

COMMISSION DECISION

of 11 December 1998

under the provisions of Council Regulation (EC) No 3286/94 concerning section 110(5) of the Copyright Act of the United States of America

(notified under document number C(1998) 4033)

(98/731/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EC) No 3286/94 of 22 December 1994 laying down Community procedures in the field of the common commercial policy in order to ensure the exercise of the Community's right under international trade rules, in particular those established under the auspices of the World Trade Organisation ⁽¹⁾, as amended by Regulation (EC) No 356/95 ⁽²⁾, and in particular Articles 13 and 14 thereof,

After consulting the Advisory Committee,

Whereas:

A. PROCEDURE

- (1) On 21 April 1997 the Commission received a complaint pursuant to Article 4 of Council Regulation (EC) No 3286/94 (hereafter 'the Regulation'). The complaint was lodged by the Irish Music Rights Organisation (IMRO) with the unanimous support of the Groupement européen des sociétés d'auteurs et compositeurs (GESAC).
- (2) The complainant alleged that Section 110(5) of the 1976 Copyright Act of the United States of America is inconsistent with several provisions of the Agreement establishing the World Trade Organisation (hereafter 'the WTO Agreement') and its annexes. On that basis the complainant asked the Commission to take the necessary actions to convince the United States of America to repeal this measure.
- (3) The complaint contained sufficient *prima facie* evidence to justify the initiation of a Community examination procedure pursuant to Article 8 of the

Regulation. Consequently, such procedure was initiated on 11 June 1997 ⁽³⁾.

- (4) Following the initiation of the examination procedure the Commission conducted an in-depth legal and factual investigation into Section 110(5) of the US Copyright Act as well as into the amendments to the statute as discussed in US Congress at the time of the investigation and enacted meanwhile. Based on the findings of this investigation the Commission reached the conclusions which are indicated below.

B. FINDINGS REGARDING THE EXISTENCE OF AN OBSTACLE TO TRADE

- (5) Although under the US Copyright Act the right holder of a musical work has the exclusive right 'to perform the copyrighted work publicly', Section 110(5) of the US Copyright Act exempts certain public performances from protection. Before the recent addition of a new subparagraph widening the scope of the exemption (see further under item D) it read as follows: 'Notwithstanding the provisions of Section 106, the following are not infringements of copyright: (...) communication or transmission embodying a performance or display of a work by the public reception of the transmission on a single receiving apparatus of a kind commonly used in private homes, unless (a) a direct charge is made to see or hear the transmission or (b) the transmission thus received is further retransmitted to the public'. The exemption covers the use of a radio or television set 'of a type commonly found in private homes' in a shop, a bar, a restaurant or any other place frequented by the public. As a result of its vague and ambiguous statutory language, Section 110(5) has given rise to a very broad interpretation of what is commonly referred to as the 'homestyle exemption'. For example, it has been held that the exemption can also apply to companies operating large chains of stores throughout the country and using the playing of music in stores as part of their commercial policy ⁽⁴⁾.

⁽³⁾ OJ C 177, 11. 6. 1997, p. 5.

⁽⁴⁾ See BMI v. Edison Bros Stores Inc. United States Court of Appeals for the Eighth Circuit, No 91-2115 and BMI v. Claire's Boutiques United States Court of Appeals for the Seventh Circuit, No 91-1232.

⁽¹⁾ OJ L 349, 31. 12. 1994, p. 71.

⁽²⁾ OJ L 41, 23. 2. 1995, p. 3.

