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## **1 ARTICLE 13**

### **1.1 Text of Article 13**

#### ***Article 13***

##### *Limitations and Exceptions*

Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.

### **1.2 General**

#### **1.2.1 Scope**

1. In *US – Section 110(5) Copyright Act*, the Panel rejected a suggested limitation of the scope of Article 13:

"In our view, neither the express wording nor the context of Article 13 or any other provision of the TRIPS Agreement supports the interpretation that the scope of application of Article 13 is limited to the exclusive rights newly introduced under the TRIPS Agreement."<sup>1</sup>

2. In interpreting Article 13, the Panel in *US – Section 110(5) Copyright Act* outlined its interpretative approach to this provision, specified the conditions for limitations or exceptions to exclusive rights and found that these conditions apply cumulatively:

"Article 13 of the TRIPS Agreement requires that limitations and exceptions to exclusive rights (1) be confined to certain special cases, (2) do not conflict with a normal exploitation of the work, and (3) do not unreasonably prejudice the legitimate interests of the right holder. The principle of effective treaty interpretation requires us to give a distinct meaning to each of the three conditions and to avoid a reading that could reduce any of the conditions to 'redundancy or inutility'. The three conditions apply on a cumulative basis, each being a separate and independent requirement that must be satisfied. Failure to comply with any one of the three conditions results in the Article 13 exception being disallowed. Both parties agree on the cumulative nature of the three conditions. The Panel shares their view. It may be noted at the outset that Article 13 cannot have more than a narrow or limited operation. Its tenor, consistent as it is with the provisions of Article 9(2) of the Berne Convention (1971), discloses that it was not intended to provide for exceptions or limitations except for those of a limited nature. The narrow sphere of its operation will emerge from our discussion and application of its provisions in the paragraphs which follow."<sup>2</sup>

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<sup>1</sup> Panel Report, *US – Section 110(5) Copyright Act*, para. 6.80.

<sup>2</sup> Panel Report, *US – Section 110(5) Copyright Act*, para. 6.97.

### 1.2.2 Relationship with other provisions

3. In *US – Section 110(5) Copyright Act*, the Panel made a finding on the scope of application of Article 13 with respect to individual subparagraphs of Articles 11 and 11*bis* of the Berne Convention (1971):

"We conclude that Article 13 of the TRIPS Agreement applies to Articles 11*bis*(1)(iii) and 11(1)(ii) of the Berne Convention (1971) as incorporated into the TRIPS Agreement, given that neither the express wording nor the context of Article 13 or any other provision of the TRIPS Agreement supports the interpretation that the scope of application of Article 13 is limited to the exclusive rights newly introduced under the TRIPS Agreement."<sup>3</sup>

4. The Panel also clearly distinguished the different situations covered by Article 11*bis*(2) of the Berne Convention (1971) and Article 13 of the TRIPS Agreement, respectively:

"We believe that Article 11*bis*(2) of the Berne Convention (1971) and Article 13 cover different situations. On the one hand, Article 11*bis*(2) authorizes Members to determine conditions under which the rights conferred by Article 11*bis*(1)(i-iii) may be exercised. The imposition of such conditions may completely replace the free exercise of the exclusive right of authorizing the use of the rights embodied in subparagraphs (i-iii) provided that equitable remuneration and the author's moral rights are not prejudiced. However, unlike Article 13 of the TRIPS Agreement, Article 11*bis*(2) of the Berne Convention (1971) would not in any case justify use free of charge.

On the other hand, it is sufficient that a limitation or an exception to the exclusive rights provided under Article 11*bis*(1) of the Berne Convention (1971) as incorporated into the TRIPS Agreement meets the three conditions contained in its Article 13 to be permissible. If these three conditions are met, a government may choose between different options for limiting the right in question, including use free of charge and without an authorization by the right holder. This is not in conflict with any of the paragraphs of Article 11*bis* because use free of any charge may be permitted for minor exceptions by virtue of the minor exceptions doctrine which applies, *inter alia*, also to Article 11*bis*.

