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1 ARTICLE 9 AND INCORPORATED PROVISIONS OF THE BERNE CONVENTION (1971)

1.1 Text of Article 9

Article 9

Relation to the Berne Convention

1. Members shall comply with Articles 1 through 21 of the Berne Convention (1971) and the Appendix thereto. However, Members shall not have rights or obligations under this Agreement in respect of the rights conferred under Article 6*bis* of that Convention or of the rights derived therefrom.
2. Copyright protection shall extend to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such.

1.2 Relationship with the Berne Convention (1971)

1. In *US – Section 110(5) Copyright Act*, in examining the consistency of certain provisions of the US Copyright Act with the TRIPS Agreement, the Panel made a finding on the relationship between the TRIPS Agreement and the Berne Convention (1971):

"Articles 9–13 of Section 1 of Part II of the TRIPS Agreement entitled 'Copyright and Related Rights' deal with the substantive standards of copyright protection. Article 9.1 of the TRIPS Agreement obliges WTO Members to comply with Articles 1–21 of the Berne Convention (1971) (with the exception of Article 6*bis* on moral rights and the rights derived therefrom) and the Appendix thereto. ...

We note that through their incorporation, the substantive rules of the Berne Convention (1971), including the provisions of its Articles 11*bis*(1)(iii) and 11(1)(ii), have become part of the TRIPS Agreement and as provisions of that Agreement have to be read as applying to WTO Members."¹

2. The Panel also considered a provision of the Vienna Convention on the Law of the Treaties with respect to the TRIPS Agreement and the Berne Convention (1971).

"We note that Article 30 of the Vienna Convention on the application of successive treaties is not relevant in this respect, because all provisions of the TRIPS Agreement – including the incorporated Articles 1–21 of the Berne Convention (1971) – entered into force at the same point in time."²

3. With respect to the relationship of the minor exceptions doctrine under the Berne Convention (1971) and the TRIPS Agreement, the Panel in *US – Section 110(5) Copyright Act* examined to what extent this doctrine under the Berne Convention (1971) had been incorporated into the TRIPS Agreement

"Having concluded that the minor exceptions doctrine forms part of the 'context' of, at least, Articles 11*bis* and 11 of the Berne Convention (1971) by virtue of an agreement within the meaning of Article 31(2)(a) of the Vienna Convention, which was made between the Berne Union members in connection with the conclusion of the respective amendments to that Convention, we next address the second step of our analysis. ...

...

[W]e conclude that, in the absence of any express exclusion in Article 9.1 of the *TRIPS Agreement*, the incorporation of Articles 11 and 11*bis* of the Berne Convention (1971) into the Agreement includes the entire *acquis* of these provisions, including the possibility of providing minor exceptions to the respective exclusive rights."³

4. In *US – Section 110(5) Copyright Act*, the Panel emphasized the need, in the light of general principles of interpretation, to harmoniously interpret provisions of the TRIPS Agreement and the Berne Convention (1971):

"In the area of copyright, the Berne Convention and the TRIPS Agreement form the overall framework for multilateral protection. Most WTO Members are also parties to the Berne Convention. We recall that it is a general principle of interpretation to adopt the meaning that reconciles the texts of different treaties and avoids a conflict between them. Accordingly, one should avoid interpreting the TRIPS Agreement to mean something different than the Berne Convention except where this is explicitly provided for. This principle is in conformity with the public international law presumption against conflicts, which has been applied by WTO panels and the Appellate Body in a number of cases. We believe that our interpretation of the legal status of the minor exceptions doctrine under the TRIPS Agreement is consistent with these general principles."⁴

5. The Panel adopted the same approach to the interpretation of the TRIPS Agreement and the WIPO Copyright Treaty ("WCT") as it had applied with respect to the TRIPS Agreement and the Berne Convention (1971) the Panel stated as follows:

"In paragraph 6.66 we discussed the need to interpret the Berne Convention and the TRIPS Agreement in a way that reconciles the texts of these two treaties and avoids a conflict between them, given that they form the overall framework for multilateral copyright protection. The same principle should also apply to the relationship between the TRIPS Agreement and the WCT. The WCT is designed to be compatible with this framework, incorporating or using much of the language of the Berne Convention and

¹ Panel Report, *US – Section 110(5) Copyright Act*, paras. 6.17–6.18.

² Panel Report, *US – Section 110(5) Copyright Act*, para. 6.41.

