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105TH CONGRESS, 2d Session | HOUSE OF REPRESENTATIVES | REPORT 105–525

COLLECTIONS OF INFORMATION ANTIPIRACY ACT

MAY 12, 1998.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. COBLE, from the Committee on the Judiciary, submitted the following

REPORT

together with

DISSENTING VIEWS

[To accompany H.R. 2652]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 2652) to amend title 17, United States Code, to prevent the misappropriation of collections of information, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

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The amendment is as follows:

Strike out all after the enacting clause and insert in lieu thereof the following:

59–006

SECTION 1. SHORT TITLE.

This Act may be cited as the "Collections of Information Antipiracy Act".

SEC. 2. MISAPPROPRIATION OF COLLECTIONS OF INFORMATION.

Title 17, United States Code, is amended by adding at the end the following new chapter:

"CHAPTER 12—MISAPPROPRIATION OF COLLECTIONS OF INFORMATION

"Sec.
"1201. Definitions.
"1202. Prohibition against misappropriation.
"1203. Permitted acts.
"1204. Exclusions.
"1205. Relationship to other laws.
"1206. Civil remedies.
"1207. Criminal offenses and penalties.
"1208. Limitations on actions.

"§ 1201. Definitions

"As used in this chapter:

"(1) COLLECTION OF INFORMATION.—The term 'collection of information' means information that has been collected and has been organized for the purpose of bringing discrete items of information together in one place or through one source so that users may access them.

"(2) INFORMATION.—The term 'information' means facts, data, works of authorship, or any other intangible material capable of being collected and organized in a systematic way.

"(3) POTENTIAL MARKET.—The term 'potential market' means any market that a person claiming protection under section 1202 has current and demonstrable plans to exploit or that is commonly exploited by persons offering similar products or services incorporating collections of information.

"(4) COMMERCE.—The term 'commerce' means all commerce which may be lawfully regulated by the Congress.

"§ 1202. Prohibition against misappropriation

"Any person who extracts, or uses in commerce, all or a substantial part, measured either quantitatively or qualitatively, of a collection of information gathered, organized, or maintained by another person through the investment of substantial monetary or other resources, so as to cause harm to the actual or potential market of that other person, or a successor in interest of that other person, for a product or service that incorporates that collection of information and is offered or intended to be offered for sale or otherwise in commerce by that other person, or a successor in interest of that person, shall be liable to that person or successor in interest for the remedies set forth in section 1206.

"§ 1203. Permitted acts

"(a) INDIVIDUAL ITEMS OF INFORMATION AND OTHER INSUBSTANTIAL PARTS.—Nothing in this chapter shall prevent the extraction or use of an individual item of information, or other insubstantial part of a collection of information, in itself. An individual item of information, including a work of authorship, shall not itself be considered a substantial part of a collection of information under section 1202. Nothing in this subsection shall permit the repeated or systematic extraction or use of individual items or insubstantial parts of a collection of information so as to circumvent the prohibition contained in section 1202.

"(b) GATHERING OR USE OF INFORMATION OBTAINED THROUGH OTHER MEANS.—Nothing in this chapter shall restrict any person from independently gathering information or using information obtained by means other than extracting it from a collection of information gathered, organized, or maintained by another person through the investment of substantial monetary or other resources.

"(c) USE OF INFORMATION FOR VERIFICATION.—Nothing in this chapter shall restrict any person from extracting information, or from using information within any entity or organization, for the sole purpose of verifying the accuracy of information independently gathered, organized, or maintained by that person. Under no circumstances shall the information so extracted or used be made available to others in a manner that harms the actual or potential market for the collection of information from which it is extracted or used.

"(d) NONPROFIT EDUCATIONAL, SCIENTIFIC, OR RESEARCH USES.—Nothing in this chapter shall restrict any person from extracting or using information for nonprofit

educational, scientific, or research purposes in a manner that does not harm the actual or potential market for the product or service referred to in section 1202.

"(e) NEWS REPORTING.—Nothing in this chapter shall restrict any person from extracting or using information for the sole purpose of news reporting, including news gathering, dissemination, and comment, unless the information so extracted or used is time sensitive, has been gathered by a news reporting entity for distribution to a particular market, and has not yet been distributed to that market, and the extraction or use is part of a consistent pattern engaged in for the purpose of direct competition in that market.

"(f) TRANSFER OF COPY.—Nothing in this chapter shall restrict the owner of a particular lawfully made copy of all or part of a collection of information from selling or otherwise disposing of the possession of that copy.

"§ 1204. Exclusions

"(a) GOVERNMENT COLLECTIONS OF INFORMATION.—

"(1) EXCLUSION.—Protection under this chapter shall not extend to collections of information gathered, organized, or maintained by or for a government entity, whether Federal, State, or local, including any employee or agent of such entity, or any person exclusively licensed by such entity, within the scope of the employment, agency, or license. Nothing in this subsection shall preclude protection under this chapter for information gathered, organized, or maintained by such an agent or licensee that is not within the scope of such agency or license, or by a Federal or State educational institution in the course of engaging in education or scholarship.

"(2) EXCEPTION.—The exclusion under paragraph (1) does not apply to any information required to be collected and disseminated by either a national securities exchange under the Securities Exchange Act of 1934 or a contract market under the Commodity Exchange Act.

"(b) COMPUTER PROGRAMS.—

"(1) PROTECTION NOT EXTENDED.—Subject to paragraph (2), protection under this chapter shall not extend to computer programs, including, but not limited to, any computer program used in the manufacture, production, operation, or maintenance of a collection of information, or any component of a computer program necessary to its operation.

"(2) INCORPORATED COLLECTIONS OF INFORMATION.—A collection of information that is otherwise subject to protection under this chapter is not disqualified from such protection solely because it is incorporated into a computer program.

"§ 1205. Relationship to other laws

"(a) OTHER RIGHTS NOT AFFECTED.—Subject to subsection (b), nothing in this chapter shall affect rights, limitations, or remedies concerning copyright, or any other rights or obligations relating to information, including laws with respect to patent, trademark, design rights, antitrust, trade secrets, privacy, access to public documents, and the law of contract.

"(b) PREEMPTION OF STATE LAW.—On or after the effective date of this chapter, all rights that are equivalent to the rights specified in section 1202 with respect to the subject matter of this chapter shall be governed exclusively by Federal law, and no person is entitled to any equivalent right in such subject matter under the common law or statutes of any State. State laws with respect to trademark, design rights, antitrust, trade secrets, privacy, access to public documents, and the law of contract shall not be deemed to provide equivalent rights for purposes of this subsection.

"(c) RELATIONSHIP TO COPYRIGHT.—Protection under this chapter is independent of, and does not affect or enlarge the scope, duration, ownership, or subsistence of, any copyright protection in any work of authorship that is contained in or consists in whole or part of a collection of information. This chapter does not provide any greater protection to a work of authorship contained in a collection of information, other than a work that is itself a collection of information, than is available to that work under any other chapter of this title.

"(d) ANTITRUST.—Nothing in this chapter shall limit in any way the constraints on the manner in which products and services may be provided to the public that are imposed by Federal and State antitrust laws, including those regarding single suppliers of products and services.

"(e) LICENSING.—Nothing in this chapter shall restrict the rights of parties freely to enter into licenses or any other contracts with respect to the use of collections of information.

"(f) COMMUNICATIONS ACT OF 1934.—Nothing in this chapter shall affect the operation of section 222(e) of the Communications Act of 1934 (47 U.S.C. 222(e)), or shall

restrict any person from extracting or using subscriber list information, as such term is defined in section 222(f)(3) of the Communications Act of 1934 (47 U.S.C. 222(f)(3)), for the purpose of publishing telephone directories in any format.

"§ 1206. Civil remedies

"(a) CIVIL ACTIONS.—Any person who is injured by a violation of section 1202 may bring a civil action for such a violation in an appropriate United States district court without regard to the amount in controversy, except that any action against a State governmental entity may be brought in any court that has jurisdiction over claims against such entity.

"(b) TEMPORARY AND PERMANENT INJUNCTIONS.—Any court having jurisdiction of a civil action under this section shall have the power to grant temporary and permanent injunctions, according to the principles of equity and upon such terms as the court may deem reasonable, to prevent a violation of section 1202. Any such injunction may be served anywhere in the United States on the person enjoined, and may be enforced by proceedings in contempt or otherwise by any United States district court having jurisdiction over that person.

"(c) IMPOUNDMENT.—At any time while an action under this section is pending, the court may order the impounding, on such terms as it deems reasonable, of all copies of contents of a collection of information extracted or used in violation of section 1202, and of all masters, tapes, disks, diskettes, or other articles by means of which such copies may be reproduced. The court may, as part of a final judgment or decree finding a violation of section 1202, order the remedial modification or destruction of all copies of contents of a collection of information extracted or used in violation of section 1202, and of all masters, tapes, disks, diskettes, or other articles by means of which such copies may be reproduced.

