

**UNITED STATES – SECTION 110(5)
OF THE US COPYRIGHT ACT**

*Arbitration
under Article 21.3(c) of the
Understanding on Rules and Procedures
Governing the Settlement of Disputes*

Award of the Arbitrator
Julio Lacarte-Muró

I. Introduction

1. On 27 July 2000, the Dispute Settlement Body (the "DSB") adopted the Panel Report¹ in *United States – Section 110(5) of the US Copyright Act* ("*United States – Section 110(5)*"). On 24 August 2000, the United States informed the DSB, pursuant to Article 21.3 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU"), that it would implement the recommendations and rulings of the DSB in this dispute.² At the DSB meeting of 11 September 2000, the United States said that it would require a "reasonable period of time" to do so, under the terms of Article 21.3 of the DSU.³

2. In view of the impossibility to reach an agreement with the United States on the period of time required for the implementation of those recommendations and rulings, the European Communities and their member States (hereinafter referred to as the "European Communities") requested that such period be determined by binding arbitration pursuant to Article 21.3(c) of the DSU.⁴

3. By joint letter of 22 November 2000, the European Communities and the United States notified the DSB that they had agreed that the duration of the "reasonable period of time" for implementation should be determined through binding arbitration, under the terms of Article 21.3(c) of the DSU, and that I should act as Arbitrator. The parties also indicated in that letter that they had agreed to extend the time-period for the arbitration, fixed at 90 days from the date of adoption by the DSB by Article 21.3(c) of the DSU, until 26 January 2001.⁵ Notwithstanding this extension of the time-period, the parties stated that the arbitration award would be deemed to be an award made under Article 21.3(c) of the DSU. My acceptance of this designation as Arbitrator was conveyed to the parties by letter of 23 November 2000.

4. Written submissions were received from the European Communities and the United States on 1 December 2000, and an oral hearing was held on 7 December 2000.

¹WT/DS160/R.

²Communication from the United States, WT/DS160/9.

³WT/DSB/M/88, para. 2.

⁴WT/DS160/10.

⁵WT/DS160/11.

II. Arguments of the Parties

A. *European Communities*

5. In the view of the European Communities, implementation in this dispute requires a "repeal" of Section 110(5)(B) of the Copyright Act, as well as a "modest adaptation" to Section 110(5)(A) of that Act. The European Communities considers that given the "simplicity" of these legislative measures and the "potential" of the United States legislative system to enact legislation expeditiously, implementation can be achieved in a period of time significantly shorter than the indicative period of 15 months set out in Article 21.3(c) of the DSU. The European Communities argues that the reasonable period of time for implementation of the DSB's recommendations and rulings in this dispute is 10 months from the date of adoption of the Panel Report on 27 July 2000, which concludes on 27 May 2001.

6. According to the European Communities, past arbitration awards under Article 21.3(c) make clear that the "reasonable period of time" for implementation is the shortest period possible within the legal system of the Member to implement the recommendations and rulings of the DSB. As implementation in this dispute will be done by legislative means, it is therefore "instructive" to note that the "reasonable periods of time" for implementation in other disputes involving legislative action range from 11 months and two weeks to 15 months and one week.

7. With regard to the United States legislative process, the European Communities notes the following. First, there exists no specific structural time-frame in the United States legislative system. In the United States House of Representatives (the "House"), a draft bill on the subject of copyright would normally be examined by the Judiciary Committee. There is no minimum time limit for this examination, nor any constitutional or regulatory obligation to consult certain parties within a predetermined time-frame. The only fixed time-frame in the House is the rule according to which a draft bill may not be considered in the House until the third calendar day on which the committee report has been available to the Members of the House. In the United States Senate, the time-frame at the similar stage of the procedure is even shorter. Thus, as there are no constitutionally fixed time-frames for initiating and completing each stage of the legislative process, there is no limit on the speed at which a legislative action to comply with WTO obligations can be undertaken.

8. The European Communities refers to a number of recent examples of intellectual property legislation under the United States legislative process, as an indication of the normal time-period in which this type of legislation is enacted. In particular, the European Communities cites three examples of legislation that was enacted in less than two months.

9. The European Communities also emphasizes that implementation of the recommendations and rulings in this dispute is "rather straight forward". The European Communities notes that "highly complex" pieces of legislation have been enacted under the United States legislative process in very short periods of time, ranging from 28 to 113 days.

10. In conclusion, the European Communities considers that the reasonable period of time for implementation in this dispute should not exceed 10 months from the date of adoption of the Panel Report, which would be 27 May 2001.

