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108TH CONGRESS, 2d Session | HOUSE OF REPRESENTATIVES | REPT. 108–421, Part 2

DATABASE AND COLLECTIONS OF INFORMATION MISAPPROPRIATION ACT

MARCH 11, 2004.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. BARTON of Texas, from the Committee on Energy and Commerce, submitted the following

ADVERSE REPORT

[To accompany H.R. 3261]

[Including cost estimate of the Congressional Budget Office]

The Committee on Energy and Commerce, to whom was referred the bill (H.R. 3261) to prohibit the misappropriation of certain databases, having considered the same, report unfavorably thereon with an amendment and recommend that the bill do not pass.

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AMENDMENT

The amendment is as follows:

Strike all after the enacting clause and insert the following:

29–006

SECTION 1. SHORT TITLE.

This Act may be cited as the "Database and Collections of Information Misappropriation Act".

SEC. 2. DEFINITIONS.

In this Act:

(1) COLLECTIVE WORK.—The term "collective work" means a work, such as a periodical issue, anthology, or encyclopedia, in which a number of contributions, constituting separate and independent works in themselves, are assembled into a collective whole.

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

(3) COMPILATION.—The term "compilation" means a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship. The term "compilation" includes collective works.

(4) DATABASE.—

(A) IN GENERAL.—Subject to subparagraph (B), the term "database" means a collection of a large number of discrete items of information produced for the purpose of bringing such discrete items of information together in one place or through one source so that persons may access them.

(B) EXCLUSIONS.—The term database does not include any of the following:

(i) A work of authorship, other than a compilation or a collective work.

(ii) A collection of information that principally performs the function of addressing, routing, forwarding, transmitting, or storing digital online communications or receiving access to connections for digital communications, except that the fact that a collection of information includes or consists of online location designations shall not by itself be the basis for applying this clause.

(iii) A collection of information gathered, organized, or maintained to perform the function of providing schedule and program information for multichannel audio or video programming.

(iv) A collection of information gathered, organized, or maintained to register domain name registrant contact data maintained by a domain name registration authority, unless such registration authority takes appropriate steps to ensure the integrity and accuracy of such information and provides real-time, unrestricted, and fully searchable public access to the information contained in such collection of information.

(C) DISCRETE SECTIONS.—The fact that a database is a subset of a database shall not preclude such subset from treatment as a database under this Act.

(5) DOMAIN NAME.—The term "domain name" means any alphanumeric designation which is registered with or assigned by any domain name registrar, domain name registry, or other domain name registration authority as part of an electronic address on the Internet.

(6) IN CONCERT.—A person acts "in concert" with another person who makes a database available in commerce if the act of making available in commerce is planned, arranged, coordinated, adjusted, agreed upon, or settled between the two persons acting together, in pursuance of some design or in accordance with some scheme.

(7) INFORMATION.—The term "information" means facts, data, works of authorship, or any other intangible material capable of being generated or gathered.

(8) INTERNET.—The term "Internet" means the combination of computer facilities and electromagnetic transmission media, and related equipment and software, comprising the interconnected worldwide network of computer networks that employ the Transmission Control Protocol/Internet Protocol or any successor protocol to transmit information.

(9) LEGAL ENTITY.—The term "legal entity" means a person, other than an individual, including a firm, corporation, union, or other organization, which is organized under the laws of the United States, a State, the District of Columbia, or any commonwealth, territory, or possession of the United States, or the laws of a foreign country.

(10) MAINTAIN.—To "maintain" a database means to update, validate, or supplement the information contained in the database.

(11) MAKING AVAILABLE IN COMMERCE TO OTHERS.—The term "making available in commerce to others" means making available in commerce to—

(A) a substantial number of members of the public; or

(B) a number of persons that extends beyond—

(i) a family and its social acquaintances; or

(ii) those who could reasonably anticipate to have a database made available in commerce to them without a customary commercial relationship.

A court may take into account repeated acts directed to different persons by the same or concerted parties in determining whether the limits imposed by subparagraph (B)(ii) have been exceeded.

SEC. 3. PROHIBITION AGAINST MISAPPROPRIATION OF DATABASES.