"(d) MONETARY RELIEF.—When a violation of section 1202 has been established in any civil action arising under this section, the plaintiff shall be entitled to recover any damages sustained by the plaintiff and defendant's profits not taken into account in computing the damages sustained by the plaintiff. The court shall assess such profits or damages or cause the same to be assessed under its direction. In assessing profits the plaintiff shall be required to prove defendant's gross revenue only; defendant must prove all elements of cost or deduction claims. In assessing damages the court may enter judgment, according to the circumstances of the case, for any sum above the amount found as actual damages, not exceeding three times such amount. The court in its discretion may award reasonable costs and attorney's fees to the prevailing party and shall award such costs and fees where it determines that an action was brought under this chapter in bad faith against a nonprofit educational, scientific, or research institution, library, or archives, or an employee or agent of such an entity, acting within the scope of his or her employment.

"(e) REDUCTION OR REMISSION OF MONETARY RELIEF FOR NONPROFIT EDUCATIONAL, SCIENTIFIC, OR RESEARCH INSTITUTIONS.—The court shall reduce or remit entirely monetary relief under subsection (d) in any case in which a defendant believed and had reasonable grounds for believing that his or her conduct was permissible under this chapter, if the defendant was an employee or agent of a nonprofit educational, scientific, or research institution, library, or archives acting within the scope of his or her employment.

"(f) ACTIONS AGAINST UNITED STATES GOVERNMENT.—Subsections (b) and (c) shall not apply to any action against the United States Government.

"(g) RELIEF AGAINST STATE ENTITIES.—The relief provided under this section shall be available against a State governmental entity to the extent permitted by applicable law.

"§ 1207. Criminal offenses and penalties

"(a) VIOLATION.—

"(1) IN GENERAL.—Any person who violates section 1202 willfully, and—

"(A) does so for direct or indirect commercial advantage or financial gain, or

"(B) causes loss or damage aggregating $10,000 or more in any 1-year period to the person who gathered, organized, or maintained the information concerned,

shall be punished as provided in subsection (b).

"(2) INAPPLICABILITY.—This section shall not apply to an employee or agent of a nonprofit educational, scientific, or research institution, library, or archives acting within the scope of his or her employment.

"(b) PENALTIES.—An offense under subsection (a) shall be punishable by a fine of not more than $250,000 or imprisonment for not more than 5 years, or both. A sec-

ond or subsequent offense under subsection (a) shall be punishable by a fine of not more than $500,000 or imprisonment for not more than 10 years, or both.

"§ 1208. Limitations on actions

"(a) CRIMINAL PROCEEDINGS.—No criminal proceeding shall be maintained under this chapter unless it is commenced within three years after the cause of action arises.

"(b) CIVIL ACTIONS.—No civil action shall be maintained under this chapter unless it is commenced within three years after the cause of action arises or claim accrues.

"(c) ADDITIONAL LIMITATION.—No criminal or civil action shall be maintained under this chapter for the extraction or use of all or a substantial part of a collection of information that occurs more than 15 years after the investment of resources that qualified the portion of the collection of information for protection under this chapter that is extracted or used.".

SEC. 3. CONFORMING AMENDMENT.

The table of chapters for title 17, United States Code, is amended by adding at the end the following:

"12. Misappropriation of Collections of Information ..... 1201".

SEC. 4. CONFORMING AMENDMENTS TO TITLE 28, UNITED STATES CODE.

(a) JURISDICTION.—Section 1338 of title 28, United States Code, is amended—

(1) in the section heading by inserting "**misappropriations of collections of information,**" after "**trade-marks,**"; and

(2) by adding at the end the following:

"(d) The district courts shall have original jurisdiction of any civil action arising under chapter 12 of title 17, relating to misappropriation of collections of information. Such jurisdiction shall be exclusive of the courts of the States.".

(b) CONFORMING AMENDMENT.—The item relating to section 1338 in the table of sections for chapter 85 of title 28, United States Code, is amended by inserting "misappropriations of collections of information," after "trade-marks,".

SEC. 5. EFFECTIVE DATE.

(a) IN GENERAL.—This Act and the amendments made by this Act shall take effect on the date of the enactment of this Act, and shall apply to acts committed on or after that date.

(b) PRIOR ACTS NOT AFFECTED.—No person shall be liable under chapter 12 of title 17, United States Code, as added by section 2 of this Act, for the use of information lawfully extracted from a collection of information prior to the effective date of this Act, by that person or by that person's predecessor in interest.

PURPOSE AND SUMMARY

H.R. 2652, the "Collections of Information Antipiracy Act," responds to a need to complement copyright law with a federal misappropriation law that prevents the wholesale copying of another's collection of information so as to harm the market for that collection. The bill ensures incentives for investment in the production and dissemination of collections of information, while maintaining continued access to information contained in such collections for public interest purposes such as education, science and research.

The Collections of Information Antipiracy Act prohibits the misappropriation of commercially valuable collections by those who pirate data collected by others through substantial effort and expense, and use it in a way that causes market injury to the producer of the original collection. This protection is modeled in part on the Lanham Act, which already makes various types of unfair competition a civil wrong under federal law. Importantly, existing protections for collections of information afforded by other bodies of law, most notably copyright and contract rights, are maintained in their present form. The bill is intended to supplement these legal rights, not replace them.

BACKGROUND AND THE NEED FOR LEGISLATION

Electronic collections, and other collections of factual material, are indispensable to the American economy on the verge of the 21st century. These information products put a wealth of data at the fingertips of business people, professionals, scientists, scholars, and consumers, and enable them to retrieve from this haystack of information the factual needles that they need to solve a particular economic, research, or educational problem. Whether databases contain financial, scientific, legal, medical, bibliographic, news, or other information, they are essential tools for improving productivity, advancing education and training, and creating a more informed citizenry. They are also the linchpins of a dynamic commercial information industry in the United States.

Developing, compiling, distributing commercially significant collections of information, and maintaining them in current and accurate form, requires substantial investments of time, personnel, and money. Information companies must dedicate massive resources to gathering and verifying factual material, presenting it in a user-friendly way, and keeping it up to date and easily accessible to customers. U.S. firms have been the world leaders in this field. They have brought to market a wide range of valuable collections that meet the information needs of businesses, professionals, researchers, and consumers worldwide. But recent legal and technological developments threaten to cast a pall over this progress, by eroding the incentives for the continued investment needed to maintain and build upon the U.S. lead in world markets for information resources.

Here in the U.S., the 1991 Supreme Court decision in *Feist Publications* v. *Rural Telephone Service Co.*[1] marked a more restrictive approach toward claims of copyright in databases.[2] The Court definitively rejected the longstanding "sweat of the brow" basis for copyright protection of compilations that was still prevalent in certain jurisdictions, and held that at least a minimal spark of creativity in selection, coordination or arrangement was required to protect a compilation under copyright. While reaffirming that most—although not all—compilations satisfy the "originality" standard, the Court emphasized that this protection is "necessarily thin." Several subsequent lower court decisions have underscored that copyright cannot be relied on to prevent a competitor from lifting massive amounts of factual material from a copyrighted database to use in preparing its own competing product.[3]

In Europe, a six-year process culminated in the issuance of a European Union Directive on Legal Protection of Databases in 1996. Among other things, the Directive requires member states to create by 1998 a new, sui generis property right for databases, to supplement copyright. But this new protection will not be extended to

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[1] 499 U.S. 340 (1991).

[2] For a fuller explanation of the "sweat of the brow" doctrine, the *Feist* case, and its impact see The Collection of Information Antipiracy Hearing on H.R. 2652 before the Subcommittee on Courts and Intellectual Property of the House Committee on the Judiciary, 105th Cong., 1st Sess., Transcript (see testimony of Prof. Jane C. Ginsburg, and testimony of Register of Copyrights Marybeth Peters).

[3] See, e.g., *Warren Publ. Inc.* v. *Microdos Data Corp.*, 115 F.3d 1509 (11th Cir. 1997) (en banc); *Martindale-Hubbell, Inc.* v. *Dunhill Int'l List Co.*, No. 88–6767–CIV–ROETTGER (S.D. Fla. Dec. 30, 1994).

U.S.-originated databases unless the U.S. is found to offer "comparable" protection to European databases. When fully implemented, the European Directive could place U.S. firms at an enormous competitive disadvantage throughout the entire European Union market. This Act is intended to remedy that problem by providing protection comparable to that outlined in the Directive without regard to a database producer's country of origin. While based on a misappropriation approach rather than a grant of property rights, this protection addresses the core concerns of the Directive. Despite its different theoretical basis and formulation, the Act will prevent commercial harm to database producers and therefore ensure adequate incentives for the continued production and dissemination of databases. Producers of collections of information will be capable of continuing to transfer and license their collections, and to waive the protection provided under the Act.

At the World Intellectual Property Organization (WIPO) in Geneva, discussions are ongoing as to the advisability of a new international treaty on protection for databases outside of copyright law, although no treaty language is currently under consideration. A previous WIPO draft treaty circulated in 1996 proposed a sui generis property right approach, similar to the model in the European Union Directive, which is rejected in favor of a misappropriation model in this Act.

Other relevant developments have been technological in nature. In cyberspace, new technology represents a threat as well as an opportunity for collections of information, as for other kinds of materials. Copying large quantities of materials from another's collection, and using it in a competing information product—behavior that copyright protection may not effectively prevent—is cheaper and easier than ever, through digital technology now in widespread use. Scanning permits non-electronic collections to be digitized, and even massive quantities of copied material can be distributed instantaneously once in digital form.