B. *United States*

11. The United States submits that the reasonable period of time for implementation of the recommendations and rulings of the DSB in this dispute is a period of "at least 15 months", and that a period that concludes upon the adjournment of the first session of the 107th Congress would be "even more prudent".

12. The United States bases its proposal on the language of Article 21.3(c) as well as past arbitration awards under this provision. Article 21.3(c) states that the "reasonable period of time" "should not exceed 15 months from the date of the adoption of a panel or Appellate Body report." However, "that time may be shorter or longer, depending upon the particular circumstances." The relevant "particular circumstances" are: the legal form of implementation (legislative or regulatory), the technical complexity of the necessary measures the Member must draft, adopt and implement, and the period of time in which the implementing Member can achieve the proposed form of implementation in accordance with its system of government. With regard to the last point, past arbitrators have stressed that the "reasonable period of time" for implementation is the shortest period possible within the normal law-making procedures of the implementing Member.

13. The United States submits that the "particular circumstances" of this dispute require that the "reasonable period of time" be "at least 15 months", or until the adjournment of the first session of the 107th Congress. In support of its proposal, the United States explains, as set out in the paragraphs below, why this period is the shortest period possible within its normal law-making procedures, based on the legislative process as described by the United States and the schedule under which the next Congress will be operating.

14. With regard to its legislative process, the United States notes that securing the enactment of legislation is a "complex and lengthy" process. The power to legislate is vested in the United States Congress, which has two chambers, the House and the Senate. The first step in the legislative process

is for a bill to be introduced in the House or the Senate by a member of Congress. This introduction may be initiated by the Executive Branch.

15. After introduction, as a general rule, a bill is referred to a standing committee or committees having jurisdiction over the subject matter of that bill. In the House, a bill may be referred to a number of committees simultaneously, while in the Senate a bill is more commonly referred to the committee with primary subject matter jurisdiction and then may be sequentially referred to other committees. Most bills are referred by the committee with jurisdiction to a subcommittee for consideration.

16. In the House, the subcommittee normally schedules public hearings to obtain the views of proponents and opponents of a bill, including government agencies, experts, interested organizations and individuals. There is no specified time-frame for committee consideration. When the hearings are completed, the subcommittee usually meets to "mark-up" the bill, i.e., to make changes and amendments prior to deciding whether to recommend the bill to the full committee. If the subcommittee votes to recommend, it is called "reporting". The subcommittee may also suggest that a bill be "tabled" (postponed indefinitely).

17. After receiving the subcommittee's report (recommendation), the full committee may conduct further study and hearings. There will again be a mark-up process. The full committee then votes whether to report the bill, either as originally introduced without amendment, or as revised, to the full House. If the full committee votes to report a bill to the House, a committee report is written by the committee's staff. An approved bill is "reported back" to the House.

18. The timing of consideration of legislation on the House floor is determined as a general rule by the Speaker of the House and the majority political party leader, who may place the bill on the calendar for House debate. The House Rules Committee generally recommends the amount of time that will be allocated for debate and whether amendments may be offered. During the debate process, the bill is read in detail and there is opportunity for members of Congress to offer further amendments. After voting on amendments, the House immediately votes on the bill itself with any adopted amendments. The bill can also be returned to the committee that reported it. If passed, the bill must be referred to the Senate, which may or may not have concurrent pending legislation.

19. While the Senate has similar procedures for consideration of legislation by relevant committees, there are significant differences in the way the Senate considers proposed legislation. The Senate functions in a less rule-driven manner than the House, and scheduling and floor consideration is generally decided by consensus. Unlike the House, where debate is strictly controlled, in the Senate debate is rarely restricted. The Senate does not have a Rules Committee to

govern floor consideration. Rather, there are complex rules mandating unanimous consent for Senate floor consideration.

20. Most bills are unlikely to be passed by the Senate exactly as referred by the House. The Senate may amend a bill or pass its own similar legislation. Therefore, a conference committee is organized to reconcile differences between the House and Senate versions. Conference committee members are appointed by each chamber and given specific instructions, which may be revised every 21 days. If the conference committee cannot reach agreement, the bill dies. If the conference committee reaches agreement on a single bill, a conference report is prepared describing the committee members' rationale for changes. The conference report must be approved by both chambers, in identical form, or the revised legislation dies.

21. After the bill proposed by the conference committee is approved by both chambers, it is sent to the President for approval. Only after presidential approval does proposed legislation become law.