(a) LIABILITY.—Any person who makes available in commerce to others a quantitatively substantial part of the information in a database generated, gathered, or maintained by another person, knowing that such making available in commerce is without the authorization of that other person (including a successor in interest) or that other person's licensee, when acting within the scope of its license, shall be liable for the remedies set forth in section 7 if—

(1) the database was generated, gathered, or maintained through a substantial expenditure of financial resources or time;

(2) the unauthorized making available in commerce occurs in a time sensitive manner and inflicts injury on the database or a product or service offering access to multiple databases; and

(3) the ability of other parties to free ride on the efforts of the plaintiff would so reduce the incentive to produce or make available the database or the product or service that its existence or quality would be substantially threatened.

(b) INJURY.—For purposes of subsection (a), the term "inflicts an injury" means serving as a functional equivalent in the same market as the database in a manner that causes the displacement, or the disruption of the sources, of sales, licenses, advertising, or other revenue.

(c) TIME SENSITIVE.—In determining whether an unauthorized making available in commerce occurs in a time sensitive manner, the court shall consider the temporal value of the information in the database, within the context of the industry sector involved.

SEC. 4. PERMITTED ACTS.

(a) INDEPENDENTLY GENERATED OR GATHERED INFORMATION.—This Act shall not restrict any person from—

(1) independently generating or gathering information obtained by means other than extracting it from a database generated, gathered, or maintained by another person; and

(2) making that information available in commerce.

(b) ACTS OF MAKING AVAILABLE IN COMMERCE BY NONPROFIT SCIENTIFIC OR RESEARCH INSTITUTIONS.—Subject to section 9, the making available in commerce of a substantial part of a database by a nonprofit scientific or research institution, including an employee or agent of such institution acting within the scope of such employment or agency, for nonprofit scientific or research purposes shall not be prohibited by section 3 if the court determines that the making available in commerce of the information in the database is reasonable under the circumstances, taking into consideration the customary practices associated with such uses of such database by nonprofit scientific or research institutions and other factors that the court determines relevant.

(c) HYPERLINKING.—Nothing in this Act shall restrict the act of hyperlinking of one online location to another or the providing of a reference or pointer (including such reference or pointer in a directory or index) to a database.

(d) NEWS REPORTING.—Nothing in this Act shall restrict any person from making available in commerce information for the primary purpose of news reporting, including news and sports gathering, dissemination, and comment, unless the information is time sensitive and has been gathered by a news reporting entity, and making available in commerce the information is part of a consistent pattern engaged in for the purpose of direct competition.

SEC. 5. EXCLUSIONS.

(a) GOVERNMENT INFORMATION.—

(1) IN GENERAL.—Except as provided in paragraph (2), protection under this Act shall not extend to—

(A) a database generated, gathered, organized, or maintained by a Federal, State, or local governmental entity, or by an employee or agent of such an entity, acting within the scope of such employment or agency; or

(B) a database generated, gathered, or maintained by an entity pursuant to and to the extent required by a Federal statute or regulation requiring such a database.

(2) EXCEPTION.—Nothing in this subsection shall preclude protection under this Act for a database gathered, organized, or maintained by an employee or agent of an entity described in paragraph (1) that is acting outside the scope of such employment or agency, or by a Federal, State, or local educational institution, or its employees or agents, in the course of engaging in education, research, or scholarship.

(b) COMPUTER PROGRAMS.—

(1) PROTECTION NOT EXTENDED.—Subject to paragraph (2), protection under section 3 shall not extend to computer programs, including any computer program used in the manufacture, production, operation, or maintenance of a database, or to any element of a computer program necessary to its operation.

(2) INCORPORATED DATABASES.—A database that is otherwise subject to protection under section 3 is not disqualified from such protection solely because it resides in a computer program, so long as the collection of information functions as a database within the meaning of this Act.

SEC. 6. RELATION TO OTHER LAWS.

(a) OTHER RIGHTS NOT AFFECTED.—

(1) IN GENERAL.—Subject to subsection (b), nothing in this Act shall affect rights, limitations, or remedies concerning copyright, patent, trademark, design rights, antitrust, trade secrets, privacy, access to public documents, and misuse.

(2) RIGHT OF CONTRACT.—Notwithstanding subsection (b), nothing in this Act shall affect rights, limitations, or remedies concerning the common law right of contract.

(b) PREEMPTION OF STATE LAW.—

(1) LAWS REGULATING CONDUCT THAT IS SUBJECT OF THE ACT.—On and after the effective date of this Act, no State statute, rule, regulation, or common law doctrine that prohibits or otherwise regulates conduct that is prohibited or regulated under this Act shall be effective.

