Congress Geneva
Plenary Session 3

Question Q182: Database protection at national and international level

Tuesday, June 22, 2004 (11.20 - 12.30 and 14.00 - 14.45)

Chairman of the Session: Alberto BERCOVITZ (Spain)
Assistant to the Reporter General: Thierry CALAME (Switzerland)

Mr Alberto BERCOVITZ, Chairman of the Session (Spain), opens the Session. He introduces
the panel which consists of Mr Sergio ELLMANN, Chairman of the Working Committee (Argen-
tina), Ms Nicola DAGG, Co-Chairman of the Working Committee (UK), Mr Ingo MEITINGER,
Secretary of the Working Committee (Switzerland), and Mr Thierry CALAME, Assistant to the
Reporter General in charge of Q182 (Switzerland).

Mr CALAME introduces the Question. The topic has one of its origins in copyright law. However,
it goes beyond copyright law. One of the background aspects is the importance of databases in
today's society. In particular databases in electronic form are easy to copy. Therefore, the pro-
tection of databases has to be investigated and evaluated. Another aspect concerns the defini-
tion of the term "database" and the conditions for protection. Is the so-called "sweat of the brow"
sufficient to justify protection or does protection require more? Mr CALAME also refers to the
EU Database Directive which introduces a "sui generis" protection.

Mr ELLMANN gives an overview about the discussions in the Working Committee. The Working
Guidelines were intensively debated with active participation of all the Members. In particular,
the "sui generis" rights were debated in connection with certain limits which need to be set.
These limits may be different from what the EU has had in mind. Limits are important for the
introduction of a new kind of protection. One needs to find an equilibrium between the public
domain and the protection for the individual. He also mentions that for reasons of clarification
the term "or other proprietary rights" has been chosen for cases where the protection is not
called "sui generis".

Mr BERCOVITZ states that the English text of the Resolution is the working text. He then starts
the debate and invites the plenary to comment on paragraph 1.

Mr Trevor COOK (UK) comments that the Resolution is creating a new IPR which imposes on
the rest of the world to follow the European way. However, it still remains to be seen whether it
will at all work. Although the US do not know such a right nothing awful happened there. He
proposes as an amendment not to exclude the protection through unfair competition. Therefore
the words "by means of the "sui generis" right or other proprietary right" should be deleted.

Mr ELLMANN states that this was exactly what was highly debated in the Working Committee.
The Committee decided to have a proprietary right with certain limits to be described in the fol-
lowing paragraphs. The goal is to protect a product by means which have not been there be-
fore. It was felt that the protection through unfair competition rules would not be sufficient and
also depends on the circumstances of the specific case. On the contrary, a proprietary right has an effect *erga omnes*. However, the Committee still does not want to follow the EU in all aspects.

Mr CALAME adds that from the Group Reports it has become clear that the scope of unfair competition protection is too small and that a proprietary right is needed. This does not have to be the EU right, but should be seen as a step forward to effective protection.

Mr COOK agrees that these are fair comments. Nevertheless, one also has to take into consideration the unsatisfactory results of the EU.

Mr CALAME comments from his personal view that the Resolution should be proactive and not too flat.

Mr Kerry TOMLINSON (UK) supports the unamended wording of paragraph 1, since no problems have been seen so far with the "sui generis" right and since there is a clear need for a proprietary right.

Mr Erwin BASINSKI (USA) notes that a new bill has been presented in the US Congress which does attempt to define a "sui generis" right. It is questionable whether this bill will move on for various reasons. First of all there are constitutional problems as to what kind of a right would be created (misappropriation right). Secondly, patents and copyright have to be considered as well for providing protection. Thirdly, the limitations suggested in paragraph 9 need to be expanded to the use on the Internet.

Ms Kirsi-Marja PITKÄNEN (Finland) suggests that the Resolution should give guidelines for the protection first and then the recommendation of paragraph 1 so that this paragraph should be moved to the end.

Mr ELLMANN refers to the US comments. The goal of the Resolution is to harmonize the law. This might give one of the views in the US Congress a push. He also agrees with the Finnish proposal mentioned before.

