

CONFERENCE ON THE WTO RULING AGAINST THE US COPYRIGHT ACT: A CALL FROM EUROPEAN AUTHORS TO THE COMMUNITY RIGHT HOLDERS TO JOIN FORCES

Cannes, 25 January 2004

Subject: *“The follow-up of the WTO ruling and the role of the European Institutions”*

1. The EU/US temporary arrangement

- ? Notified on 23 June to the WTO
- ? Covers a 3-year period, starting from the end of the Reasonable Period of Time: 21 December 2001 - 21 December 2004
- ? Consists of a lump-sum, \$3.3 million payment from US to GESAC for the purposes of setting up a fund for the promotion of authors' rights and the provision of general assistance to EU music authors (the payment offsets the nullification and impairment of benefits suffered by the EU over that period, as determined by the Arbitrators)
- ? US remain under the obligation to comply with the WTO ruling. If no compliance, the EU and the US will resume talks at least 45 days prior to the end of the 3-year period (that is, beginning of November 2004) with a view to finding a solution

2. Compliance

- ? The EU/US temporary arrangement is just an interim solution to the dispute. The end goal is compliance with the WTO ruling.
- ? In this case, compliance would seem to entail the amendment of Section 110(5) of US Copyright Act; in particular, the withdrawal of its sub-paragraph B (the 'business exemption').

[The 'business exemption' was introduced in 1998, sponsored by Rep. Sensenbrenner (R-WI; he is currently the Chairman of the House Judiciary Committee, competent for intellectual property matters). This amendment changed the scope of the pre-existing

'homestyle exemption' (the subject-matter of the EU TBR investigation). Sub-paragraph A of Section 110(5) was not considered TRIPS inconsistent by the panel, account taken of its limited scope after 1998. US compliance should not lead to a return to the pre-1998 situation]

- ? As of today, no real prospects of amendment. It would be important to build pressure from the inside –US Congress would more easily listen to the demands of domestic constituencies. EU collecting societies should consider co-operation with US societies with a view to mounting lobbying/public campaigns in the US

3. What will happen after 21 December 2004

a) Countermeasures

- ? Last resort in WTO disputes: only if all other alternatives fail.
- ? On 7 January 2002, the EU requested the authorisation to suspend TRIPs obligations vis-à-vis the US. The countermeasures would consist in the levying of a special fee to US right holders that apply for action by the EU customs authorities to block counterfeit or pirated goods at the EU border (however, the measure would be limited to “copyright goods”: CDs, DVDs, Software, etc...).
- ? Because of the low level of overgone royalties, as determined by the WTO Arbitrators, the countermeasures would have a limited economic impact (especially if compared with other cases: FSC). However, we should not underestimate their political/psychological value.

b) Agreement

- ? The EU is interested in inducing compliance: and there seems to be no other way to comply than to amend Section 110(5) of the US Copyright Act.
- ? For that reason, a further temporary agreement is far from being the preferred option. Nevertheless, it ought not to be excluded, provided that strict conditions are respected (as the US cannot postpone compliance forever).

Not necessarily along the lines of existing arrangement. The WTO Agreements foresee that a breach of an obligation may be compensated with concessions in other fields. For instance, it might be possible to envisage an increase of some specific copyright protection that would offset the losses due to Section 110(5).

Annex

Background

1. Chronology of the Copyright dispute

- 21 April 1997** – TBR Complaint lodged by IMRO, with the unanimous support of GESAC members, on US ‘homestyle exemption’
- 3 February 1998** – TBR Investigation Report confirms TRIPS violations
- 27 October 1998** – Amendment to US Copyright Act – ‘business exemption’
- 26 January 1999** – Request for consultations
- 27 July 2000** – Adoption of panel report – subparagraph B condemned
- 23 July 2001** – 1st Bilateral Understanding EU/US: agreement to explore possible settlement of the dispute, arbitration on nullification and impairment
- 27 July 2001** – End of (original) Reasonable Period of Time. RPT extended
- 9 November 2001** – Award of the Arbitrators (\$1,100,000 per year)
- 18 December 2001** – 2nd Bilateral Understanding EU/US: agreement on the principle of financial contribution
- 20 December 2001** – End of extended Reasonable Period of Time
- 7 January 2002** – Request for authorisation to adopt countermeasures. (US requests arbitration: suspended)
- 23 June 2003** – Notification to WTO of mutually satisfactory temporary arrangement
- 3 September 2003** – Payment
- 21 December 2004** – End of 3-year period covered by temporary arrangement

2. The TBR investigation and the Panel Report

In the framework of a procedure under the EC Trade Barriers Regulation, the EC investigated the compatibility with the TRIPS Agreement of the “homestyle exemption” contained in section 110(5) of the Copyright Act.

Section 110(5) of the 1976 US Copyright Act exempted under certain conditions US restaurants, bars, shops and other public places from obtaining a licence and paying fees for the playing of radio or TV music on their premises.

The TBR report concluded that Section 110(5) was contrary to Article 9.1 of the TRIPs Agreement (incorporating the author's rights under the 1976 Berne Convention on the Protection of Literary and Artistic Works), which provides that the communication to the public of musical works needs prior authorisation of the author and the subsequent paying of a licence fee (as is the case in all EC Member States).

Subsequently, as a result of intense lobbying by the influential National Restaurant Association and the National Federation of Independent Businesses, Section 110(5) was amended. The "homestyle exemption" was supplemented with a far-reaching "business exemption", which became sub-paragraph B of Section 110(5). With this amendment, the original "homestyle exemption", which was the object of the TBR investigation, was reduced in scope to a rather marginal exemption, as follows:

- (a) Subparagraph A now exempts businesses playing only "dramatic" music (*i.e.* operas and musicals) on non-professional or "homestyle" equipment. The coverage of this subparagraph is very limited: operas and musicals are not commonly played by US radio or TV stations.
- (b) Subparagraph B exempts businesses with regard to the public communication of "nondramatic music" (all kinds of songs) on radio or TV, as long as they meet the generous surface or equipment criteria set forth in the legislation. The economic impact of this subparagraph is said to be very important, as it covers the playing of songs through radio and TV in a majority of commercial establishments in the US.

The EC challenged Section 110(5), as amended, before the World Trade Organisation. The Panel acknowledged that the TRIPs Agreement provides for limited exceptions or limitations to the authors' exclusive rights (through its Article 13) but it found that subparagraph B, because of its major economic impact (it represents 99% of the statute's coverage), was inconsistent with Articles 11bis(1) and 11(1)(ii) of the Berne Convention on the Protection of Literary and Artistic Rights as incorporated into the TRIPs Agreement by Article 9.1 of that agreement. The US did not appeal the report, and it was adopted by the DSB on 27 July 2001.

DEFENSIVE POINTS

Issues not directly linked to WTO case

EU collecting societies (in particular IMRO) have complained that the Arbitrators Award was too low, among other things because it did not take into account the “real” EU share of the US music market (IMRO would claim that 25% of music broadcast in the US is of EU-origin; US collecting societies estimates are significantly lower – 5-10%).

- ? An issue that came to the attention of the Commission during the WTO procedure relates to the discrepancies about the EU share of the US music market. According to some views, the EU share is bigger than what comes out of the actual royalty distributions. This is a matter that goes beyond the scope of intellectual property protection treaties, and that falls squarely within the ambit of music rights collective management. Therefore, it is essentially a private matter, on which the Commission has no particular views and which cannot be considered by the WTO either.

- ? Quite aside from this issue, the Commission thinks that EU collecting societies, together with US societies, could also consider practical means to increase efficiency of royalty collection in the US, in anticipation of a legislative change.

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