Various legal and technological options exist today for producers of collections of information to protect their investments. In 1997, the Copyright Office issued a Report on Legal Protection of Databases, which lists these options, and explains the benefits and shortcomings of each. Copyright, on the federal level, and the state contract law underlying licensing agreements, remain essential tools. But the coverage of copyright law is limited after *Feist*, and the protection of a contract binds only the parties to that contract. In at least some jurisdictions, state misappropriation law today offers protection to certain types of collections in certain circumstances. State misappropriation law, however, is unsettled and does not provide nationwide consistency. Moreover, to the extent that it is not preempted by federal copyright law, it is limited in scope, protecting only time-sensitive information and only against direct competition.[4] Other sources of protection, primarily trademark and trade secrecy law, or technological means such as encryption, are also available, but none is adequate to address the crux of the problem. Moreover, a balanced statutory solution may provide consumers with greater access to information than the re-

[4] See *National Basketball Ass'n* v. *Motorola, Inc.*, 105 F.3d 841 (2d Cir. 1997).

strictive contractual terms and technological protection measures likely to be adopted in the absence of adequate legal protections. In sum, there are meaningful gaps in protection that can best be filled by a new federal statute.

When all of these legal and technological factors are added together, the bottom line is clear: there is a need to act to ensure adequate incentives for continued investment in the production and dissemination of collections of information. Already today, the lack of appropriate protection has begun to have a negative impact, with several court decisions that have resulted in serious damage to markets, and producers exhibiting a reluctance to make their products widely available over the Internet or in other easily copied formats. As noted by the Register of Copyrights in her testimony, appropriately delineated incentives should cause the public to benefit overall from increased availability of greater quantities of more accurate information. New federal legislation can serve to improve the market climate for collections of information in the U.S.; ensure protection for U.S. collections abroad on an equitable basis; place the U.S. on the leading edge of an emerging international consensus; and provide a balanced and measured response to the new challenges of cyberspace.

The Collections of Information Antipiracy Act is such a balanced proposal. It is aimed at actual or threatened market injury from misappropriation of collections of information. The goal is to stimulate the creation of more collections, as well as increased dissemination to the public, and to encourage more competition among producers. The bill avoids conferring a monopoly on facts, or providing a breadth of protection that would be inconsistent with these goals.

This bill differs significantly in approach and scope of coverage from H.R. 3531, introduced in the last Congress by then-Chairman Carlos Moorhead. H.R. 3531 proposed to enact a new form of sui generis exclusive property right in collections of information. In response to the concerns raised by interested parties and outlined in the Copyright Office Report on Legal Protection for Databases, H.R. 2652 adopts a different model for protection. It represents a minimalist approach grounded in the misappropriation branch of unfair competition law, focusing more precisely on the damage that can be done from substantial takings from collections of information. It also contains several additional provisions responsive to concerns of users, including more exceptions to and exclusions from the prohibition; specific definitions of important terms to clarify and narrow its coverage; a statute of limitations provision that limits the duration of the prohibition and prevents "perpetual" protection; and a reduction or elimination of civil and criminal penalties that could have a negative impact on public interest uses.

The bill would prohibit the extraction or the use in commerce of all or a substantial part of a collection of information in a manner which causes harm to the market of the producer of the collection. Those who violate this act would be liable to the producer of the collection for damages in an amount equal to that the producer's damages plus any additional profits of the defendant, with the possibility of costs and attorney's fees, and could be held criminally liable in appropriate circumstances.

In essence, the Act would restore a modified form of the "sweat of the brow" protection available in the past as a separate doctrine and then under copyright law, but under appropriate Constitutional power and with appropriate limitations. Enactment of the bill is within Congress' authority to regulate interstate commerce under Article I, Section 8, Clause 3 of the Constitution. The form of protection provided is sufficiently different from copyright so as to avoid constitutionality issues under the Supreme Court's interpretation of the Patent and Copyright Clause in *Feist*. The Act does not create a property right like copyright, but rather a tort-based cause of action against misappropriation, founded on proof of market harm.[5] It promotes different policies and by different means, encouraging investment rather than creativity and does so through a prohibition of harmful conduct rather than a grant of exclusive control regardless of harm. It is a form of unfair competition law, which like trademark and trade secrecy law is within Congress' commerce power.[6]

HEARINGS

The Subcommittee on Courts and Intellectual Property conducted two days of legislative hearings on this legislation on October 23, 1997 and on February 12, 1998. Testifying on October 23 were Marybeth Peters, Register of Copyrights, U.S. Copyright Office; Paul Warren, Executive Publisher, Warren Publishing Incorporated; Laura D'Andrea Tyson, Professor, University of California at Berkeley, former National Economic Advisor to the President, and former Chair of the White House Counsel of Economic Advisors; James G. Neal, Sheridan Director of the Milton S. Eisenhower Library at John Hopkins University; Dr. William A. Wulf, President, National Academy of Engineering on behalf of the National Research Council; Professor Jerome Reichman, Senior Advisor to the National Research Council; and Dr. Robert S. Ledley, Director of Medical Computing, Biophysics Division, Georgetown University Medical Center. Testifying on February 12 were Robert Aber, Senior Vice President and General Counsel, NASDAQ Stock Market; Dr. Debra W. Stewart, Dean of the Graduate School, North Carolina State University, on behalf of the Association of American Universities; Dr. Richard Corlin, Speaker of the House of Delegates, American Medical Association; William Hammack, President of the Sunshine Pages; Professor Jane Ginsberg, Columbia University School of Law; Jonathan Band, on behalf of the On-Line Banking Association; and Tim Casey, for the Information Technology Association of America.

COMMITTEE CONSIDERATION

The Subcommittee on Courts and Intellectual Property conducted a markup on this legislation on March 18, 1998. The Subcommittee

[5] The Collection of Information Anti-Piracy Act: Hearing on H.R. 2652 before the Subcommittee on Courts and Intellectual Property of the House Committee on the Judiciary, 105th Congress., 1st Sess, Transcript at 70 (Testimony of Prof. Jane C. Ginsburg).

[6] See The Collection of Information Antipiracy Hearing on H.R. 2652 before the Subcommittee on Courts and Intellectual Property of the House Committee on the Judiciary, 105th Cong., 1st Sess, Transcript (see testimony of Prof. Jane C. Ginsburg, and testimony of Register of Copyrights Marybeth Peters).

reported the bill, H.R. 2652, as amended, to the full Committee, by voice vote, a quorum being present. On March 24, 1998, the Committee conducted a markup and reported the bill, H.R. 2652, as amended, to the House by voice vote, a quorum being present.

COMMITTEE OVERSIGHT FINDINGS

In compliance with clause 2(l)(3)(A) of rule XI of the Rules of the House of Representatives, the Committee reports that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

COMMITTEE ON GOVERNMENT REFORM AND OVERSIGHT FINDINGS

No findings or recommendations of the Committee on Government Reform and Oversight were received as referred to in clause 2(l)(3)(D) of rule XI of the Rules of the House of Representatives.

NEW BUDGET AUTHORITY AND TAX EXPENDITURES

Clause 2(l)(3)(B) of House rule XI is inapplicable because this legislation does not provide new budget authority or increased tax expenditures.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

In compliance with clause 2(l)(3)(C) of rule XI of the Rules of the House of Representatives, the Committee sets forth, with respect to H.R. 2652, the following estimate and comparison prepared by the Director of the Congressional Budget Office under Section 403 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, April 14, 1998.

Hon. HENRY J. HYDE,
Chairman, Committee on the Judiciary,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 2652, the Collections of Information Antipiracy Act.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contacts for this estimate are Mark Grabowicz (for federal costs) and Pepper Santalucia (for the state and local impact).

Sincerely,

JUNE E. O'NEILL, *Director.*

Enclosure.

H.R. 2652—Collections of Information Antipiracy Act

CBO estimates that enacting this legislation would have no significant impact on the federal budget. While the bill could lead to increases in both direct spending and receipts, the amounts involved would be less than $500,000 a year. Because H.R. 2652

could affect direct spending and receipts, pay-as-you-go procedures would apply.

H.R. 2652 would attempt to protect substantial investments made in the collecting of information or the establishing of databases with commercial value. The legislation generally would prohibit the misappropriation of a substantial portion of such information in a way that would decrease its potential market value. Violators of the bill's provisions would be subject to a criminal fine, imprisonment, or civil action.

Because H.R. 2652 would establish a new federal crime, CBO anticipates that the U.S. government would be able to pursue cases that it otherwise would be unable to prosecute. Based on information from the Department of Justice, however, we do not expect the government to pursue many additional cases. Thus, CBO estimates that enacting the bill would not have a significant impact on the cost of federal law enforcement activity. Implementing the bill also could increase costs to the federal courts if more civil suits are filed by private parties, but we do not expect many additional cases. Any additional costs to federal law enforcement agencies or to the federal courts would be subject to the availability of appropriated funds.

Enacting H.R. 2652 could increase governmental receipts from fines, but we estimate that any such increase would be less than $500,000 annually. Criminal fines are deposited as revenues in the Crime Victims Fund and spent in the following year. Thus, any change in direct spending from the fund would match the increase in revenues with a one-year lag.