(2) CLARIFICATION OF INAPPLICABILITY TO CASES NOT INVOLVING COMMERCIAL COMPETITION.—Paragraph (1) shall not apply to preempt actions under State law against a person for taking actions that—

(A)(i) disrupt the sources of data supply to a database; or

(ii) substantially impair the perceived accuracy, currency, or completeness of data in a database by inaccurate, untimely, or incomplete replication and distribution of such data; and

(B) do not involve the person making available in commerce the data from such database in competition with such database.

(c) COMMUNICATIONS ACT OF 1934.—Nothing in this Act shall affect the operation of section 222(e) or any other provision of the Communications Act of 1934 (47 U.S.C. 151 et seq.), or shall restrict any person from making available in commerce or extracting subscriber list information, as such term is defined in section 222(h)(3) of the Communications Act of 1934 (47 U.S.C. 222(h)(3)).

(d) SECURITIES.—Nothing in this Act shall—

(1) affect the operation of the Securities Act of 1933 (15 U.S.C. 78a et seq.), the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.), the Public Utility Holding Company Act of 1935 (15 U.S.C. 79a et seq.), the Trust Indenture Act of 1939 (15 U.S.C. 77aaa et seq.), the Investment Company Act of 1940 (15 U.S.C. 80a–1 et seq.), the Investment Advisers Act of 1940 (15 U.S.C. 80b et seq.), or the Securities Investor Protection Act of 1970 (15 U.S.C. 78aaa et seq.), or the rules or regulations thereunder;

(2) affect the authority of the Securities and Exchange Commission; or

(3) apply to information with respect to quotations for, or indications, orders, or transactions in, securities.

(e) MISUSE.—Judicial doctrines of misuse shall apply under this Act.

SEC. 7. CIVIL REMEDIES.

(a) CIVIL ACTIONS.—

(1) COMMENCEMENT OF ACTIONS.—Any person who is injured by a violation of section 3 may bring a civil action for such a violation in an appropriate United States district court. Any action against a State governmental entity may be brought in any court that has jurisdiction over claims against such entity.

(2) NOTICE OF COMMENCEMENT OF ACTIONS AND APPEALS.—Any person who brings an action for such a violation, or who files an appeal from any final decision on such an action, shall transmit notice of such action or appeal to the Fed-

eral Trade Commission, the United States Patent and Trademark Office, and the Register of Copyrights, in accordance with subsection (i)(1).

(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 or restrain a violation or attempted violation of section 3. 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) MONETARY RELIEF.—

(1) ACTUAL DAMAGES AND ATTRIBUTABLE PROFITS.—When a violation of section 3 has been established in any civil action arising under this section, the plaintiff shall be entitled to recover the actual damages sustained by the plaintiff as a result of the violation and any profits of the defendant that are attributable to the violation and are not taken into account in computing the actual 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 and the defendant shall be required to prove all elements of cost or deduction claims.

(2) ADDITIONAL DAMAGES.—In addition to actual damages, the court may enter judgment for an additional amount not exceeding 2 times such actual damages after considering the following factors:

(A) Whether the plaintiff notified the defendant of the alleged violation and the defendant continued to violate section 3.

(B) The willfulness of the defendant's conduct.

(C) Whether the defendant has a history of database misappropriation.

(D) The defendant's ability to pay.

(E) Whether the alleged violation had a serious negative financial impact on the plaintiff.

(F) Any good faith effort by the defendant to rectify the misappropriation.

(G) Whether the assessment of additional damages is necessary in order to deter future violations.

(d) IMPOUNDMENT.—At any time while an action under this section is pending, including an action seeking to enjoin a violation, the court may order the impounding, on such terms as it deems reasonable, of all copies of contents of a database made available in commerce or attempted to be made available in commerce potentially in violation of section 3, 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 or attempted violation of section 3, order the remedial modification or destruction of all copies of contents of a database made available in commerce or attempted to be made available in commerce in violation of section 3, and of all masters, tapes, disks, diskettes, or other articles by means of which such copies may be reproduced.

(e) COSTS AND ATTORNEY'S FEES.—The court in its discretion may award reasonable costs and attorney's fees to the prevailing party. The court shall award costs and fees if it determines that an action was brought or a defense was raised under this Act in bad faith.

(f) ACTIONS AGAINST UNITED STATES GOVERNMENT.—Subsections (b) and (d) 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.