Mr Clark LACKERT (USA) observes that what is the protection of databases can be found in Recital b). The protection does not refer to the data contained in the database.

Mr ELLMANN states that the answer will come later in the Resolution and that collecting data is not locked up (see paragraph 8, second sentence of the Resolution).

Mr BERCOVITZ puts the proposal of Mr COOK to delete the last words of paragraph 1 to a vote.

*This proposal is rejected by a great majority.*

Mr Michael PATTISON (Australia) comments on the word "substantial". He fears that the threshold for protection might be too high although protection should only be given to non-trivial databases. He suggests to replace "substantial" by "significant".

Mr CALAME states that this was also debated in the Working Committee. The feeling was that the threshold should not be too low and that some judicial guidance is needed with the help of further decisions to come. He proposes to leave the wording as it stands.

Mr PATTISON answers that the word "significant" would insure to exclude trivial databases from protection. He also mentions that "what is worth copying is worth protecting".

Mr ELLMANN notes that the word "substantial" is widely used. Paragraph 48 of the Advocate General's opinion talks about "substantial". He suggests to leave the word in. If the threshold is
low it may be interpreted as low. It should be left to the local courts to find out whether the threshold is met in a specific case.

Mr BERCOVITZ puts to a vote the proposal of Mr PATTISON to replace "substantial" by "significant".

_This proposal is defeated._

He invites the participants to make a written submission for further proposals.

Mr ELLMANN states that in fact the investment is protected.

Mr BERCOVITZ puts paragraph 1 to a vote.

_It is accepted by majority._

Mr BERCOVITZ then invites the audience for comments on paragraph 2. Since no comments are made, the paragraph is put to a vote.

_It is accepted._

Mr BERCOVITZ moves to paragraph 3.

Mr Ernesto O'FARRELL (Argentina) observes that the last sentence of this paragraph is not very clear in the term "comprehensive and may be followed by other legislators". Who is meant by "other legislators"?

Mr ELLMANN answers that this term was inserted during the discussions to make a stronger point as to whom the message should be addressed. One may change the word "legislator". However, reference should be made to these people.

Mr BERCOVITZ puts the proposal to delete the words "and may be followed by other legislators" to a vote.

_This proposal is rejected._

Mr BERCOVITZ invites to vote on the whole paragraph 3.

_This paragraph is carried._

Mr BERCOVITZ then moves to paragraph 4.

_This is accepted by a great majority without further comments._

Mr BERCOVITZ asks for comments on paragraph 5.

Mr Wolf R. MEIER-EWERT (Germany) observes that the protection does not require the existence of copyright protection and that the words "in addition to" should be replaced by "irrespective of", "independently from" or a similar wording.

Mr ELLMANN answers that the Working Committee accepts the proposal "irrespective of" but that it would not accept a wording along the lines of "independently from".

Mr Shane SMYTH (Ireland) refers to the comments made earlier by Mr COOK. He notes that no further areas of protection are mentioned.

Mr ELLMANN answers that any other kind of protection was less problematic.
Mr CALAME adds that it is not the intention to limit any existing rights.

Mr BERCOVITZ has the plenary vote on paragraph 5 whereby the words "in addition to" are replaced by "irrespective of".

*This is accepted by a great majority.*

Mr BERCOVITZ moves to paragraph 6.

Mr MEIER-EWERT states that his comment relates to paragraphs 6 and 8. He questions whether the Committee had given thought to technical protection. This might in particular apply to electronic databases.

Mr ELLMANN answers that this was not discussed in the context of Q182 and that it had not been analysed in the Group Reports. The Resolution should therefore not advance into this aspect.

Mr MEIER-EWERT comments that technical rights might block other rights and that this issue should therefore be addressed.

Mr COOK supports this view.

A Member of the Dutch Group adds that the words "through a sui generis right" should be deleted, since paragraph 1 could be moved to the end of the Resolution.

Mr TOMLINSON supports this view but sees it as a drafting point.

Mr COOK suggests to deal with this issue in the context of paragraph 9 as technical limitations.

Mr ELLMANN agrees that the Committee will take this as a drafting point.

Mr BERCOVITZ puts paragraph 6 to a vote.

