is used. To make it truly a "homestyle" exemption, the language would have to allow for fewer speakers than ten. An alternative to specifying a specific number of speakers that may be used is to place a limit on the maximum average sound decibel level that a stereo might produce. This limits what types of equipment that may be used to those of a non-commercial type. Larger establishments would need a system that is capable of producing louder broadcasts and so would fall outside the exemption's coverage. It would also avoid the somewhat arbitrary determination of how many speakers may be used, while also accounting for technological improvements in home stereo equipment.

The most important aspect of Senator Brown's proposal, however, is that it includes a financial means requirement. Congress refused to adopt such a condition, but this may be an excellent way of limiting the exemption's applicability. The original homestyle

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240. S. 1628, 104th Cong. § 1 (1996).
241. Panel Report, *supra* note 1, at ¶ 6.120.

exemption was intended to protect establishments that were so small they could not afford to pay license fees. Basing coverage on a predetermined level or percentage of gross annual income creates a bright-line rule that is much easier to follow and would meet Article 13's requirements because of its greatly limited scope of application.

Additionally, Congress has the option to simply repeal the exemption in its entirety and wash its hands of the long-debated matter. It is unlikely that ASCAP, BMI, SESAC, or other performing rights organizations would enforce licensing requirements on small businesses. Very little income is generated from the businesses that Congress intended to protect with the homestyle exemption. Rather than spend the immense time and resources necessary to collect a relatively miniscule amount of money in royalties from small business owners, performing rights organizations are more likely to simply ignore them completely. If the rights societies were to seek royalties on a grand scale, small business owners could easily band together and engage in collective bargaining to reach some private agreement that would allow for a manageable licensing scheme for proprietors that would still meet copyright requirements. Pressures of practicality and economics, not more regulation, would thus solve the problem.

Finally, there is the question of whether any such exemption as § 110(5) should exist at all. Should there be an exception to the exclusive right to license performances of a copyright work merely because small business owners do not want (or have the ability) to pay license fees, and performing rights organizations have not found or sought a practical and effective way to enforce their collection? To restaurant businesses, for example, playing music in their establishments is something akin to an ordinary expense incurred when buying fine tablecloths and expensive artwork. While not essential to serving food, these greatly enhance the dining experience and thus attract customers and increase revenues. Why should business owners be allowed to avoid paying an expense that greatly increases customer satisfaction simply because it is something that is an artistic expression by nature rather than something tangible?

The European Communities argued that just because it is impractical to enforce a right does not mean that the right should be taken away. This is a compelling argument that the WTO Panel addressed with seeming contradiction. It accepted the argument when it came to the business exemption because there was such a large economic impact because of tremendously wide coverage of the exemption. However, it did not accept the argument when applying it to small businesses covered by the homestyle exemption. This author agrees with the European Communities' argument, but accepts that there is a strong and unique American tradition of seeking to protect small "mom and pop" shops. This tradition will likely continue in the realm of copyright law in one form or another for years to come.

VII. CONCLUSION

Congress must soon decide whether to amend or repeal the business exemption in § 110(5)(B), or to keep the provision and pay out damages, thus resulting in an unfavorable inequity of copyright enforcement between Americans and Europeans and criticism from those very nations the United States has pressured to enforce copyright protections. At the time the FMLA was passed, there was concern that the United States would be violating its international obligations:

> The Congress has been advised by the Secretary of Commerce that the fairness in music licensing reform legislation violates U.S. international treaty obligations. The United States Trade Representative, the Register of Copyrights, and the . . . Commissioner of Patents and Trademarks have all joined with the Secretary of Commerce in voicing concerns [that the bill] would "violate our obligations under the Berne Convention for the Protection of Literary and Artistic Works." As a consequence, it could result in the WTO finding that United States has violated its multilateral treaty obligations. Adequate attention was not given to these concerns.[242]

These fears have come true and now it is time for Congress to decide how to fix the situation. Either it can accept the WTO's

242. 144 Cong. Rec. E2255 (daily ed. Oct. 20, 1998) (statement of Rep. Tanner).

recommendations and repeal the business exemption, thus honoring U.S. international treaty obligations, or it can refuse, with negative repercussions for both the more minor financial copyright administration and the greater international relations levels.

Will the United States take this opportunity to revise the § 110(5) exemption, or will Congress choose instead to pay potentially increasing damages? The original homestyle exemption under the 1976 Act was very narrow in scope and specific in intent, but it was greatly expanded with the FMLA. Rather than risk not passing the entire 1998 Amendment, Congress bent to pressure from the restaurant lobbies and included the additional exemption. Congress now has the chance to remove the business exemption and keep the other amendments contained in the FMLA. In doing so, it would gracefully appease the restaurant lobbies while placing any blame on the World Trade Organization. Congress also has the opportunity to amend the current homestyle exemption to better define what businesses may be covered, specifically the small "mom and pop" stores that it originally intended to protect.