(h) LIMITATION ON LIABILITY OF CERTAIN ENTITIES.—

(1) LIMITATION ON LIABILITY.—No provider of an interactive computer service shall be liable under section 3 for making available information that is provided by another information content provider.

(2) DEFINITIONS.—In this subsection, the terms "interactive computer service" and "information content provider" have the meanings given those terms in section 230(f) of the Communications Act of 1934 (47 U.S.C. 230(f)).

(3) CONSTRUCTION.—For purposes of section 230 of the Communications Act of 1934 and any other provision of law, the provisions of this Act shall not be construed to be a law pertaining to intellectual property.

(i) OVERSIGHT OF CIVIL REMEDIES BY FTC AND PTO.—

(1) NOTICE.—The Federal Trade Commission, the Director of the United States Patent and Trademark Office, and the Register of Copyrights shall, by regulation, prescribe the form and procedures by which persons shall transmit the notices required by subsection (a)(2).

(2) OVERSIGHT.—The Federal Trade Commission, the Director of the United States Patent and Trademark Office, and the Register of Copyrights shall re-

view the actions conducted under this section for the purposes of identifying instances in which judicial interpretation of this Act adversely or otherwise materially affects the administration of laws and policies within their respective jurisdictions.

(3) AMICUS CURIAE BRIEFS.—The Federal Trade Commission, the Director of the United States Patent and Trademark Office, and the Register of Copyrights may, in appropriate instances, file briefs as friends of the court in appeals from final decisions of actions under this section.

(4) REPORTS.—The Federal Trade Commission, the Director of the United States Patent and Trademark Office, and the Register of Copyrights shall, within 18 months after the date of the enactment of this Act, each transmit a report to the Committee on the Judiciary and the Committee on Energy and Commerce of the House of Representatives and the Committee on the Judiciary and the Committee on Commerce, Science, and Transportation of the Senate on their operations under this subsection. Such reports shall include—

(A) a summary of any briefs filed under paragraph (3);

(B) an explanation of the impact, if any, of the judicial decisions reviewed on existing laws and policies within the jurisdiction of the Commission, the Director of the Patent and Trademark Office, or the Register of Copyrights, as the case may be; and

(C) any recommendations for legislative or other changes that the Commission, the Director of the Patent and Trademark Office, or the Register of Copyrights, as the case may be, considers appropriate.

SEC. 8. LIMITATION ON ACTIONS.

No civil action shall be maintained under this Act unless it is commenced within 2 years after the cause of action arises or claim accrues.

SEC. 9. EXCLUSION FROM LIABILITY FOR EDUCATIONAL INSTITUTIONS AND RESEARCH LABORATORIES.

(a) EXCLUSION.—Except as provided in subsection (d), no liability shall be imposed under this Act on—

(1) any accredited nonprofit postsecondary educational institution or any nonprofit research laboratory,

(2) any employee of such educational institution or laboratory acting within the scope of his or her employment, or

(3) any student enrolled in such educational institution acting in furtherance of the supervised activities or programs of the institution,

by reason of activities undertaken for nonprofit education, scientific, or research purposes.

(b) ACCREDITATION.—For purposes of this section, accreditation shall be as determined by a regional or national accrediting agency recognized by the Council on Higher Accreditation or the United States Department of Education.

(c) NONPROFIT RESEARCH LABORATORY.—For purposes of this section, a nonprofit research laboratory is a nonprofit research organization that is primarily engaged in basic or applied scientific research, or both, and that is a qualified organization as defined in section 41(b)(6)(B) of the Internal Revenue Code of 1986 for purposes of the research credit determined under section 41 of such Code.

(d) EXCEPTION.—Subsection (a) does not apply to an institution, laboratory, employee of such institution or laboratory, or student of such institution to the extent that the institution, laboratory, employee, or student makes available substantially all of a database in direct commercial competition with a person who made the substantial expenditure described in section 3(a)(1).

SEC. 10. EFFECTIVE DATE.

(a) IN GENERAL.—This Act shall take effect on the date of the enactment of this Act, and shall apply to acts of making available in commerce on or after that date with respect to databases existing before, on, or after that date.

(b) PRIOR ACTS NOT AFFECTED.—No person shall be liable under section 3 for making available in commerce on or after the date of the enactment of this Act a quantitatively substantial part of the information in a database in violation of that section, when the information was lawfully extracted from the database before the date of the enactment of this Act, by that person or by that person's predecessor in interest.

SEC. 11. NONSEVERABILITY.