- (6) Under Article 9(1) of the WTO Agreement on Trade-Related Intellectual Property Rights (hereafter 'TRIPs'), members must comply with Articles 1 to 21 of the Berne Convention for the Protection of Literary and Artistic Works (hereafter the 'Berne Convention'). Article 11 *bis*(1) of the Berne Convention, as revised by the Paris Act of 1971, grants the right holders of literary and artistic works (which include musical works) the exclusive right of authorising not only the broadcasting and other wireless communication of their works, but also the public communication of a broadcast of their works by loudspeaker or analogous instrument. By permitting qualifying locations to use music without being licensed by the right holders and without payment of royalties, the US exemption deprives right holders of the protection to which they are entitled under Article 11 *bis*(1)(iii) when broadcasts of their works are publicly communicated by loudspeakers or analogous instruments and under Article 11(1)(ii) when direct cable transmissions of their works are publicly communicated by such instruments. Article 11 *bis*(1)(iii) or Article 11(1)(ii) clearly cover situations where broadcast music or music transmitted by cable is further transmitted to the public by a radio or a television apparatus (such as under the homestyle exemption) or any other means since it addresses the issue of public communication of broadcast works and not the technical specifications of the means used for that purpose.
- (7) Article 11 *bis*(2) of the Berne Convention provides that, while countries may place conditions on the exercise of the exclusive rights set out in Article 11 *bis*(1), such conditions may not be prejudicial to the right holders' right to obtain equitable remuneration. Section 110(5) of the US Copyright Act is prejudicial to the right holders' right to obtain such remuneration, as it deprives them of all remuneration in respect of the use of their works in situations covered by the homestyle exemption.
- (8) The Commission also reviewed the homestyle exemption from the point of view of 'minor reservations', a category of exceptions which might be considered to apply on the exercise of the exclusive rights under the Berne Convention, but concluded that, even where 'minor reservations' were applicable to the exclusive rights set out in Article 11 *bis*(1)(iii) and (1)(ii), it would still remain that the homestyle exemption is clearly not a minor reservation. The exemption is widely applied on a commercial basis through the US and the economic losses incurred by Community right-holders are important, ranging between 13 to 24 % of the US performing rights organisations' annual distributions to Community collecting societies representing composers and arrangers of music, lyricists and publishers.
- (9) Since Article 9(1) of TRIPs imposes a mandatory obligation on WTO members to comply with Articles 1 to 21 of the Berne Convention, a WTO member is in breach of its obligations under the TRIPs Agreement where it fails to comply with the Berne Convention. Therefore, since Section 110(5) of the US Copyright Act contravenes Article 11 *bis*(1), *bis*(2) and (1) of the Berne Convention, Section 110(5) of the US Copyright Act is in breach of Article 9(1) of TRIPs. Also, the Commission holds the opinion that Article 13 of TRIPs cannot be invoked by the United States to justify the homestyle exemption, as this provision limits the scope of existing exemptions under the Berne Convention to 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. It does not allow additional exemptions to the rights protected under the Berne Convention.
- (10) Under these circumstances the Commission considers that the complainant's allegations are well-founded and that Section 110(5) of the US Copyright Act constitutes an obstacle to trade within the meaning of Article 2(1) of the Regulation, that is 'a practice adopted or maintained by a third country in respect of which international trade rules establish a right of action'.
- (11) The Commission none the less considers that reference to the above legal bases does not rule out recourse to any other pertinent provision of the WTO Agreement and of the Agreements annexed to it, which could be of use in procedures before the WTO.

C. FINDINGS REGARDING ADVERSE TRADE EFFECTS

- (12) Section 110(5) of the US Copyright Act curtails Community right holders in the full and normal exercise of their exclusive rights under the Berne Convention and the TRIPs Agreement. The right

holders are deprived of the possibility to license the performing right of their work (either directly or through collecting societies) and of the possibility to obtain remuneration for the communication of their works to the public.

- (13) The most direct effect of Section 110(5) is that it deprives right holders of their remuneration for certain communications to the public. Estimations made by the Commission reveal that the direct loss of licensing income to Community right holders for performing rights in music (i.e. composers and arrangers of music, lyricists and music publishers) resulting from the application of Section 110(5) amounts to between USD 3,8 and 6,8 million a year. These amounts represent 13 to 24 % of the US performing rights organisations' annual distributions to Community collecting societies representing these three categories of right holders. This shows that the losses caused by the homestyle exemption to the Community right holders are important.
- (14) The homestyle exemption also entails indirect losses to the Community right holders as it acts as a disincentive to the US performing right organisations to effectively and efficiently license bars, shops, restaurants and others in markets where no exemption exists and leads to a reduction of the efficiency of US organisations when trying to license such venues. The result of the very existence of Section 110(5) is that even those venues which clearly do not qualify for the exemption are not always properly licensed.
- (15) Further indirect losses are also caused by the fact that the homestyle exemption has acted as a catalyst for negative public and private attitudes towards licensing of non-dramatical musical works in the US. Powerful lobbies of music users have systematically (and successfully) resisted efforts by the collecting societies to effectively license and to collect reasonable fees for the communication of music to the public.
- (16) As a result of Section 110(5), the prospective revenue a right holder can expect from the licensing of his work in the US is less than it should be. This reduced prospective income may

have a negative impact on the stimulus to export music to the US.