22. The United States also emphasizes the importance of the Congressional schedule for the process. The Constitution mandates only that Congress meet "at least once in every year" and that it convene on 3 January, unless another date is chosen. A Congress lasts two years, and meets in two sessions of one year each, beginning in January. Accordingly, the earliest date a bill can be introduced is January. The adjournment date varies, largely depending on whether it is an election year. In an election year, Congress may adjourn in October, but in a non-election year it is typical for Congress to adjourn in November or December.

23. With regard to the Congressional schedule for 2001, the United States makes the following points. As a result of the 7 November 2000 elections, a new President and executive administration and a new Congress will have to address this issue. The new President will be sworn in on 20 January 2001. Since any legislation proposed by the Executive Branch will have to be approved by a new administration prior to its transmittal to Congress, it is unreasonable to expect that legislation would be transmitted to Congress before March or April 2001 at the earliest.

24. In any event, while the new Congress will officially be in session on 3 January, the usual business during at least the first month of Congress is to choose committee chairpersons and members, fill leadership posts, and address other administrative concerns. The new Congress is not likely to even begin serious consideration of legislation until mid to late February or early March of 2001.

25. In addition, the United States notes that other factors, such as the large volume of legislation introduced at the beginning of every Congress, and the inherent "myriad opportunities" for delay, create complexity and uncertainty in the United States legislative process.

26. For these reasons, the United States requests that it be given "at least 15 months" from the date of adoption of the Panel Report on 27 July 2000, and preferably until the adjournment of the first session of the 107th Congress, as a "reasonable period of time" for implementation. In the view of the United States, a period of "at least 15 months" is also consistent with previous arbitration awards under Article 21.3(c) involving implementation through legislative means.

III. Reasonable Period of Time

27. The United States has said that it will comply with the recommendations and rulings of the DSB in *United States – Section 110(5)*, but has requested a "reasonable period of time" under Article 21.3 of the DSU in which to do so. As the duration of the "reasonable period of time" in this case has not been agreed by the parties, they have requested that I determine this period of time through binding arbitration under Article 21.3(c) of the DSU. Thus, the issue to be resolved in this arbitration is the following: what is the "reasonable period of time" for implementation of the recommendations and rulings of the DSB in *United States – Section 110(5)*?

28. My mandate in this arbitration is governed by Article 21.3(c) of the DSU. Article 21.3(c) provides that when the "reasonable period of time" is determined through arbitration:

... a guideline for the arbitrator should be that the reasonable period of time to implement panel or Appellate Body recommendations should not exceed 15 months from the date of adoption of a panel or Appellate Body report. However, that time may be shorter or longer, depending upon the particular circumstances.

29. Thus, when the "reasonable period of time" is determined through arbitration, the guideline for the arbitrator is that this period should not exceed 15 months from the date of adoption of the panel report and/or the Appellate Body report. This does not mean, however, that the arbitrator is obliged to grant 15 months in all cases. Article 21.3(c) makes clear that the "reasonable period of time" may be shorter or longer, depending upon the "particular circumstances". The applicable

"particular circumstances" thus influence the determination of what is a "reasonable period of time" for implementation, as has been stated by previous arbitrators.⁶

30. The meaning of Article 21.3(c) is elucidated by its context. Paragraph 1 of Article 21 provides:

Prompt compliance with recommendations or rulings of the DSB is essential in order to ensure effective resolution of disputes to the benefit of all Members. (emphasis added)

31. Thus, the DSU explicitly emphasizes the importance of "prompt" compliance. In recognition of this principle, previous arbitrators have established that the most important factor in establishing the length of the "reasonable period of time" is the following:

... it is clear that the reasonable period of time, as determined under Article 21.3(c), should be the *shortest period possible within the legal system of the Member* to implement the recommendations and rulings of the DSB.⁷ (emphasis added)

32. The "shortest period possible within the legal system of the Member" generally refers to the "normal legislative procedures", and does not require a Member to utilize an "*extraordinary* legislative procedure" in every case.⁸

33. With these principles in mind, I now turn to an examination of the arguments made by the European Communities and the United States in order to determine what would be a "reasonable period of time" in the "particular circumstances" of this dispute.