H.R. 2652 would impose an intergovernmental mandate as defined in the Unfunded Mandates Reform Act of 1995 (UMRA), because it would preempt state laws regarding the protection of collections of information. However, CBO estimates that complying with this mandate would not have a significant impact on state budgets. The bill contains no private-sector mandates as defined in UMRA.

The CBO staff contacts for this estimate are Mark Grabowicz (for federal costs) and Pepper Santalucia (for the state and local impact). This estimate was approved by Robert A. Sunshine, Deputy Assistant Director for Budget Analysis.

CONSTITUTIONAL AUTHORITY STATEMENT

Pursuant to rule XI, clause 2(l)(4) of the Rules of the House of Representatives, the Committee finds the authority for this legislation in Article I, section 8, clause 3 of the Constitution.

SECTION-BY-SECTION ANALYSIS

1. SECTION ONE—SHORT TITLE

The short title of the act will be the "Collections of Information Antipiracy Act."

2. SECTION TWO—PROHIBITION AGAINST MISAPPROPRIATION

Section 1202 sets out the central prohibition of the Act. It states that any person who extracts, or uses in commerce, all or a sub-

stantial part of a collection of information of another so as to cause harm to that other person's actual or potential market for a product or service is liable for the remedies established in this act. To be eligible for protection, the collection of information must be gathered, organized, or maintained through the investment of substantial monetary or other resources. The maintenance that is referred to may include updating or ongoing verification of the information collected. In order to qualify, the investment must be substantial, whether it consists of money, time, or effort. The protection would extend to any successor in interest of the person that produced the collection of information.

The use of a substantial part of a collection of information cannot be unlawful under this act unless it is a use made in commerce. Accordingly, the use of information for purely private purposes, without a nexus to commerce such as dissemination to others, would not be prohibited. The intent of the Committee is to ensure that those with lawful access to a collection have the ability freely to use its contents for purposes of noncommercial internal study, research or analysis. In contrast, the act of extraction itself could fall within the prohibition of the bill even if it is noncommercial and private, in order to safeguard against the destruction of a market from the members of the intended market simply downloading a collection for their own use without authorization or payment.

The prohibition of the Act applies only if either the entire collection, or a substantial part of the collection, is taken. The intent is to prohibit piratical takings that misappropriate the value of the collection itself, rather than particular items of information it contains. Since the taking of a substantial part of a collection may seriously harm the collection's market, the prohibition cannot be limited to the taking of the entire collection. Only portions of the collection that are substantial in amount or importance to the value of the collection as a whole would be covered. Qualitative harm may occur through the extraction of a quantitatively small but valuable portion of a collection of information. For example, the Physician's Desk Reference, a work that compiles generally available information about every prescription drug approved by the FDA, contains some several thousand drugs and is available to both consumers and medical professionals. If a second comer extracted information about the thousand most commonly prescribed medications and offered it for sale to the general public—for example under the title "Drugs Every Consumer Should Know"—that extraction and use, although a fraction of the total collection of information, would cause the kind of market harm that the Committee intends H.R. 2652 to prevent. Similarly, the extraction or use of real-time quotes for all technology stocks from a securities database, while constituting a relatively small portion of actively traded or volatile securities, may be of such "qualitative" importance to the value of the database that it creates the type of commercial harm that the Committee intends section 1202 to prevent.

Under the misappropriation approach of this bill, liability is premised on harm to the actual or potential market for the collection of information. The element of market harm is therefore critical, and should be properly understood. Misappropriation under the chapter occurs only if the extraction or use in commerce directly

causes harm to the actual or potential market for a collection of information produced by the aggrieved person. Clearly, extracting information from a database and using it in a new database which competes with the first database causes harm to the actual market for the first database. Similarly, if a person extracts so much of an online database that the person would be able, in the future, to avoid paying a subscription fee for access to the data it contains, that person has harmed the market for the database.

The prohibition is written so as to avoid preventing consumer, scientific, or educational uses of information which has been acquired through lawful access. It would not, for example, prevent scientists from sharing data sets, or publishing the results of their analysis of data, since such acts do not ordinarily involve use in commerce that would harm the market for the database. Nor is the Act intended to cover indirect harm to the market for a product. For example, a chemical company which uses the information in a database (for which it paid) to create a new chemical which revolutionizes a segment of the industry, and thereby diminishes demand for the database by decreasing the number of companies in the industry, has not misappropriated information within the meaning of this chapter. The harm to the market was not directly caused by the use of the information, but by the changes to the industry that came about through the effect of the use of the information.

Section 1201 provides several definitions. It defines "collection of information" to mean information that has been collected and has been organized for the purpose of bringing discrete items of information together in one place or through one source so that users may access them. The definition is intended to avoid sweeping too broadly, particularly in the digital environment, where all types of material when in digital form could be viewed as collections of information. It makes clear that the statute protects what has been traditionally thought of as a database, involving a collection made by gathering together multiple discrete items with the purpose of forming a body of material that consumers can use as a resource in order to obtain the items themselves. This is in contrast to elements of information combined and ordered in a logical progression or other meaningful way in order to tell a story, communicate a message, represent something, or achieve a result. Thus, a novel would not be considered a "collection of information" even if it appears in electronic form, and therefore could be described as made up of elements of information that have been put together in some logical way. Similarly, material such as interface specifications would not ordinarily be covered, although a collection of such specifications created in order to provide consumers access to the individual specifications could be covered. The term "in one place or through one source" denotes the availability of the information to consumers in a single material object or through a specific address, location or other source. It does not require that all of the information be present at any particular physical site.

The section also contains a definition of "potential market," which means "any market that a person claiming protection under section 1202 has current and demonstrable plans to exploit or that is commonly exploited by persons offering similar products or services incorporating collections of information." This definition, which

is drawn from judicial interpretations of the fair use doctrine under copyright law, is intended to clarify that "potential market" is not to be interpreted in a circular way, so that any market that the producer of the collection could someday exploit is deemed a potential market sufficient to lead to liability.

"Information" is defined to mean facts, data, works of authorship, or other intangible material capable of being collected and organized in a systematic way. It is important to ensure that databases made through substantial investments in collecting and organizing copyrightable works of authorship, which will be a critical source of entertainment and educational material for consumers on the Internet, may be protected under this Chapter.

Paragraph (4) defines "commerce" as all commerce which may be lawfully regulated by the Congress. Given the breadth of this definition, a collection of information that is utilized within a particular organization or group of customers, but not made available to the general public, may qualify for protection under this Chapter as "offered or intended to be offered for sale or otherwise . . . in commerce." Since many collections will be disseminated through licensing mechanisms, the relevant offer is not limited to one made for sale.

3. SECTION 1203—PERMITTED ACTS

Section 1203 sets out a list of acts that are permitted despite the language of the prohibition in section 1202. These permitted acts are designed for public policy purposes, to ensure that the statute does not have the unintended effect of providing ownership of information itself, or impeding appropriate and beneficial types of uses.

Subsection (a) makes clear that the extraction or use of individual items of information is not prohibited. This is crucial in establishing that this legislation does not allow the producer of a collection to "lock up" individual pieces of information contained in the collection. The second sentence ensures that a single item in a collection cannot be considered either quantitatively or qualitatively substantial so as to give rise to liability under section 1202, even if it is in itself a valuable copyrighted work. On the other hand, this subsection would not excuse the extraction or use of many individual items in a repeated or systematic way, in order to evade the prohibition against extraction of a substantial portion.

Subsection (b) further clarifies that the act does not grant protection of the information itself, despite its inclusion within a collection. Others remain free to independently gather and use the same information which is contained in another's collection of information, whether for their own use or to produce a competing collection.

Subsection (c) exempts the use of information for purposes of verifying the accuracy of information independently gathered by the verifier. This concept stems from the early "sweat of the brow" copyright cases, which permitted subsequent compilers to use earlier compilations to verify the fruits of their own independent labor.[7] Potential abuse is avoided by the limitations in the sub-

[7] See *Illinois Bell Tel. Co.* v. *Haines & Co.,* 683 F. Supp. 1204 (N.D. Ill. 1988), aff'd, 905 F.2d 1081 (7th Cir. 1990), vacated and remanded, 499 U.S. 944 (1991); *Rural Tel. Serv. Co.* v. *Feist Publications, Inc.,* 916 F.2d 718 (10th Cir. 1990).

section requiring the information to be used only internally, not for distribution to others, and for the sole purpose of verifying accuracy rather than adding to or supplementing the information in the verifier's own collection. The exemption will be particularly important for scientists and other researchers, permitting them to use collections of information produced by others to check the results of their research.

It will also be important for the securities and commodities industries, where it is a common practice to verify the current market as part of placing an order for a security or commodity. For example, investors frequently decide to purchase investments through an online securities trading system that they have followed by means of a delayed data service. Typically, the online trading system will allow the investor to verify electronically the last sale price or prevailing quote for the investment as a last step before the investor places the buy order—called a "market check" or "market verification" service. In today's marketplace, providers of these services distribute millions of real-time quotations each month, aiding individuals by allowing them to attain easy and quick access to accurate information on which to decide whether to invest or trade in without unduly burdening them with the costs that would be associated with accessing a continual stream of real-time data. This subsection seeks to maintain the status quo and not to supercede any agreements with market verification services concerning the use of market quotation information. This provision permits the extraction of information for verification purposes unless it harms the market for those collections of information. Nothing in this subsection would permit delayed data subscribers to avoid fees when they verify delayed data by retrieving a real time price, a practice which is widespread within the industry.