³ Panel Report, *US – Section 110(5) Copyright Act*, paras. 6.60 and 6.63.

⁴ Panel Report, *US – Section 110(5) Copyright Act*, para. 6.66.

the TRIPS Agreement. The WCT was unanimously concluded at a diplomatic conference organized under the auspices of WIPO in December 1996, one year after the WTO Agreement entered into force, in which 127 countries participated. Most of these countries were also participants in the TRIPS negotiations and are Members of the WTO. For these reasons, it is relevant to seek contextual guidance also in the WCT when developing interpretations that avoid conflicts within this overall framework, except where these treaties explicitly contain different obligations."⁵

1.3 Article 5(1) of the Berne Convention (1971) as incorporated in the TRIPS Agreement

1.3.1 Scope of Article 5(1)

6. In *China – Intellectual Property Rights*, the Panel was called upon to interpret Article 5(1) of the Berne Convention (1971). The Panel considered the scope of Article 5(1) as follows:

"Article 5(1) of the Berne Convention (1971) provides for the enjoyment of two overlapping sets of rights that have been described as 'the twin pillars on which protection under the Convention rests'. First, there are 'the rights which their respective laws do now or may hereafter grant to their nationals'.⁶ This is a national treatment obligation. ...

Second, there are 'the rights specially granted by this Convention'. This term is not defined. However, Article 5(1) refers to rights that authors shall enjoy in respect of works. Articles 6*bis*, 8, 9, 11, 11*bis*, 11*ter*, 12, 14, 14*bis* and 14*ter* all provide for such rights.⁷ Nevertheless, the incorporation of provisions of the Berne Convention (1971), including Article 5, is subject to the terms of Article 9.1 of the TRIPS Agreement ... Therefore, 'the rights specially granted by this Convention' as used in Article 5(1) of that Convention, as incorporated by Article 9.1 of the TRIPS Agreement, do not include the rights referred to in Article 6*bis* of the Berne Convention (1971). This Report refers to these rights in that sense."⁸

7. The Panel in *China – Intellectual Property Rights*, further elaborated on the categories of "works" the two sets or rights under Article 5(1) of the Berne Convention relate to:

"The categories of 'works' in respect of which authors shall enjoy the rights specially granted by the Convention vary according to the terms of each Article granting the relevant right. For example, the rights of reproduction (Article 9) and of broadcasting (Article 11*bis*) are granted to authors of 'literary and artistic works'. That expression is defined, in a non-exhaustive manner, in Article 2(1) of the Berne Convention (1971)."⁹

1.4 Article 11 of the Berne Convention (1971) as incorporated in the TRIPS Agreement

1.4.1 Scope of Article 11

8. In *US – Section 110(5) Copyright Act*, the Panel was called upon to interpret Article 11 of the Berne Convention (1971). The Panel considered the scope of Article 11 as follows:

"As in the case of Article 11*bis*(1) of the Berne Convention (1971), which concerns broadcasting to the public and communication of a broadcast to the public, the exclusive rights conferred by Article 11 cover public performance; private performance does not require authorization. Public performance includes performance by any means or process, such as performance by means of recordings (e.g., CDs, cassettes

⁵ Panel Report, *US – Section 110(5) Copyright Act*, para. 6.70.

⁶ (footnote original) The Panel notes that this provision, as incorporated by Article 9.1 of the TRIPS Agreement, is distinct from Article 3.1 of that Agreement.

⁷ (footnote original) This enumeration is without prejudice to other such rights.

⁸ Panel Report, *China – Intellectual Property Rights*, paras. 7.106-7.107.

⁹ Panel Report, *China – Intellectual Property Rights*, para. 7.115.

and videos).¹⁰ It also includes communication to the public of a performance of the work."¹¹

1.4.2 Paragraph 1

9. In *US – Section 110(5) Copyright Act*, the Panel agreed with the parties that a particular type of communication was covered by the exclusive rights set forth in Article 11(1) of the Berne Convention (1971):

"We share the understanding of the parties that a communication to the public by loudspeaker of a performance of a work transmitted by means other than hertzian waves is covered by the exclusive rights conferred by Article 11(1) of the Berne Convention (1971)."¹²

10. In *US – Section 110(5) Copyright Act (Article 25.3)*, the Arbitrators emphasized the difference between Members' respective obligations under Article 11(1)(ii) of the Berne Convention (1971) and right holders' exercise or exploitation of rights:

"For purposes of the present dispute, this means that the United States is under an obligation to make available to EC right holders the exclusive rights set forth in Articles 11bis(1)(iii) and 11(1)(ii).¹³ It is important to bear in mind, however, that, while it is for the *United States* to *provide* EC right holders with the exclusive rights set forth in Articles 11bis(1)(iii) and 11(1)(ii), it is for *EC right holders* to determine whether and how to *exercise* or *exploit* those rights."¹⁴

1.4.3 Relationship between Article 11 of the Berne Convention (1971) and other Articles of this Convention.

11. In *US – Section 110(5) Copyright Act*, the Panel found Article 11 to be a *general* rule concerning the communication of performances of works, while Article 11bis provided a *specific* rule concerning a particular type of communication:

"Regarding the relationship between Articles 11 and 11bis, we note that the rights conferred in Article 11(1)(ii) concern the communication to the public of performances of works in general. Article 11bis(1)(iii) is a specific rule conferring exclusive rights concerning the public communication by loudspeaker or any other analogous instrument transmitting, by signs, sounds or images, the broadcast of a work."¹⁵

1.5 Article 11bis of the Berne Convention (1971) as incorporated in the TRIPS Agreement

1.5.1 Paragraph 1

12. In *US – Section 110(5) Copyright Act*, in interpreting Article 11bis(1), the Panel addressed the three "separate exclusive" rights provided by Article 11bis(1) subparagraph (i) through (iii):

"In the light of Article 2 of the Berne Convention (1971), 'artistic' works in the meaning of Article 11bis(1) include non-dramatic and other musical works. Each of the

¹⁰ (footnote original) However, public performance by means of cinematographic works is separately covered in Article 14(1)(ii) of the Berne Convention. Public performance of a literary work or communication to the public of the recitation is covered by Article 11ter of the Berne Convention.

¹¹ Panel Report, *US – Section 110(5) Copyright Act*, para. 6.24.

¹² Panel Report, *US – Section 110(5) Copyright Act*, para. 6.51.

¹³ (footnote original) Article 1.1 of the TRIPS Agreement makes clear that "Members shall give effect to the provisions of the [TRIPS] Agreement." Members must, therefore, implement in their domestic law the protection required by the TRIPS Agreement. Moreover, Article 1.3 of the TRIPS Agreement provides in relevant part that "Members shall accord the treatment provided for in this Agreement to the nationals of other Members." (footnote omitted) This confirms that the exclusive rights conferred by Articles 11bis(1)(iii) and 11(1)(ii) must be granted to EC right holders.

¹⁴ Award of the Arbitrator on *US – Section 110(5) Copyright Act (Article 25.3)*, para. 3.15.

¹⁵ Panel Report, *US – Section 110(5) Copyright Act*, para. 6.25.

subparagraphs of Article 11*bis*(1) confers a separate exclusive right; exploitation of a work in a manner covered by any of these subparagraphs requires an authorization by the right holder. For example, the communication to the public of a broadcast creates an additional audience and the right holder is given control over, and may expect remuneration from, this new public performance of his or her work.

The right provided under subparagraph (i) of Article 11*bis*(1) is to authorize the broadcasting of a work and the communication thereof to the public by any other means of wireless diffusion of signs, sounds or images. It applies to both radio and television broadcasts. Subparagraph (ii) concerns the subsequent use of this emission; the authors' exclusive right covers any communication to the public by wire or by rebroadcasting of the broadcast of the work, when the communication is made by an organization other than the original one.

Subparagraph (iii) provides an exclusive right to authorize the public communication of the broadcast of the work by loudspeaker, on a television screen, or by other similar means. Such communication involves a new public performance of a work contained in a broadcast, which requires a licence from the right holder."¹⁶

13. In *US – Section 110(5) Copyright Act (Article 25.3)*, the Arbitrators emphasized the difference between Members' respective obligations under Article 11*bis*(1)(iii) of the Berne Convention (1971) and right holders' exercise or exploitation of rights as follows:

"For purposes of the present dispute, this means that the United States is under an obligation to make available to EC right holders the exclusive rights set forth in Articles 11*bis*(1)(iii) and 11(1)(ii).¹⁷ It is important to bear in mind, however, that, while it is for the *United States* to *provide* EC right holders with the exclusive rights set forth in Articles 11*bis*(1)(iii) and 11(1)(ii), it is for *EC right holders* to determine whether and how to *exercise* or *exploit* those rights."¹⁸