34. At the outset, I note that the parties agree that the means of implementation in this dispute is legislative, rather than administrative. I recall the statement of a past arbitrator that a legislative

⁶See, e.g., Award of the Arbitrator under Article 21.3(c) of the DSU, *Chile – Taxes on Alcoholic Beverages*, WT/DS87/15, WT/DS110/14, 23 May 2000, paras. 39, 41-45; Award of the Arbitrator under Article 21.3(c) of the DSU, *Canada – Certain Measures Affecting the Automotive Industry*, WT/DS139/12, WT/DS142/12, 4 October 2000, para. 39; Award of the Arbitrator under Article 21.3(c) of the DSU, *Canada – Patent Protection of Pharmaceutical Products* ("*Canada – Pharmaceutical Patents*"), WT/DS114/13, 18 August 2000, para. 48.

⁷Award of the Arbitrator under Article 21.3(c) of the DSU, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/15, WT/DS48/13, 29 May 1998, para. 26; quoted with approval in Award of the Arbitrator under Article 21.3(c) of the DSU, *Korea – Taxes on Alcoholic Beverages* ("*Korea – Alcoholic Beverages*"), WT/DS75/16, WT/DS84/14, 4 June 1999, para. 37.

⁸Award of the Arbitrator under Article 21.3(c) of the DSU, *Korea – Alcoholic Beverages*, *supra*, footnote 7, para. 42.

change is likely, absent evidence to the contrary, to be more time-consuming than an administrative change.⁹

35. In this arbitration, the United States originally proposed, in a communication to the DSB dated 24 August 2000, 15 months from the date of adoption of the Panel Report as a "reasonable period of time" for implementation.¹⁰ However, in these proceedings, the United States states that it is asking for "a period of time of at least 15 months or until the adjournment of the next session of Congress"¹¹ for implementation. The United States explains that implementation will likely not be completed until the end of the first session of the 107th Congress, which could end "as late as December 2001".¹² By my calculation, the United States appears to be asking for between 15 months and 17 months and four days, the latter period being the time between 27 July 2000, the date of adoption of the Panel Report, and the last day of December 2001, 31 December.

36. The United States emphasizes the following factors as relevant in support of its request for a reasonable period of time of "at least 15 months or until the adjournment of the next session of Congress": the "complexity" of the United States legislative procedure¹³; the Congressional schedule for 2001, including the fact that the new President and executive administration and the new Congress are not yet in place¹⁴; the "controversy" surrounding this legislation¹⁵; and the enormous volume of legislation introduced into each new Congress and the small percentage of legislation that is actually passed.¹⁶ The United States also notes the "myriad opportunities for delay inherent in the U.S. legislative process" as a factor that creates uncertainty as to the timing of any proposed legislation.¹⁷

37. The European Communities proposes that the "reasonable period of time" be set at 10 months from the date of adoption of the Panel Report. If this proposal were accepted, the "reasonable period of time" would conclude on 27 May 2001.¹⁸ In support of its proposal, the European Communities emphasizes the flexibility inherent in the United States legislative system, as evidenced by the absence of any mandatory time-frames in the system, and by the time-periods that have actually been

⁹Award of the Arbitrator under Article 21.3(c) of the DSU, *Canada – Pharmaceutical Patents*, *supra*, footnote 6, para. 49.

¹⁰Communication from the United States, WT/DS160/9.

¹¹United States' submission, para. 40.

¹²*Ibid.*, para. 2.

¹³*Ibid.*, paras. 7-15, 34.

¹⁴*Ibid.*, paras. 16-25, 32-33.

¹⁵*Ibid.*, para. 32.

¹⁶*Ibid.*, para. 21.

¹⁷*Ibid.*, para. 34.

¹⁸European Communities' submission, para. 39.

utilized by the United States Congress in enacting other legislation.¹⁹ In addition, the European Communities contends that the legislative changes required to bring the United States measure into conformity will be relatively simple.²⁰

38. With regard to the specific proposal of the United States, it seems to me that the United States has proposed a longer period of time than is reasonable for implementation in this case. In this regard, I note that the United States Congress appears to have flexibility with regard to the amount of time it takes to enact legislation. In response to questioning at the oral hearing, the United States acknowledged that Congress has "a fair amount of flexibility" in the scheduling of its work. Furthermore, the "vast majority" of steps in the legislative process, according to the United States, are not subject to mandatory time-frames. Thus, when the United States Congress wants to act promptly on a matter, its normal legislative procedures allow it the flexibility to do so. In my view, the time-period proposed by the United States does not take sufficient account of this flexibility.