This subsection is not intended to allow unscrupulous pirates to extract and use real-time quotations of securities and commodities markets and clearing organizations without the permission of the securities and commodities markets that gather, organize and maintain that information. Such activities are not undertaken for legitimate accuracy verification purposes.

Subsection (d) seeks to alleviate the concerns expressed by members of the research, scientific, and university communities that any new protection for collections of information would hinder their ability to carry on basic research. The subsection recognizes the value and importance of nonprofit educational, scientific and research purposes, permitting the extraction or use of information for such purposes as long as doing so does not harm the market for the original product or service. Ordinarily such uses will not cause market harm; it is typically where the user is a member of the intended market for the collection that the bill's prohibition would be called into play. The act also supplements this limitation by providing special relief for nonprofit educational, scientific or research institutions, libraries and archives, from substantial civil and criminal liability under the Act. As described below, such an institution is exempt from criminal liability and entitled to a reduction or remittal of monetary relief for good faith conduct, and may also obtain attorney's fees and costs when sued in bad faith.

This provision seeks to maintain the status quo in relation to how academic institutions use market quotations. Security and futures markets and clearing organizations have traditionally made available unprecedented portions of their collections of information to academics and researchers and will continue to do so under the belief that such activity is in the pubic interest to do so. For example, a university professor could not open an account with a brokerage firm which grants access to real time quotations and subsequently disseminate those quotations university wide to the extent that he or she replicate a real time service. Such activity would fall outside of the permitted acts under this subsection.

Section 1203(e) is premised on the Committee's cognizance of the essential role that the press plays in our constitutional system. This subsection reflects the Committee's intent that the act neither inhibit legitimate news gathering activities nor permit the labeling of conduct as "news reporting" as a pretext for usurping a compiler's investment in collecting information.[8]

For purposes of this subsection, "news reporting" should be construed to mean dissemination of news to the public, including sports scores and statistics, without regard to the means through which it is disseminated, whether by print media such as newspapers, by television news programs, or online.

The Committee expects that news reporting will seldom fall within the prohibition of section 1202, and therefore this exemption will rarely need to be invoked. News articles typically use particular items of information from a collection rather than the collection as a whole. Even if substantial portions of a collection are used, the use often will not affect the market for the collection and therefore will not implicate section 1202.

Section 1203(e) is applicable only if the extraction or use of all or a substantial part of another's collection of information is "for the sole purpose of news reporting or comment." Courts should be "chary of deciding what is and what is not news,"[9] and should examine, on a case-by-case basis, whether a claim under this provision is justified. In some circumstances, the amount taken from the collection may be relevant to a determination of whether the defendant's sole purpose was in fact news reporting. For example, the republication of an entire collection of information as an insert to a newspaper would not usually be excused by the mere fact that the newspaper as a whole is engaged in news reporting, or by the inclusion of an article related to the subject matter of only one distinct portion of the collection. Courts should, however, avoid second-guessing how much information is appropriate to use for a valid news reporting purpose.

This provision seeks to maintain the status quo in relation to how news operations use market quotations. While security and futures markets and clearing organizations have traditionally allowed news organizations to use market data in a reasonable manner that legitimately contributes to the news functions, this section would not allow news organizations to replicate real time quote services which harm the market for those collections of informa-

[8] Cf. *Wainwright Sec.* v. *Wall Street Transcript Corp.,* 558F.2d 91 (2d Cir. 1977).

[9] *Harper & Row, Publishers, Inc.* v. *Nation Enterprises, Inc.,* 723 F.2d 197, 215 (2d Cir. 1983) (Meskill, J., dissenting), rev'd on other grounds, 471 U.S. 539 (1985).

tion. For example, an entity which establishes itself as a news service and opens an account with a brokerage firm which grants access to real time quotations and subsequently disseminates those quotations to the public to such an extent that it would replicate a real time service would not be protected from the prohibition contained in section 1202 by this subsection.

The final clause of this subsection, excepting from its application a consistent pattern of competitive takings of time-sensitive information, is intended to preserve the holding in *International News Service* v. *Associated Press*[10] and is therefore tailored to the specific facts in that case. It should not be interpreted to have any other meaning, including any implication as to the permissibility of conduct not falling within its narrow scope.

Subsection (f) establishes the principle permitting resale or other sharing of a physical copy of a collection of information once that copy has been lawfully obtained. It does so by using language similar to that of the "first sale doctrine" in the Copyright Act, stating that the owner of a particular lawful copy of all or part of a collection of information may sell or otherwise dispose of that copy.

4. SECTION FOUR—EXCLUSIONS

Subsection (a) rules out protection for government collections of information. It provides that the act's protection does not extend to collections of information gathered, organized or maintained by or for governmental entities, their employees, agents, or exclusive licensees. It is designed to ensure that information collected by the government at taxpayer expense will be made available for public knowledge and basic research. The provision responds to concerns that the bill would thwart access to government information currently available to the public, especially to the scientific, research and educational communities. The exclusion is broader than the similar provision in section 105 of the Copyright Act; it applies to state and local governments as well as the federal government, and covers collections prepared for the government by independent contractors and exclusive licensees as well as employees.

This subsection does not apply, however, to collections of information gathered, organized or maintained by agents or licensees of the government created outside the scope of their agency or license, or by Federal or State educational institutions in the course of engaging in education or scholarship. When a party retained by the government to perform one particular task also invests in producing databases that add value to the information it has produced or collected for the government, it should not be precluded from protection. Similarly, educational institutions that happen to be government owned should not be disadvantaged relative to private institutions when producing databases unrelated to the provision of regulatory government functions.

Nor does the exclusion apply to information required to be collected and disseminated by securities, futures exchanges and clearing organizations operating under the Securities and Exchange Act of 1934 or the Commodity Exchange Act. Under the authority of both Acts, the dissemination of market data and price quotes in

[10] 248 U.S. 215 (1918).

collections of information supplied by securities and commodities markets are regulated by the SEC and the CFTC, respectively. Because of the fact that the Securities Exchange Act of 1934 requires securities exchanges, securities associations, securities information processors and clearing organizations to register with the SEC, and the fact that the Commodity Exchange Act requires commodities markets to register with the CFTC, might cause the financial markets to be deemed agents or exclusive licensees of the SEC and CFTC, this language clarifies that the unique relationship between government regulatory authorities and the securities and commodities markets does not bar protection under this chapter for the collections of information those markets produce.

Subsection (b) rules out protection under this chapter for computer programs. Computer programs are already closely linked with collections of information, and in the future will be even more so. The search engine for a large collection of information stored on CD–ROM is a type of computer program. Similarly, computer programs referred to as "intelligent agents" can gather information from the World Wide Web and create a collection of information. Section 1204(b)(1) is intended to make clear that notwithstanding the often close relationship between a program and a collection of information, computer programs are not protected under this chapter, including programs that are used in the manufacture, production, operation, or maintenance of a collection of information, or any elements of the program that are necessary for the program's operation.

At the same time, Section 1204(b)(2) makes clear that a collection of information does not lose protection by virtue of its inclusion within a computer program. For example, a set of engineering constants contained in a program which performs mathematical calculations using those constants remains a protected collection of information, assuming it meets the criteria of the Act. Section 1204(b)(2) recognizes that the information in a data-file is distinct from the instructions that perform operations on that information.

5. SECTION FIVE—RELATIONSHIP TO OTHER LAWS

Section 1205 deals with the relationship of the Act to existing legal rights or obligations relating to information. Subsection (a) clarifies that nothing in this act will affect the rights, limitations or remedies available to a party under current law, other than state rights preempted under subsection (b). For example, nothing in this act would negate the ability of a party to receive copyright protection for a collection of information should that collection qualify for protection as a "compilation" under the Copyright Act. Similarly, other laws that may provide affirmative rights of access to information would remain unaffected. This subsection establishes the general principle of non-interference; subsequent subsections provide specific examples of areas of law particularly relevant to the coverage of this Chapter.

Subsection (b) provides for preemption of state law to the extent it provides equivalent rights in the same subject matter. This subsection makes clear that federal law controls in this specific area, with state common law or statutes dealing with misappropriation of collections of information, as defined in section 1201, preempted

by this Act. On the other hand, state law providing different rights in collections of information are not preempted. The Act specifies that state laws regarding trademark, design rights, antitrust, trade secrets, privacy, access to public documents and the law of contract shall not be deemed to provide equivalent rights.

Subsection (c) addresses the relationship between the protection provided by this Act and by copyright law. The first sentence clarifies that protection under this chapter is independent of, but complementary to, any copyright protection that may subsist in a work of authorship that is contained in or consists in whole or in part of a collection of information. In evaluating a claim under this chapter, it is not relevant whether copyright protection exists in the collection of information or any component thereof. Rather, a court's task is to determine whether the defendant has misappropriated all or a substantial portion of the plaintiff's collection of information in violation of this chapter—irrespective of whether or not part or all of the contents of such collection of information consists of copyrighted material. When a defendant's use or extraction is also alleged to constitute copyright infringement, the court should determine that issue exclusively under the Copyright Act.