As regards situations that would not meet the above-mentioned three conditions, a government may not justify an exception, including one involving use free of charge, by Article 13 of the TRIPS Agreement. However, also in these situations Article 11*bis*(2) of the Berne Convention (1971) as incorporated into the TRIPS Agreement would nonetheless allow Members to substitute, for an exclusive right, a compulsory licence, or determine other conditions provided that they were not prejudicial to the right holder's right to obtain an equitable remuneration."<sup>4</sup>

5. In the same context, the Panel considered that a reading of Articles 11*bis*(2) of the Berne Convention (1971) and Article 13 of the TRIPS Agreement which did not differentiate the situations covered respectively by these provisions, would render Article 13 "somewhat redundant":

"We believe that our interpretation gives meaning and effect to Article 11*bis*(2), the minor exceptions doctrine as it applies to Article 11*bis*, and Article 13. However, in our view, under the interpretation suggested by the European Communities this would not be the case, e.g., in the following situations. If any *de minimis* exception from rights conferred by Article 11*bis*(1)(i-iii) were subject to the requirement to provide equitable remuneration within the meaning of Article 11*bis*(2), no exemption whatsoever from the rights recognized by Article 11*bis*(1) could permit use free of charge even if the three criteria of Article 13 were met. As a result, narrow exceptions or limitations would be subject to the three conditions of Article 13 in addition to the requirement to provide equitable remuneration. At the same time, broader exceptions or limitations which do not comply with the criteria of Article 13 could arguably still be justified under Article 11*bis*(2) as long as the conditions imposed ensure, *inter alia*,

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<sup>3</sup> Panel Report, *US – Section 110(5) Copyright Act*, para. 6.94.

<sup>4</sup> Panel Report, *US – Section 110(5) Copyright Act*, paras. 6.87-6.89.

equitable remuneration. Such an interpretation could render Article 13 somewhat redundant because narrow exceptions would be subject to all the requirements of Article 13 and Article 11*bis*(2) on a cumulative basis, while for broader exceptions compliance with Article 11*bis*(2) could suffice. Both situations would lead to the result that any use free of charge would not be permissible. These examples are illustrative of situations where the terms and conditions of Article 13, Article 11*bis*(2) and the minor exceptions doctrine would not be given full meaning and effect."<sup>5</sup>

### 1.2.3 "certain special cases"

6. In *US – Section 110(5) Copyright Act*, the Panel interpreted the meaning of the phrase "certain special cases", the first condition in Article 13:

"In our view, the first condition of Article 13 requires that a limitation or exception in national legislation should be clearly defined and should be narrow in its scope and reach. On the other hand, a limitation or exception may be compatible with the first condition even if it pursues a special purpose whose underlying legitimacy in a normative sense cannot be discerned. The wording of Article 13's first condition does not imply passing a judgment on the legitimacy of the exceptions in dispute. However, public policy purposes stated by law-makers when enacting a limitation or exception may be useful from a factual perspective for making inferences about the scope of a limitation or exception or the clarity of its definition."<sup>6</sup>

7. The Panel also addressed the relevance of whether the measure at issue had as its declared aim a legitimate public policy:

"As regards the parties' arguments on whether the public policy purpose of an exception is relevant, we believe that the term 'certain special cases' should not lightly be equated with 'special purpose'.<sup>7</sup> It is difficult to reconcile the wording of Article 13 with the proposition that an exception or limitation must be justified in terms of a legitimate public policy purpose in order to fulfill the first condition of the Article. We also recall in this respect that in interpreting other WTO rules, such as the national treatment clauses of the GATT and the GATS, the Appellate Body has rejected interpretative tests which were based on the subjective aim or objective pursued by national legislation."<sup>8</sup>

8. The Panel subsequently applied the above quoted standard under Article 13 to examine whether the United States' measure at issue in *US – Section 110(5) Copyright Act* met the first condition of "certain special cases":

"[W]e first examine whether the exceptions have been clearly defined. Second, we ascertain whether the exemptions are narrow in scope, *inter alia*, with respect to their reach. In that respect, we take into account what percentage of eating and drinking establishments and retail establishments may benefit from the business exemption under subparagraph (B), and in turn what percentage of establishments may take advantage of the homestyle exemption under subparagraph (A). On a subsidiary basis, we consider whether it is possible to draw inferences about the reach of the business and homestyle exemptions from the stated policy purposes underlying these exemptions according to the statements made during the US legislative process."<sup>9</sup>

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<sup>5</sup> Panel Report, *US – Section 110(5) Copyright Act*, para. 6.90.