1.5.2 Paragraph 2

14. In *US – Section 110(5) Copyright Act*, the Panel addressed the authorization, provided by Article 11*bis*(2), to substitute a compulsory licence for an exclusive right under Article 11*bis* (1):

"We also conclude that Article 11*bis*(2) of the Berne Convention (1971) as incorporated into the TRIPS Agreement allows Members to substitute a compulsory licence for an exclusive right under Article 11*bis*(1), or determine other conditions provided that they are not prejudicial to the right holder's right to obtain an equitable remuneration. Article 11*bis*(2) is not relevant for the case at hand, because the United States has not provided a right in respect of the uses covered by the present Section 110(5), the exercise of which would have been subjected to conditions determined in its legislation."¹⁹

1.5.3 Relationship between Article 11*bis* of the Berne Convention (1971) and other Articles of the Convention

15. With respect to the relationship between Articles 11 and 11*bis* of the Berne Convention (1971) as incorporated in the TRIPS Agreement, see paragraph 11 above.

¹⁶ Panel Report, *US – Section 110(5) Copyright Act*, paras. 6.20-6.22.

¹⁷ (footnote original) Article 1.1 of the TRIPS Agreement makes clear that "Members shall give effect to the provisions of the [TRIPS] Agreement." Members must, therefore, implement in their domestic law the protection required by the TRIPS Agreement. Moreover, Article 1.3 of the TRIPS Agreement provides in relevant part that "Members shall accord the treatment provided for in this Agreement to the nationals of other Members." (footnote omitted) This confirms that the exclusive rights conferred by Articles 11*bis*(1)(iii) and 11(1)(ii) must be granted to EC right holders.

¹⁸ Award of the Arbitrator on *US – Section 110(5) Copyright Act (Article 25.3)*, para. 3.15.

¹⁹ Panel Report, *US – Section 110(5) Copyright Act*, para. 6.95.

1.5.4 Minor exceptions doctrine

16. In *US – Section 110(5) Copyright Act*, the Panel addressed the question whether the "minor exceptions doctrine" in the context of copyrights applied under the TRIPS Agreement. The Panel decided first to examine to what extent this doctrine formed part of the Berne Convention (1971) *acquis* and second, to assess whether that doctrine had been incorporated into the TRIPS Agreement. With respect to the scope of the minor exceptions doctrine under the Berne Convention (1971), the Panel held:

"The General Report of the Brussels Conference of 1948 refers to 'religious ceremonies, military bands and the needs of the child and adult education' as examples of situations in respect of which minor exceptions may be provided. The Main Committee I Report of the Stockholm Conference of 1967 refers also to 'popularization' as one example. When these references are read in their proper context, it is evident that the given examples are of an illustrative character. ...

... On the basis of the information provided to us, we are not in a position to determine that the minor exceptions doctrine justifies only exclusively non-commercial use of works and that it may under no circumstances justify exceptions to uses with a more than negligible economic impact on copyright holders. On the other hand, non-commercial uses of works, e.g., in adult and child education, may reach a level that has a major economic impact on the right holder. At any rate, in our view, a non-commercial character of the use in question is not determinative provided that the exception contained in national law is indeed *minor*."²⁰

17. As the second step in its "minor exceptions analysis", the Panel examined to what extent this doctrine under the Berne Convention (1971) had been incorporated into the TRIPS Agreement. See the excerpt in paragraph 3 above.

1.6 Article 17 of the Berne Convention (1971) as incorporated in the TRIPS Agreement

1.6.1 Scope of Article 17

18. In *China – Intellectual Property Rights*, Article 17 of the Berne Convention (1971) was invoked as a defence to a claim of a violation of Article 5(1) of the Berne Convention (1971). Article 17 provides that the provisions of the Berne Convention cannot affect the rights of its members "to permit, to control, or to prohibit, by legislation or regulation, the circulation, presentation, or exhibition of any work or production in regard to which the competent authority may find it necessary to exercise that right." With respect to the scope of Article 17, the Panel in *China – Intellectual Property Rights* concluded as follows:

"The right of a government 'to control, or to prohibit' the 'circulation, presentation, or exhibition' of any work or production clearly includes censorship for reasons of public order."²¹ ...

The Panel accepts that the three terms 'circulation, presentation, or exhibition' are not necessarily an exhaustive list of the forms of exploitation of works covered by Article 17. However, a noticeable feature of these three terms is that they do not correspond to the terms used to define the substantive rights granted by the Berne Convention (1971), although they may be included within some of those rights²² or

²⁰ Panel Report, *US – Section 110(5) Copyright Act*, paras. 6.57-6.58.