The second sentence of subsection (c) amplifies this principle. Because a collection of information protected under this chapter can consist, in whole or part, of one or more copyrighted works, this sentence affirms that an original work of authorship that is one of the items contained in a collection of information does not receive greater protection under this Act than it does under the copyright law. A work that is itself a collection of information, however, may receive greater protection against misappropriation under this chapter than it would receive against infringement as a compilation protected by copyright. Because the nature of the protection is distinct, a court evaluating a claim under this chapter need not distinguish between copyrightable and uncopyrightable components of collections of information. If the use or extraction of all or a substantial part of a collection of information violates this chapter, it is irrelevant whether copyright subsists in any part of that collection.

Subsection (d) deals with the relationship to antitrust law. It states that this chapter will not limit application of antitrust laws, including those laws regarding single suppliers of products and services. The subsection is intended to address the so-called "sole source" issue, involving situations where the information within a collection is not available elsewhere for others to obtain, giving the producer of the collection a de facto monopoly over the facts contained therein. The Committee believes that an appropriate response to potential abuse, to the extent it is not dealt with by existing regulatory authorities overseeing certain industries, can be found in the antitrust laws, which are specifically designed to deal with such monopoly concerns. The essential facilities doctrine in particular may be particularly relevant to this issue.

Subsection (e) reaffirms the basic principle of freedom of contract. It makes clear that nothing in this Act prevents the producer of the collection of information from entering into any licensing agreements or contracts concerning the use of the collection. In today's marketplace, licensing and other contractual mechanisms are

widely relied upon in disseminating collections of information. The Committee intends to preserve the ability to structure and enforce contractual arrangements tailored to the particular circumstances of a transaction. The enforceability of such licenses was recently upheld in *ProCD, Inc.* v. *Zeidenberg*,[11] which recognized the important role that private arrangements play in the efficient exploitation of information-based products to the benefit of both producers and users of these products.

Subsection (f) provides that nothing in this chapter shall affect the operation of provisions of the Communications Act of 1934, as amended. Consequently, nothing in this bill shall affect the operations of sections 251, 252, 271 or 272 of the Communications Act of 1934, as amended, and this bill shall not have any effect on any existing right contained in the Communications Act to extract or use information from a collection of information for the purpose of obtaining access to a network element, as such term is defined in section 153(29) of the Communications Act of 1934, as amended, (47 U.S.C. 153(29)), or otherwise to provide a telecommunications service as provided for under the Communications Act of 1934, as amended. Nor shall anything in this chapter affect the operation of section 222(e) of the Communications Act of 1934, as amended, (47 U.S.C. 222(e)), or shall restrict any person from extracting or using subscriber list information, as such term is defined in section 222(f)(3) of the Communications Act of 1934 (47 U.S.C. 222(f)(3)), for the purpose of publishing telephone directories in any format. This provision addresses the concerns of companies which presently use such information to publish independent directories separate from those published by the telephone service provider.

6. SECTION SIX—CIVIL REMEDIES

This section sets out the civil penalties which may be imposed for a violation of the act. Subsection (a) establishes exclusive subject matter jurisdiction in United States district courts. Subsection (b) gives courts the power to grant permanent and temporary injunctions to prevent violations of section 1202. An injunction may be served on a party anywhere in the United States and may be enforced by any district court having jurisdiction over the party.

Subsection (c) allows the appropriate court to impound copies of contents of a collection of information extracted or used in violation of this act. The court may also, as part of a final judgement or decree, order the remedial modification or destruction of all contents of a collection of databases extracted or used in violation of this act. Both the injunction and order of destruction may extend to all masters, tapes, disks, diskettes, or other articles by means of which copies may be produced.

Subsection (d) authorizes monetary damages for a violation of this act. The plaintiff is entitled to recover any damages it sustained as well as the defendant's profits not taken into account in computing damages. The plaintiff is required to prove the defendant's gross revenue only, while the defendant has the burden of proving all elements of cost or deduction claimed. The court may assess treble damages up to three times the amount of actual dam-

[11] 86 F.3d 1447 (7th Cir. 1996).

ages. The court may also award reasonable costs and attorney's fees to the prevailing party, and shall award such costs and fees if the action was brought in bad faith against a nonprofit educational, scientific or research institution, library or archives.

Subsection (e) requires a court to reduce or remit entirely monetary relief in any case where a defendant believed and had reasonable grounds for believing that his or her conduct was permissible under this Act, if the defendant was acting within the scope of his or her employment by a nonprofit educational, scientific, or research institution, library or archives.

The injunction and impoundment provisions of this act do not apply to any action against the United States Government. The relief provided under this section is available against a state entity only to the extent permitted by law.

7. SECTION SEVEN—CRIMINAL PENALTIES

Any person who willfully violates this Act for direct or indirect commercial advantage or financial gain, or causes loss or damages aggregating $10,000 or more in any one-year calendar period is criminally liable. Such an offense is punishable by a fine of not more than $250,000 or imprisonment for not more than five years, or both. A second or subsequent offense is punishable by a fine of not more than $500,000 or imprisonment for not more than 10 years, or both. Section 1207 does not apply to an employee or agent of a nonprofit educational, scientific, or research institution, library or archives, acting within the scope of his or her employment. Like the similar limitations on civil remedies, this exception is intended to avoid the chilling effect these substantial penalties might have on legitimate public interest uses of collections of information.

8. SECTION EIGHT—LIMITATIONS ON ACTIONS

Section 1208 establishes a two-prong statute of limitations. First, no criminal or civil proceedings may be maintained unless it is commenced within three years after the cause of action arises. Additionally, no action can be maintained more than fifteen years after the investment of resources that qualified for protection that portion of the collection of information that is extracted or used. This language means that new investments in an existing collection, if they are substantial enough to be worthy of protection, will themselves be able to be protected, ensuring that producers have the incentive to make such investments in expanding and refreshing their collections. At the same time, however, protection will not be perpetual; the substantial investment that is protected under the Act cannot be protected for more than fifteen years. By focusing on that investment that made the particular portion of the collection that has been extracted or used eligible for protection, the provision avoids providing ongoing protection to the entire collection every time there is an additional substantial investment made in its scope or maintenance.

9. SECTION NINE—EFFECTIVE DATE

The provisions of this Act take effect upon enactment and are applicable to acts committed on or after that date, with respect to col-

lections of information existing on that date or produced after that date. However, no person can be liable for the use of information from a collection of information where the information was lawfully extracted prior to the date of enactment of this Act.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3 of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (new matter is printed in italic and existing law in which no change is proposed is shown in roman):

TITLE 17, UNITED STATES CODE

Chap.		Sec.
1.	**Subject Matter and Scope of Copyright**	**101**
*	*	*
12.	***Misappropriation of Collections of Information***	***1201***
*	*	*

CHAPTER 12—MISAPPROPRIATION OF COLLECTIONS OF INFORMATION

Sec.
1201. Definitions.
1202. Prohibition against misappropriation.
1203. Permitted acts.
1204. Exclusions.
1205. Relationship to other laws.
1206. Civil remedies.
1207. Criminal offenses and penalties.
1208. Limitations on actions.

§ 1201. Definitions

As used in this chapter:

(1) COLLECTION OF INFORMATION.—The term "collection of information" means information that has been collected and has been organized for the purpose of bringing discrete items of information together in one place or through one source so that users may access them.

(2) INFORMATION.—The term "information" means facts, data, works of authorship, or any other intangible material capable of being collected and organized in a systematic way.

(3) POTENTIAL MARKET.—The term "potential market" means any market that a person claiming protection under section 1202 has current and demonstrable plans to exploit or that is commonly exploited by persons offering similar products or services incorporating collections of information.

(4) COMMERCE.—The term "commerce" means all commerce which may be lawfully regulated by the Congress.

§ 1202. Prohibition against misappropriation

Any person who extracts, or uses in commerce, all or a substantial part, measured either quantitatively or qualitatively, of a collection of information gathered, organized, or maintained by another person through the investment of substantial monetary or other resources, so as to cause harm to the actual or potential market of

that other person, or a successor in interest of that other person, for a product or service that incorporates that collection of information and is offered or intended to be offered for sale or otherwise in commerce by that other person, or a successor in interest of that person, shall be liable to that person or successor in interest for the remedies set forth in section 1206.

§ 1203. Permitted acts

(a) INDIVIDUAL ITEMS OF INFORMATION AND OTHER INSUBSTANTIAL PARTS.—Nothing in this chapter shall prevent the extraction or use of an individual item of information, or other insubstantial part of a collection of information, in itself. An individual item of information, including a work of authorship, shall not itself be considered a substantial part of a collection of information under section 1202. Nothing in this subsection shall permit the repeated or systematic extraction or use of individual items or insubstantial parts of a collection of information so as to circumvent the prohibition contained in section 1202.

(b) GATHERING OR USE OF INFORMATION OBTAINED THROUGH OTHER MEANS.—Nothing in this chapter shall restrict any person from independently gathering information or using information obtained by means other than extracting it from a collection of information gathered, organized, or maintained by another person through the investment of substantial monetary or other resources.