<sup>6</sup> Panel Report, *US – Section 110(5) Copyright Act*, para. 6.112.

<sup>7</sup> (footnote original) We note that the term "special purpose" has been referred to in interpreting the largely similarly worded Article 9(2) of the Berne Convention (1971). See Ricketson, *The Berne Convention*, op.cit., p. 482. We are ready to take into account "teachings of the most highly qualified publicists of the various nations" as a "subsidiary source for the determination of law". We refer to this phrase in the sense of Article 38(d) of the Statute of the International Court of Justice which refers to such "teachings" (or, in French "la doctrine") as "subsidiary means for the determination of law." But we are cautious to use the interpretation of a term developed in the context of an exception for the reproduction right for interpreting the same terms in the context of a largely similarly worded exception for other exclusive rights conferred by copyrights.

<sup>8</sup> Panel Report, *US – Section 110(5) Copyright Act*, para. 6.111.

<sup>9</sup> Panel Report, *US – Section 110(5) Copyright Act*, para. 6.113.

#### 1.2.4 "do not conflict with a normal exploitation of the work"

9. In *US – Section 110(5) Copyright Act*, in examining the second condition under Article 13, i.e. "do not conflict with a normal exploitation of the work", the Panel first sought a definition for the term "exploitation":

"The ordinary meaning of the term 'exploit' connotes 'making use of' or 'utilising for one's own ends'. We believe that 'exploitation' of musical works thus refers to the activity by which copyright owners employ the exclusive rights conferred on them to extract economic value from their rights to those works."<sup>10</sup>

10. The Panel in *US – Section 110(5) Copyright Act* then proceeded to provide an interpretation of the term "normal":

"We note that the ordinary meaning of the term 'normal' can be defined as 'constituting or conforming to a type or standard; regular, usual, typical, ordinary, conventional ...'. In our opinion, these definitions appear to reflect two connotations: the first one appears to be of an empirical nature, i.e., what is regular, usual, typical or ordinary. The other one reflects a somewhat more normative, if not dynamic, approach, i.e., conforming to a type or standard. We do not feel compelled to pass a judgment on which one of these connotations could be more relevant. Based on Article 31 of the Vienna Convention, we will attempt to develop a harmonious interpretation which gives meaning and effect to both connotations of 'normal'.

If 'normal' exploitation were equated with full use of all exclusive rights conferred by copyrights, the exception clause of Article 13 would be left devoid of meaning. Therefore, 'normal' exploitation clearly means something less than full use of an exclusive right."<sup>11</sup><sup>12</sup>

11. The Panel in *US – Section 110(5) Copyright Act* then endorsed a differentiated examination of whether a limitation or an exception conflicts with the normal exploitation of a work:

"We agree with the European Communities that whether a limitation or an exception conflicts with a normal exploitation of a work should be judged for each exclusive right individually."<sup>13</sup>

12. The Panel in *US – Section 110(5) Copyright Act* also indicated that when assessing the meaning of "normal exploitation", it would consider both empirical and normative criteria:

"In our view, this test [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 this exemption] seems to reflect the empirical or quantitative aspect of the connotation of 'normal', the meaning of 'regular, usual, typical or

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<sup>10</sup> Panel Report, *US – Section 110(5) Copyright Act*, para. 6.165.

<sup>11</sup> (footnote original) In the context of exceptions to reproduction rights under Article 9(2) of the Berne Convention (1971) – whose second condition is worded largely identically to the second condition of Article 13 of the TRIPS Agreement – the Main Committee I of the Stockholm Diplomatic Conference (1967) stated:

"If it is considered that reproduction conflicts with the normal exploitation of the work, reproduction is not permitted at all. If it is considered that reproduction does not conflict with the normal exploitation of the work, the next step would be to consider whether it does not unreasonably prejudice the legitimate interests of the author. Only if such is not the case would it be possible in certain special cases to introduce a compulsory licence, or to provide for use without payment. A practical example may be photocopying for various purposes. If it consists of producing a very large number of copies, it may not be permitted, as it conflicts with a normal exploitation of the work. If it implies a rather large number of copies for use in industrial undertakings, it may not unreasonably prejudice the legitimate interests of the author, provided that, according to national legislation, an equitable remuneration is paid. If a small number of copies is made, photocopying may be permitted without payment, particularly for individual or scientific use."