*It is accepted by a great majority.*

Mr BERCOVITZ then adjourns the Session and invites the plenary to a coffee break.

The Meeting is resumed with the debate on paragraph 7.

*It is unanimously accepted without further discussion.*

Mr BERCOVITZ moves to paragraph 8.

A Member of the Spanish Group comments on the words "extraction" and "re-utilisation". The EU Directive is broader than the suggested text. The Member proposes to use the words without a definition in the Resolution.

Mr ELLMANN answers that this was used because of the language of the EU Directive. The Working Committee did not want to leave out a definition. However, one could add the words "at least" after "should".

Mr CALAME adds that the terms without definition might be interpreted too narrow and that the Working Committee therefore suggested the definition.
Mr Alfonso DIEZ DE RIVERA ELZABURU (Spain) observes that the definition for the second term is not correct. A re-utilisation is not the same as making available. One should therefore delete the definition.

Mr CALAME comments that also the World Copyright Treaty uses the words "making available".

Mr Luis SCHMIDT (Mexico) notes that the words "making available" together with "re-utilisation" could be seen as a tautology or as redundant. If they are synonymous they should be deleted. Otherwise they should be in there as a specific element. With regard to the definition of "extraction" the language could be deleted. The term is important whereas the definition is only a partial one.

Mr ELLMANN responds that it is preferred to use the terms which are used by international treaties or laws, such as the EU Directive. It needs to be as clear as possible to the reader. Therefore the chosen language should stay in.

Mr BERCOVITZ puts to a vote the deletion of the words "making available".  

This proposal is defeated.

He then puts to a vote the deletion of the words "transfer to another medium".  

This proposal is also rejected.

Mr Brian GRAY (Canada) suggests to delete the words "sources other than" in the last sentence of paragraph 8. Otherwise, it would be inconsistent with Recital b) of the Resolution.

Mr CALAME comments that this refers to the independent making (creation) of a database. Another language would refer to taking out parts of the database which is not meant in this context.

Mr PATTISON suggests to make clear that the database is protected and not the data contained in the database and to add a second sentence after the first sentence stating that non-substantial parts of the database contents can be copied.

Mr GRAY upholds his proposal for amendment.

Mr ELLMANN concedes that there may be an interlink between the Recitals and the Resolution part. Here the independent making of a database is concerned.

Mr CALAME agrees and adds that this wording reiterates the position of AIPPI. Otherwise, there might be a contradiction to the first sentence of paragraph 8.

Mr TOMLINSON expresses his concerns about this position. He would be against the intention of this sentence.

Mr BERCOVITZ puts to a vote the deletion of the words "sources other than".  

This proposal is rejected.

Mr ELLMANN states that the second amendment proposed by Mr PATTISON would not add to the Resolution, since the first sentence of paragraph 8 already states that only copying of substantial parts can be prohibited.

Mr BERCOVITZ puts to a vote the proposal to add the words "non-substantial parts can be".  

This proposal is rejected as well.
Mr Mark HAFTKE (UK) questions whether the rights provided under paragraph 8 should be limited to an exclusive right holder or whether they would also be available for the non-exclusive licensee.

Ms DAGG answers that this aspect was not considered in the Committee. The debate focussed on the choice between “maker” and “right holder”.

Mr HAFTKE agrees to deal with it in paragraph 12.

Mr BERCOVITZ puts paragraph 8 to a vote.

*It is accepted by a great majority.*

Mr BERCOVITZ moves to the discussion of paragraph 9.

Mr COOK suggests to replace the words "such as" by "including". The reason is that there are little experiences with that “sui generis” right. The right should also be part of the system of checks and balances. Therefore the limitations should not be optional but need to form an integral part of the right.

Mr MEIER-EWERT supports this position and emphasizes that the limitations need to be mandatory.

Mr Jorge OTAMENDI (Argentina) suggests to delete the words "governmental purposes". Such a limitation would give governments the unlimited access to databases. Experience shows that governmental purposes are not always in the best interest of the public.

Mr ELLMANN agrees that the intention was to have compulsory limitations. However, there are also limits to the limitations. There is no objection from the Committee to such limitations. He reiterates that the mandatory character of limitations was intended and that the text reflects the answers from the Group Reports.