(c) USE OF INFORMATION FOR VERIFICATION.—Nothing in this chapter shall restrict any person from extracting information, or from using information within any entity or organization, for the sole purpose of verifying the accuracy of information independently gathered, organized, or maintained by that person. Under no circumstances shall the information so extracted or used be made available to others in a manner that harms the actual or potential market for the collection of information from which it is extracted or used.

(d) NONPROFIT EDUCATIONAL, SCIENTIFIC, OR RESEARCH USES.—Nothing in this chapter shall restrict any person from extracting or using information for nonprofit educational, scientific, or research purposes in a manner that does not harm the actual or potential market for the product or service referred to in section 1202.

(e) NEWS REPORTING.—Nothing in this chapter shall restrict any person from extracting or using information for the sole purpose of news reporting, including news gathering, dissemination, and comment, unless the information so extracted or used is time sensitive, has been gathered by a news reporting entity for distribution to a particular market, and has not yet been distributed to that market, and the extraction or use is part of a consistent pattern engaged in for the purpose of direct competition in that market.

(f) TRANSFER OF COPY.—Nothing in this chapter shall restrict the owner of a particular lawfully made copy of all or part of a collection of information from selling or otherwise disposing of the possession of that copy.

§ 1204. Exclusions

(a) GOVERNMENT COLLECTIONS OF INFORMATION.—

(1) EXCLUSION.—Protection under this chapter shall not extend to collections of information gathered, organized, or maintained by or for a government entity, whether Federal, State, or local, including any employee or agent of such entity, or any person exclusively licensed by such entity, within the scope of the employment, agency, or license. Nothing in this subsection shall preclude protection under this chapter for information gathered, organized, or maintained by such an agent or licensee that is not within the scope of such agency or license, or by a Federal or State educational institution in the course of engaging in education or scholarship.

(2) EXCEPTION.—The exclusion under paragraph (1) does not apply to any information required to be collected and disseminated by either a national securities exchange under the Securities Exchange Act of 1934 or a contract market under the Commodity Exchange Act.

(b) COMPUTER PROGRAMS.—

(1) PROTECTION NOT EXTENDED.—Subject to paragraph (2), protection under this chapter shall not extend to computer programs, including, but not limited to, any computer program used in the manufacture, production, operation, or maintenance of a collection of information, or any component of a computer program necessary to its operation.

(2) INCORPORATED COLLECTIONS OF INFORMATION.—A collection of information that is otherwise subject to protection under this chapter is not disqualified from such protection solely because it is incorporated into a computer program.

§ 1205. Relationship to other laws

(a) OTHER RIGHTS NOT AFFECTED.—Subject to subsection (b), nothing in this chapter shall affect rights, limitations, or remedies concerning copyright, or any other rights or obligations relating to information, including laws with respect to patent, trademark, design rights, antitrust, trade secrets, privacy, access to public documents, and the law of contract.

(b) PREEMPTION OF STATE LAW.—On or after the effective date of this chapter, all rights that are equivalent to the rights specified in section 1202 with respect to the subject matter of this chapter shall be governed exclusively by Federal law, and no person is entitled to any equivalent right in such subject matter under the common law or statutes of any State. State laws with respect to trademark, design rights, antitrust, trade secrets, privacy, access to public documents, and the law of contract shall not be deemed to provide equivalent rights for purposes of this subsection.

(c) RELATIONSHIP TO COPYRIGHT.—Protection under this chapter is independent of, and does not affect or enlarge the scope, duration, ownership, or subsistence of, any copyright protection in any work of authorship that is contained in or consists in whole or part of a collection of information. This chapter does not provide any greater protection to a work of authorship contained in a collection of information, other than a work that is itself a collection of information, than is available to that work under any other chapter of this title.

(d) ANTITRUST.—Nothing in this chapter shall limit in any way the constraints on the manner in which products and services may

be provided to the public that are imposed by Federal and State antitrust laws, including those regarding single suppliers of products and services.

(e) LICENSING.—Nothing in this chapter shall restrict the rights of parties freely to enter into licenses or any other contracts with respect to the use of collections of information.

(f) COMMUNICATIONS ACT OF 1934.—Nothing in this chapter shall affect the operation of section 222(e) of the Communications Act of 1934 (47 U.S.C. 222(e)), or shall restrict any person from extracting or using subscriber list information, as such term is defined in section 222(f)(3) of the Communications Act of 1934 (47 U.S.C. 222(f)(3)), for the purpose of publishing telephone directories in any format.

§ 1206. Civil remedies

(a) CIVIL ACTIONS.—Any person who is injured by a violation of section 1202 may bring a civil action for such a violation in an appropriate United States district court without regard to the amount in controversy, except that any action against a State governmental entity may be brought in any court that has jurisdiction over claims against such entity.

(b) TEMPORARY AND PERMANENT INJUNCTIONS.—Any court having jurisdiction of a civil action under this section shall have the power to grant temporary and permanent injunctions, according to the principles of equity and upon such terms as the court may deem reasonable, to prevent a violation of section 1202. Any such injunction may be served anywhere in the United States on the person enjoined, and may be enforced by proceedings in contempt or otherwise by any United States district court having jurisdiction over that person.

(c) IMPOUNDMENT.—At any time while an action under this section is pending, the court may order the impounding, on such terms as it deems reasonable, of all copies of contents of a collection of information extracted or used in violation of section 1202, and of all masters, tapes, disks, diskettes, or other articles by means of which such copies may be reproduced. The court may, as part of a final judgment or decree finding a violation of section 1202, order the remedial modification or destruction of all copies of contents of a collection of information extracted or used in violation of section 1202, and of all masters, tapes, disks, diskettes, or other articles by means of which such copies may be reproduced.

(d) MONETARY RELIEF.—When a violation of section 1202 has been established in any civil action arising under this section, the plaintiff shall be entitled to recover any damages sustained by the plaintiff and defendant's profits not taken into account in computing the damages sustained by the plaintiff. The court shall assess such profits or damages or cause the same to be assessed under its direction. In assessing profits the plaintiff shall be required to prove defendant's gross revenue only; defendant must prove all elements of cost or deduction claims. In assessing damages the court may enter judgment, according to the circumstances of the case, for any sum above the amount found as actual damages, not exceeding three times such amount. The court in its discretion may award reasonable costs and attorney's fees to the prevailing party and shall

award such costs and fees where it determines that an action was brought under this chapter in bad faith against a nonprofit educational, scientific, or research institution, library, or archives, or an employee or agent of such an entity, acting within the scope of his or her employment.

(e) REDUCTION OR REMISSION OF MONETARY RELIEF FOR NONPROFIT EDUCATIONAL, SCIENTIFIC, OR RESEARCH INSTITUTIONS.—The court shall reduce or remit entirely monetary relief under subsection (d) in any case in which a defendant believed and had reasonable grounds for believing that his or her conduct was permissible under this chapter, if the defendant was an employee or agent of a nonprofit educational, scientific, or research institution, library, or archives acting within the scope of his or her employment.

(f) ACTIONS AGAINST UNITED STATES GOVERNMENT.—Subsections (b) and (c) shall not apply to any action against the United States Government.

(g) RELIEF AGAINST STATE ENTITIES.—The relief provided under this section shall be available against a State governmental entity to the extent permitted by applicable law.

§ 1207. Criminal offenses and penalties

(a) VIOLATION.—

(1) IN GENERAL.—Any person who violates section 1202 willfully, and—

(A) does so for direct or indirect commercial advantage or financial gain, or

(B) causes loss or damage aggregating $10,000 or more in any 1-year period to the person who gathered, organized, or maintained the information concerned,

shall be punished as provided in subsection (b).

(2) INAPPLICABILITY.—This section shall not apply to an employee or agent of a nonprofit educational, scientific, or research institution, library, or archives acting within the scope of his or her employment.

(b) PENALTIES.—An offense under subsection (a) shall be punishable by a fine of not more than $250,000 or imprisonment for not more than 5 years, or both. A second or subsequent offense under subsection (a) shall be punishable by a fine of not more than $500,000 or imprisonment for not more than 10 years, or both.

§ 1208. Limitations on actions

(a) CRIMINAL PROCEEDINGS.—No criminal proceeding shall be maintained under this chapter unless it is commenced within three years after the cause of action arises.

(b) CIVIL ACTIONS.—No civil action shall be maintained under this chapter unless it is commenced within three years after the cause of action arises or claim accrues.

(c) ADDITIONAL LIMITATION.—No criminal or civil action shall be maintained under this chapter for the extraction or use of all or a substantial part of a collection of information that occurs more than 15 years after the investment of resources that qualified the portion of the collection of information for protection under this chapter that is extracted or used.

TITLE 28, UNITED STATES CODE

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PART IV—JURISDICTION AND VENUE

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CHAPTER 85—DISTRICT COURTS; JURISDICTION

Sec.
1330. Actions against foreign states.

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1338. Patents, plant variety protection, copyrights, mask works, trade-marks, *misappropriations of collections of information,* and unfair competition.

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§ 1338. Patents, plant variety protection, copyrights, mask works, trade-marks, *misappropriations of collections of information,* and unfair competition

(a) The district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to patents, plant variety protection, copyrights and trade-marks. Such jurisdiction shall be exclusive of the courts of the states in patent, plant variety protection and copyright cases.