²¹ (*footnote original*) Even the right of a government "to permit" the circulation, presentation, or exhibition of a work could be exercised for reasons of public order, such as the publication or broadcast by the police of a photograph of a wanted criminal: see Masouyé, C., *Guide to the Berne Convention*, (World Intellectual Property Organization, 1978) ("WIPO Guide to the Berne Convention"), para. 17.3. The Panel notes that, as stated in its preface, this Guide is not intended to be an authentic interpretation of the provisions of the Berne Convention since such an interpretation is not within the competence of the International Bureau of WIPO.

²² (*footnote original*) For example, the term "la représentation" is expressly included in the French text in Article 17 as well as in Articles 11(1)(i) (ii), 14(1)(ii) and 14*bis*(2)(b) in the phrase "la représentation et l'exécution", rendered as "performance" in the English text.

they may refer to acts incidental to the exercise of some of those rights.²³ The word 'exhibition' is not even used in the provisions setting out the substantive rights granted by the Convention.²⁴ Therefore, it cannot be inferred that Article 17 authorizes the denial of all copyright protection in any work."²⁵

19. The Panel in *China – Intellectual Property Rights*, further elaborated on the scope of Article 17 as follows:

"A government's right to permit, to control, or to prohibit the circulation, presentation, or exhibition of a work may interfere with the exercise of certain rights with respect to a protected work by the copyright owner or a third party authorized by the copyright owner. However, there is no reason to suppose that censorship will eliminate those rights entirely with respect to a particular work.

With respect to those rights that are granted by the Berne Convention (1971), China is unable to explain why Article 4(1) of its Copyright Law provides for the complete denial of their protection with respect to particular works. Without prejudice to the range of rights that are granted by the Berne Convention (1971), it suffices to note that they are mostly exclusive rights of authorizing certain acts with respect to protected works. An exclusive right of authorizing necessarily entails the right to prevent others from carrying out the relevant acts with respect to protected works. China is unable to explain why censorship interferes with copyright owners' rights to prevent third parties from exploiting prohibited works.

...

The Panel notes that copyright and government censorship address different rights and interests. Copyright protects private rights, as reflected in the fourth recital of the preamble to the TRIPS Agreement, whilst government censorship addresses public interests."²⁶

1.7 Article 20 of the Berne Convention (1971) as incorporated in the TRIPS Agreement

20. In *US – Section 110(5) Copyright Act*, the Panel declined to address Article 20 of the Berne Convention (1971), because – contrary to the European Communities' argument – the United States was not claiming that the TRIPS Agreement authorizes exceptions inconsistent with the Berne Convention (1971):

"In regard to the argument of the European Communities that the US interpretation of Article 13 is incompatible with Article 20 of the Berne Convention (1971) and Article 2.2 of the TRIPS Agreement because it treats Article 13 of the TRIPS Agreement as providing a basis for exceptions that would be inconsistent with those permitted under the Berne Convention (1971), we note that the United States is not arguing this but rather that Article 13 clarifies and articulates the standards applicable to minor exceptions under the Berne Convention (1971). Since the EC arguments in relation to these provisions would only be relevant if a finding that would involve inconsistency with the Berne Convention (1971) were being advocated, we do not feel it is necessary to examine them further."²⁷

²³ (footnote original) For example, the word "la circulation" used in Article 17 of the French text is also used in provisions on possible limitations on the rights of translation and reproduction in Articles I(4), II(6), II(8), III(2)(b), III(4)(d), III(6) and IV(5) of the Appendix, rendered as "circulation" in the English text in Articles II(8) and III(4)(d) of the Appendix and "distributed" or "distribution" elsewhere.

²⁴ (footnote original) The word "exhibition" in Article 17 is also used in the definition of "published works" in Article 3(3) which provides *inter alia* that "the exhibition of a work of art ... shall not constitute publication". Article 3(3) of the French text also uses the word "la représentation" of certain categories of works for the same purpose.

²⁵ Panel Report, *China – Intellectual Property Rights*, paras. 7.126-7.127.

²⁶ Panel Report, *China – Intellectual Property Rights*, paras. 7.132-7.133, and 7.135.

²⁷ Panel Report, *US – Section 110(5) Copyright Act*, para. 6.82.

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