See the Records of the Intellectual Property Conference of Stockholm, 11 June – 14 July 1967. Report on the Work of the Main Committee I (Substantive Provisions of the Berne Convention: Articles 1-20. As reproduced in the Berne Convention Centenary, p. 197.

<sup>12</sup> Panel Report, *US – Section 110(5) Copyright Act*, paras. 6.166-6.167.

<sup>13</sup> Panel Report, *US – Section 110(5) Copyright Act*, para. 6.173.

ordinary'. We can, therefore, accept this US approach, but only for the empirical or quantitative side of the connotation. We have to give meaning and effect also to the second aspect of the connotation, the meaning of 'conforming to a type or standard'. We described this aspect of normalcy as reflecting a more normative approach to defining normal exploitation, that includes, *inter alia*, a dynamic element capable of taking into account technological and market developments. The question then arises how this normative aspect of 'normal' exploitation could be given meaning in relation to the exploitation of musical works.

...

Thus it appears that one way of measuring the normative connotation of normal exploitation is to consider, in addition to those forms of exploitation that currently generate significant or tangible revenue, those forms of exploitation which, with a certain degree of likelihood and plausibility, could acquire considerable economic or practical importance."<sup>14</sup>

13. After exploring the two different connotations of the term "normal exploitation", the Panel in *US – Section 110(5) Copyright Act* then set forth a test for "normal exploitation" based on the consideration of "economic competition" and "market conditions". In this context, the Panel first explained its view as to when a conflict arises between an exception or limitation and normal exploitation of the work:

"We believe that an exception or limitation to an exclusive right in domestic legislation rises to the level of a conflict with a normal exploitation of the work (i.e., the copyright or rather the whole bundle of exclusive rights conferred by the ownership of the copyright), 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."<sup>15</sup>

14. The Panel in *US – Section 110(5) Copyright Act* then went on to find:

"In developing a benchmark for defining the normative connotation of normal exploitation, we recall the European Communities' emphasis on the potential impact of an exception rather than on its actual effect on the market at a given point in time, given that, in its view, it is the potential effect that determines the market conditions.

...

We base our appraisal of the actual and potential effects on the commercial and technological conditions that prevail in the market currently or in the near future. What is a normal exploitation in the market-place may evolve as a result of technological developments or changing consumer preferences. Thus, while we do not wish to speculate on future developments, we need to consider the actual and potential effects of the exemptions in question in the current market and technological environment.

We do acknowledge that the extent of exercise or non-exercise of exclusive rights by right holders at a given point in time is of great relevance for assessing what is the normal exploitation with respect to a particular exclusive right in a particular market. However, in certain circumstances, current licensing practices may not provide a sufficient guideline for assessing the potential impact of an exception or limitation on normal exploitation. For example, where a particular use of works is not covered by the exclusive rights conferred in the law of a jurisdiction, the fact that the right holders do not license such use in that jurisdiction cannot be considered indicative of what constitutes normal exploitation. The same would be true in a situation where,

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<sup>14</sup> Panel Report, *US – Section 110(5) Copyright Act*, paras. 6.178 and 6.180.

<sup>15</sup> Panel Report, *US – Section 110(5) Copyright Act*, para. 6.183.

due to lack of effective or affordable means of enforcement, right holders may not find it worthwhile or practical to exercise their rights."<sup>16</sup>

#### **1.2.5 "do not unreasonably prejudice the legitimate interests of the right holder"**

15. In *US – Section 110(5) Copyright Act*, in examining the third condition under Article 13, i.e. the phrase "do not unreasonably prejudice the legitimate interests of the right holder", the Panel distinguished several steps in the analysis of this requirement:

"We note that the analysis of the third condition of Article 13 of the TRIPS Agreement implies several steps. First, one has to define what are the 'interests' of right holders at stake and which attributes make them 'legitimate'. Then, it is necessary to develop an interpretation of the term 'prejudice' and what amount of it reaches a level that should be considered 'unreasonable'."<sup>17</sup>

16. The Panel in *US – Section 110(5) Copyright Act* then proceeded to examine each of these terms in turn and began with their ordinary meaning:

"The ordinary meaning of the term 'interests' may encompass a legal right or title to a property or to use or benefit of a property (including intellectual property). It 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. Accordingly, the notion of 'interests' is not necessarily limited to actual or potential economic advantage or detriment.