Mr Nicolai LINDGREEN (Denmark) supports Mr COOK.

The Mexican Group suggests to insert the words "non-commercial" between the words "private use". Only a private use which does not have a commercial goal should be exempt from the protection.

Mr MEIER-EWERT proposes to add to the sentence in paragraph 9 the words "and should take account of technical protection measures". He refers to his earlier intervention in which he gave the reason for this addition.

Mr CALAME states that technical protection measures were not discussed in the context of Q182 in AIPPI but that this could be reflected in the Recitals.

Mr TOMLINSON supports Mr CALAME. In his view, the Question Q182 has nothing to do with technical protection measures.

Mr Ralph NACK (Germany) adds that, since this point was not discussed, AIPPI would not be in a position to express a clear statement on this issue.

Mr BERCOVITZ puts to a vote the first suggested amendment to replace the words "such as" by "including".

*This proposal is defeated by a small majority of 35 to 30 votes.*
He then asks for the vote on the second amendment (insertion of "non-commercial" between "private use").

This proposal is rejected by a great majority.

The next vote is taken on the deletion of the words "and governmental purposes".

This is carried by 42 votes in favour.

The last amendment concerns the insertion of "and taking account of technical protection measures".

This proposal is rejected.

Finally, a vote is taken on paragraph 9 as a whole.

It is accepted by a great majority.

Mr BERCOVITZ moves to paragraph 10.

Mr Pierre GENDRAUD (France) observes that the problem is to determine the date when the protection begins. Nobody knows when the database is completed. In fact, it is never completed so that this would lead to an unlimited duration. He suggests to delete the entire paragraph or at least to introduce the wording "or from the date of first commercial use" after "completion".

Mr ELLMANN adds that the Working Committee approves this proposal but that one should also insert the words "whichever is first". However, this would not be in line with the EU Directive.

Mr LINDGREEN states that the words should read "whichever is last", because the database would not be completed before the first commercial use.

Mr GENDRAUD supplements his proposal which should read "or from the first commercial use by the provider".

Mr CALAME notes that this issue was not discussed in the Working Committee. One has to see it in connection with paragraph 11, and one has to mark a starting point for the protection.

Mr ELLMANN states that the Working Committee supports the original language. The proposed changes were not discussed in the Committee. They also do not appear in the international treaties. Before inserting such wording one would need to evaluate the consequences.

Mr CALAME supports this position.

Mr BERCOVITZ puts to a vote the deletion of the entire paragraph 10.

This proposal is rejected.

He then votes on the insertion of "or from the first commercial use by the provider".

This amendment is also rejected.

There is no vote on the wording "whichever is first" which was not suggested as a formal amendment.

Mr BERCOVITZ then puts the entire paragraph 10 to a vote.

It is approved by a great majority.
Mr BERCOWITZ moves to paragraph 11. Since there are no comments it is put to a vote.

*It is approved by a great majority.*

Mr BERCOWITZ then invites the plenary to comment on paragraph 12. He adds that it concerns a separate issue which will be introduced by the heading "Further studies”.

Mr ELLMANN suggests to add the words "subject to the provisions set out below" in paragraph 1 to comfort the concerns of the Finnish Group and to keep the order of the paragraphs as suggested. This is accepted by the Finnish Group.

*Upon a vote paragraph 12 is approved unanimously.*

Mr BERCOWITZ puts the Resolution part as a whole to a vote.

*It is approved by a great majority.*

Mr BERCOWITZ moves to the Recitals.

Mr MEIER-EWERT repeats his concerns about technical protection measures and suggests to consider this in the Recitals.

Mr COOK supports this proposal and refers to the EU Directive.

Mr ELLMANN states that the Working Committee will include some reference language in the Recitals and explain that Q182 does not address this issue.

Mr BERCOWITZ puts the entire Resolution to a vote.

*It is approved by the plenary by a great majority.*

Mr BERCOWITZ thanks all participants, the panel and the Members of the Working Committee and closes the Session.

Minutes: Jochen BÜHLING, Deputy Reporter General (Germany)