39. As stated above, in implementing the DSB's recommendations and rulings, the implementing Member should act "promptly". For the legislation at issue here, Congress will be acting to bring the United States into compliance with its international obligations under the *WTO Agreement*. It seems to me that this is the type of matter for which Congress would try to comply with the international obligations of the United States as soon as possible, taking advantage of the flexibility that it has within its normal legislative procedures.

40. The United States emphasizes the enormous volume of legislation introduced every year and the small percentage of legislation that is actually passed.²¹ It may be true that a great deal of legislation is introduced every year, and that only a small percentage of it becomes law. However, I do not see how this should affect, in any substantial way, the obligations of the United States to implement the recommendations and rulings of the DSB in a particular dispute.

41. Furthermore, in my view, one of the factors listed by the United States as support for the period it has proposed is not relevant for the determination of a "reasonable period of time" for implementation. The United States refers to the "controversy" surrounding the legislation, and the "divergent views of stakeholders".²² However, as a past arbitrator has stated clearly:

¹⁹European Communities' submission, paras. 26-38.

²⁰*Ibid.*, para. 5.

²¹United States' submission, para. 21.

²²*Ibid.*, para. 32, footnote 37.

I see nothing in Article 21.3 to indicate that the supposed domestic "contentiousness" of a measure taken to comply with a WTO ruling should in any way be a factor to be considered in determining a "reasonable period of time" for implementation.²³

42. I agree. Thus, any argument as to the "controversy", in the sense of domestic "contentiousness", regarding the measure at issue is not relevant. In the oral hearing, the United States conceded that "controversy", in this sense, is not relevant, and stated that the "controversy" to which it referred was related to the *content* of the legislation to be enacted to effect implementation, that is, whether the legislation would simply repeal Section 110(5)(B) of the Copyright Act or whether some other approach would be utilized. While I agree that this is an important issue, I do not see how it will add any *additional* time to the legislative process, as the *content* of the legislation effecting implementation is precisely the issue that Congress will decide through its normal procedures.

43. For all of these reasons, it is my view that the period of time proposed by the United States, that is, "at least 15 months" or until the end of the next legislative session of the United States Congress, is not justified by the "particular circumstances" of this case.

44. The European Communities argues that 10 months is a "reasonable period of time" for implementation. The European Communities emphasized at the oral hearing that the United States Congress can act "extremely quickly" if it so chooses.

45. I have no doubt that it is true that the United States Congress can act quickly. However, I recall the statement by the arbitrator in *Korea – Alcoholic Beverages* that an implementing Member should not be forced to utilize "extraordinary legislative procedures" in every case. Rather, the Member's "normal legislative procedures" are, generally, to be used.²⁴ In this arbitration, while it is true that the United States Congress has flexibility in the timing and management of its legislative procedures, it is clear that the process involves a number of time-consuming and complex steps. Given that the Congressional schedule for 2001 begins, at the earliest, in January, a "reasonable period of time" of 10 months, ending on 27 May 2001, does not seem sufficient in the particular circumstances of this case.

46. Finally, I would like to conclude by making the following general observation regarding implementation of recommendations and rulings of the DSB. Article 21.3(c) makes clear that the

²³Award of the Arbitrator under Article 21.3(c) of the DSU, *Canada – Pharmaceutical Patents*, *supra*, footnote 6, para. 60.

²⁴Award of the Arbitrator under Article 21.3(c) of the DSU, *Korea – Alcoholic Beverages*, *supra*, footnote 7, para. 42.

"reasonable period of time" for implementation is measured as from the "date of adoption of a panel or Appellate Body report". I recall that Article 21.1 establishes that "prompt compliance" is essential in order to ensure effective resolution of disputes to the benefit of all Members. Clearly, timeliness is of the essence. Thus, an implementing Member must use the time after adoption of a panel and/or Appellate Body report to begin to implement the recommendations and rulings of the DSB. Arbitrators will scrutinize very carefully the actions an implementing Member takes in respect of implementation during the period after adoption of a panel and/or Appellate Body report and prior to any arbitration proceeding. If it is perceived by an arbitrator that an implementing Member has not adequately begun implementation after adoption so as to effect "prompt compliance", it is to be expected that the arbitrator will take this into account in determining the "reasonable period of time".

IV. The Award

47. I determine that the "reasonable period of time" for the United States to implement the recommendations and rulings of the DSB in this case is *12 months* from the date of adoption of the Panel Report by the DSB on 27 July 2000. The "reasonable period of time" will thus expire on *27 July 2001*.

Signed in the original at Geneva this 12th day of December 2000 by:

Julio Lacarte-Muró