(b) The district courts shall have original jurisdiction of any civil action asserting a claim of unfair competition when joined with a substantial and related claim under the copyright, patent, plant variety protection or trade-mark laws.

(c) Subsections (a) and (b) apply to exclusive rights in mask works under chapter 9 of title 17 to the same extent as such subsections apply to copyrights.

(d) The district courts shall have original jurisdiction of any civil action arising under chapter 12 of title 17, relating to misappropriation of collections of information. Such jurisdiction shall be exclusive of the courts of the States.

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DISSENTING VIEWS

I agree with the stated goals of this legislation—to protect database owners from misappropriation of their work product—but I do not believe that we should try to provide database owners with protection that is not within our power to grant. More precisely, I am convinced that the Copyright Clause and the First Amendment do not countenance the type of protection that the proponents of this bill would seek to bestow.

Congress is of course limited in its authority by the powers enumerated in Article I and the amendments to the Constitution. Therefore, any power to provide protections for "collections of information" must fall within the bounds of this authority.

The Supreme Court has ruled out the establishment of protection for databases under the Copyright Clause (Article I, Section 8, clause 8) of the Constitution. In *Feist Publications* v. *Rural Telephone Service Co,* 499 U.S. 340 (1991), the Court unanimously held that the Copyright Clause protects only original works of authorship and prohibits protection for data and factual information. The Court outlined a two-part test for this "originality" requirement:

> To qualify for copyright protection, a work must be original to the author. *Harper & Row,* [417 U.S. 539 (1985)] at 547–549. Original, as the term is used in copyright, means only that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity.

Feist, 499 U.S. at 345.

Lower courts have clarified that as a consequence of the requirement for originality for copyright protection, copyright cannot prevent a competitor from extracting factual information from a database, even if that work has been registered under the Copyright Act. In other words, copyright will only protect the original, creative material within a database.

This legislation extends far beyond the original and creative elements of "collections of information," and copyright cannot serve as the basis for its enactment by Congress.

The drafters of H.R. 2652 have attempted to avoid this defect by styling the bill as a Federal "misappropriation" statute, as though we were not creating a new property right, but establishing a new tort. However, the bill seeks to establish a new property right for "collections of information," complete with civil and criminal remedies for unauthorized use, and exceptions for the use of individual items or "insubstantial parts," scholarly activity, and news reporting. Such characteristics belie the "misappropriation" label, and look suspiciously analogous to those of copyright (infringement, fair use, etc.).

It is possible that congressional authority for enactment of H.R. 2652 could instead exist under the Commerce Clause (Article I, Section 8, clause 3). However, the Supreme Court's interpretation of the relationship between the Commerce Clause and another enumerated power (the Bankruptcy Clause) in *Railway Labor Executives' Association* v. *Gibbons,* 455 U.S. 457 (1982), seems to rule out this possibility.

In *Railway Labor,* the Court struck down a statute providing protection to the employees of a railroad in bankruptcy. The Court found that the proposed statute violated the "uniformity" requirement of the Bankruptcy Clause, which Congress could not circumvent by purporting to legislate under the Commerce Clause. *Railway Labor,* 455 U.S. at 469. The *Railway Labor* opinion makes clear that Congress cannot avoid the particular requirements (e.g., uniformity, originality) of one enumerated power (e.g., the Bankruptcy Clause, the Copyright Clause), by relying on the generality of the Commerce Clause.

Perhaps a true misappropriation law, which does not impinge on the dictates of the Copyright Clause as elucidated by the *Feist* decision, could conceivably coexist with copyright under Congress' Commerce Clause authority. However, as the Court explained in *Feist,* this protection would be "available under a theory of unfair competition." *Feist,* 499 U.S. at 354.

Undoubtedly, supporters of H.R. 2652 will argue that "misappropriation" fits within the definition of "unfair competition," and that the bill is tailored to Justice O'Connor's statement in *Feist* regarding "protection for the fruits of [data] research" from unfair competition. However, "misappropriation" under H.R.2652 cannot be reconciled with Justice O'Connor's, and the Supreme Court's, interpretation of "unfair competition."

Again writing for a unanimous Court in *Bonito Boats* v. *Thunder Craft Boats,* 489 U.S. 141 (1989) Justice O'Connor explained the relationship between the law of unfair competition and protection of property:

> The Law of unfair competition has its roots in the common-law tort of deceit: its general concern is with protecting *consumers* from confusion as to source. While that concern may result in the creation of "quasi-property rights" in communicative symbols, the focus is on the protection of consumers, not the protection of producers as an incentive to product innovation.

Bonito Boats, 489 U.S. at 157 (emphasis in original).

Even the supporters of H.R. 2652 would be hard-pressed to argue that this legislation is motivated by an intention to protect consumers. The bill's focus is on the "investment of substantial monetary or other resources" and the "harm to the actual or potential market" of the database producer. The courts have made clear that competition law is not intended to serve as an instrument for one competitor to use against another, but as a means of fostering competition for the benefit of consumers. See *Northwest Power Products, Inc.* v. *Omark Indus., Inc.,* 576 F.2d 83, 89 (5th Cir. 1978); *Manufacturing Research Corp.* v. *Greenleetool Co.,* 693 F.2d 1037, 1043 (11th Cir. 1982).

Finally, this legislation may also fall short of what is necessary under the First Amendment. Factual information and ideas are the building blocks of all forms of expression, and the Supreme Court has recognized that the First Amendment leaves little room for restrictions on the dissemination of ideas and factual information. In fact, the Court's ruling in *Harper & Row, Publishers, Inc.* v. *Nation Enterprises,* 471 U.S. 539 (1985), seems to indicate that our rights of expression under the First Amendment preclude Congress from limiting access to information in the manner contemplated by this legislation.

> Our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open," *New York Times Co.* v. *Sullivan,* 376 U.S. 254, 270 (1964), *leaves no room for a statutory monopoly over information and ideas.* "The arena of public debate would be quiet, indeed, if a politician could copyright his speeches or a philosopher his treatises and thus obtain a monopoly on the ideas they contained." *Lee* v. *Runge,* 404 U.S. 887, 893 (1971) (Douglas, J., dissenting from denial of certiorari). A broad dissemination of principles, ideas, and factual information is crucial to the robust public debate and informed citizenry that are "the essence of self-government." *Garrison* v. *Louisiana,* 379 U.S. 64, 74–75 (1964). And every citizen must be permitted freely to marshal ideas and facts in the advocacy of particular political choices.

Harper & Row, 471 U.S. at 582 (emphasis added).

The Court distinguished copyright protection from the rights protected by the First Amendment by making clear that copyright protection is limited to the author's expression of facts or ideas, not the facts or ideas themselves. In *Harper & Row,* the Court recited with approval the Second Circuits explanation that copyright's "idea-expression" dichotomy "strike[s] a definitional balance between the First Amendment and the Copyright Act by permitting free communication of facts while still protecting an author's expression." *Harper & Row,* 471 U.S. at 556 (quoting 723 F.2d 195, 203 (2d Circuit 1983)). The Court goes on to make clear that "[n]o author may copyright his ideas or the facts he narrates." *Harper & Row,* 471 U.S. at 556.

As I stated initially, I am extremely sympathetic to the efforts of my Colleagues to protect the misappropriation of the work and efforts of database publishers. Without a doubt, Congress should be concerned about the need to provide incentives to produce and maintain valuable collections of information. However, our efforts are nugatory if we do not enact legislation that comports with the requirements of the Constitution. I have attempted to lay out the relevant Supreme Court decisions that bear on these requirements, and I am convinced that the Court will not find the current bill satisfactory under these standards.

Finally, I would like to point out what I believe is an unintended consequence of the legislation as it was reported by the Judiciary Committee.

The Internet is actually itself a collection of interdependent databases linked through our telecommunications infrastructure. Many of the most primary and crucial elements of the Net are databases that make online communications possible. For example, the list of domain names is a database that depends on a lookup table (another database) to translate the characters making up a domain name into a numerical Internet address. Other tables (also databases) designate pathways over which to route messages across the Internet to the address of the intended recipient.

As the legislation is currently drafted, a proprietary claim over these or other databases that comprise the Internet could be asserted. Such claims could restrict access to any domain name system, unified directory, translation, routing, or other lookup table essential to the functioning of the Internet in an open systems environment. The result would be a disastrous disruption in the operation of the Internet and for the millions of people who depend on its proper performance. The exploding growth of the Internet and online commerce would be impaired in that case.

The bill as reported by the Committee does include an exception for subscriber list information necessary for the publication of traditional telephone directories, which are necessary for the use of the traditional, public switched-voice network operated by common carriers under the Telecommunications Act. However, not all communications networks are covered—specifically, those operating in a digital environment of computer-to-computer communications, offering enhanced information and telecommunications services.

Should the Supreme Court somehow find this legislation constitutionally permissible, failure to include an exception for collections of information necessary for the operation and proper functioning of digital communications/computer networks could threaten the open systems precepts that underpin the almost unimaginable expansion of the Internet. I do not believe this is what the authors of this bill intended, and I look forward to working with them to rectify this oversight.

ZOE LOFGREN.

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