The term 'legitimate' has the meanings of

- '(a) conformable to, sanctioned or authorized by, law or principle; lawful; justifiable; proper;
- (b) normal, regular, conformable to a recognized standard type.'

Thus, the term relates to lawfulness from a legal positivist perspective, but it has also the connotation of legitimacy from a more normative perspective, in the context of calling for the protection of interests that are justifiable in the light of the objectives that underlie the protection of exclusive rights.

We note that the ordinary meaning of 'prejudice' connotes damage, harm or injury. 'Not unreasonable' connotes a slightly stricter threshold than 'reasonable'. The latter term 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'."<sup>18</sup>

17. After considering the ordinary meaning of the individual terms of the phrase "do not unreasonably prejudice the legitimate interests of the right holder", the Panel in *US – Section 110(5) Copyright Act* applied its approach to the case at hand:

"Given that the parties do not question the 'legitimacy' of the interest of right holders to exercise their rights for economic gain, the crucial question becomes which degree or level of 'prejudice' may be considered as 'unreasonable'. Before dealing with the question of what amount or which kind of prejudice reaches a level beyond reasonable, we need to find a way to measure or quantify legitimate interests."<sup>19</sup>

18. The Panel in *US – Section 110(5) Copyright Act* then explained its views about measuring legitimate interests:

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<sup>16</sup> Panel Report, *US – Section 110(5) Copyright Act*, paras. 6.184 and 6.187-6.188.

<sup>17</sup> Panel Report, *US – Section 110(5) Copyright Act*, para. 6.222.

<sup>18</sup> Panel Report, *US – Section 110(5) Copyright Act*, paras. 6.223-6.225.

<sup>19</sup> Panel Report, *US – Section 110(5) Copyright Act*, para. 6.226.

"In our view, one – albeit incomplete and thus conservative – way of looking at legitimate interests is the economic value of the exclusive rights conferred by copyright on their holders. It is possible to estimate in economic terms the value of exercising, e.g., by licensing, such rights. That is not to say that legitimate interests are necessarily limited to this economic value.

In examining the second condition of Article 13, we have addressed the US argument that the prejudice to right holders caused by the exemptions at hand are minimal because they already receive royalties from broadcasting stations. We concluded that each exclusive right conferred by copyright, *inter alia*, under each subparagraph of Articles 11*bis* and 11 of the Berne Convention (1971), has to be considered separately for the purpose of examining whether a possible conflict with a 'normal exploitation' exists.

The crucial question is which degree or level of 'prejudice' may be considered as 'unreasonable', given that, under the third condition, a certain amount of 'prejudice' has to be presumed justified as 'not unreasonable'. In our view, 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."<sup>20</sup>

19. The Panel in *US – Section 110(5) Copyright Act* indicated that the "reasonableness" of the prejudice to the right holder should not be assessed only with respect to the parties of the dispute at hand:

"However, given our considerations above, our assessment of whether the prejudice, caused by the exemptions contained in Section 110(5), to the legitimate interests of the right holder is of an unreasonable level is not limited to the right holders of the European Communities."<sup>21</sup>

20. With respect to its methodology for examination of the existence of a prejudice, the Panel in *US – Section 110(5) Copyright Act* stated that it would consider information on market conditions and consider both actual and potential effects:

"We will consider the information on market conditions provided by the parties taking into account, to the extent feasible, the actual as well as the potential prejudice caused by the exemptions, as a prerequisite for determining whether the extent or degree of prejudice is of an unreasonable level. In these respects, we recall our consideration above that taking account of actual as well as potential effects is consistent with past GATT/WTO dispute settlement practice.

...

[I]n considering the prejudice to the legitimate interests of right holders caused by the business exemption, we have to take into account not only the actual loss of income from those restaurants that were licensed by the CMOs at the time that the exemption become 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."<sup>22</sup>

Current as of: December 2024

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<sup>20</sup> Panel Report, *US – Section 110(5) Copyright Act*, paras. 6.227-6.229.

<sup>21</sup> Panel Report, *US – Section 110(5) Copyright Act*, para. 6.235.

<sup>22</sup> Panel Report, *US – Section 110(5) Copyright Act*, paras. 6.236 and 6.249.