- (17) Under these circumstances the Commission considers that the complainant's allegations are well-founded and that Section 110(5) of the US Copyright Act is causing adverse trade effects within the meaning of Article 2(4) of the Regulation.

D. RECENT AMENDMENTS TO SECTION 110(5) OF THE US COPYRIGHT ACT

- (18) While the Commission was investigating the homestyle exemption, US Congress was examining a bill amending Section 110(5) of the US Copyright Act in view of widening its scope.
- (19) On 6 and 7 October 1998, the bill, entitled 'Fairness in Music Licensing Act', was adopted by, respectively, the US House of Representatives and the US Senate. The bill consists of adding a new subparagraph B to Section 110(5) of the US Copyright Act which provides for a further exception to the rightholders' exclusive right to authorise public communication of their works, while the homestyle exemption remains unchanged under subparagraph A. The new subparagraph B now applies to a much wider range of beneficiaries, namely eating, drinking and other commercial establishments provided that they fulfil a certain number of conditions, mainly with regard to the surface of the establishment and the number of loudspeakers used. It covers the use of any type of audiovisual device, and is thus not limited to the use of a 'homestyle' apparatus only.
- (20) The bill was signed by the President of the United States on 27 October 1998, to enter into force 90 days after enactment. Since this means that, from a legal point of view, the bill is now part of the US legal order, although its entry into effect has been delayed for 90 days, it can already be the object of a dispute settlement procedure under WTO.
- (21) From a legal point of view, the new paragraph B of Section 110(5) also deprives right holders to the protection they are entitled under Articles 11 *bis* (1)(iii) and 11(1)(ii) of the Berne Convention when broadcasts of their works or cable transmissions of their works are communicated to the

public. Therefore, the Commission's analysis of the 1976 version of Section 110(5) of the US Copyright Act (now under subparagraph A of the section) fully applies to the new version of the Statute, which is thus equally in breach of the Berne Convention and the TRIPs Agreement.

- (22) As far as the adverse trade effects are concerned, it is clear that they will be seriously amplified by the widening of the Statute's scope in terms of beneficiaries and type of audiovisual devices used to perform music in public establishments. Whereas the Commission estimated that the 1976 homestyle exemption applied to between 20 and 35 % of US business establishments categorised as small business by US Government and employing fewer than 20 persons, and to between 6 and 12 % of US business of the same category employing more than 20 persons, the US collecting societies estimate that, only where eating and drinking business is concerned, the new Bill would already exempt 70 % of all US bars and restaurants, as they fall below the surface thresholds under the new Section 110(5)B.

E. COMMUNITY INTEREST

- (23) Ensuring that WTO partners fully comply with their obligations is of the utmost importance for the Community which has committed itself to the same obligations. Therefore, the Community should immediately challenge Section 110(5) of the US Copyright Act.

F. CONCLUSIONS AND MEASURES TO BE TAKEN

- (24) Meetings have been held and letters have been exchanged with the relevant US authorities to discuss this matter further and aimed at finding an

amicable solution to the problems concerning the licensing of music works but the US authorities have not forwarded any proposals in view of such a solution.

- (25) In these circumstances, it appears that the interests of the Community call for initiation of WTO dispute settlement proceedings,

HAS DECIDED AS FOLLOWS:

Article 1

1. Section 110(5) of the Copyright Act of the United States of America appears to be inconsistent with the obligations of that country under the Marrakesh Agreement Establishing the World Trade Organisation and constitutes an 'obstacle to trade' within the meaning of Article 2(1) of Regulation (EC) No 3286/94.

2. The Community, will commence action against the United States of America under the Understanding on the Rules and Procedures for the Settlement of Disputes and other relevant WTO provisions with a view to securing removal of the obstacle to trade.

Article 2

This Decision shall apply from the date of its publication in the *Official Journal of the European Communities*.

Done at Brussels, 11 December 1998.

For the Commission

Leon BRITTAN

Vice-President