(a) IN GENERAL.—If the Supreme Court of the United States holds that the provisions of section 3, relating to prohibition against misappropriation of databases, are invalid under Article I of, or the First Amendment to, the Constitution of the United States, then this Act is repealed, effective as of the date of the Supreme Court decision.

(b) TERMINATION.—Subsection (a) shall cease to be effective at the end of the 10-year period beginning on the date of the enactment of this Act.

PURPOSE AND SUMMARY

H.R. 3261, the "Database and Collections of Information Misappropriation Act" creates comprehensive and perpetual protection for databases. The Committee ordered H.R. 3261 reported unfavorably, with an amendment.

BACKGROUND AND NEED FOR LEGISLATION

The importance of databases to commerce

One of the basic tenets of intellectual property law holds that facts are not copyrightable, recognizing the great need to widely disseminate factual information. To qualify for copyright protection a work must be original to the author and possess a minimal degree of creativity. It is a well-established principle that no one may claim originality as to facts. Facts, by their very nature, are discovered, not created, and therefore, are part of the public domain.

This policy has served commerce well. The culture of business and science involves using existing data in different ways, or combining existing data with newly generated data. Information is the foundation to advances in medical and other scientific research. It is also a fundamental element of innovation in products and services. Allowing scientists and businesses to access and use factual information propels society forward rather than relegating important resources to "reproducing" the same information.

The "sweat of the brow" doctrine and Feist

While the majority of courts through U.S. history had upheld the policy that facts are not copyrightable, a minority of courts granted copyright protection to factual compilations under the "sweat of the brow" doctrine. The courts reasoned that even in cases in which a database lacked creativity or originality, a publisher was entitled to protection because of the time and resources expended in collecting and organizing the information.

In 1991, the Supreme Court in *Feist Publications, Inc.* v. *Rural Tel. Ser. Co,* 499 U.S. 340 (1991), rejected the "sweat of the brow" doctrine. The Court reaffirmed that originality is the central component of copyright. While explaining that the vast majority of factual compilations will pass the originality test, the Court emphasized that compilations of factual information would receive only limited protection. The Court explained that the copyright in a factual compilation extends only to the author's original contributions, not the facts or information conveyed.

History of congressional action

The *Feist* decision started a debate as to whether database producers would continue to invest resources in the creation and maintenance of databases. This debate has been ongoing since the 104th Congress, with various versions of property rights and misappropriation bills moving between the Committee on Energy and Commerce and the Committee on the Judiciary.

During those years, the proponents of the legislation have produced no compelling evidence that there is any danger to the continued prosperity of the database industry. In fact, a 2003 report

by Dr. Martha E. Williams entitled, The State of Databases Today, showed an increase in the total number of databases as well as an increase in the private sector's share of the database market. Since the *Feist* decision, the database market has grown 147%. The amount of information contained in the databases increased at an even greater rate, 363%. In addition, there has been a steady shift in database production, away from government and academic production and toward private sector production. In 1990, government databases made up 17% of the database market, academic databases made up 12%, and private sector databases made up 68%. By 2002, the private sector had grown to constitute 90% of the total database market.

Further, there exist a number of state and Federal remedies to protect investments in databases. Those remedies include copyright, the Computer Fraud and Abuse Act, contract, and trespass to chattels. Database producers have been successful in protecting their products using these available remedies.

H.R 3261

H.R. 3261 raises Constitutional questions. It defies the parameters articulated by the Supreme Court in the *Feist* decision. It attempts to rely on the Commerce Clause of the United States Constitution to do what the Intellectual Property Clause prohibits. In doing so, H.R. 3261 would create a host of problems involving the free use of factual information. This has significant repercussions for scientific research, academic development, and innovation in products and services in a wide range of industries.

The Supreme Court has held that the Intellectual Property Clause of the Constitution precludes the copyright of facts. The Supreme Court has also stated that Congress cannot avoid the particular requirements of one specific Constitutional provision by relying on the general authority of the Commerce Clause. The Court went on to explain that permitting that type of Congressional action would eradicate the limitation on Congress' power contained in a limiting Clause.[1] The Office of Legal Counsel of the Justice Department (DoJ) reached this very conclusion with regard to database legislation when considering an earlier version of the legislation.[2]

Proponents of the legislation have long pointed to the law of trademark as evidence that Congress has the power to enact legislation under the Commerce Clause when the Supreme Court has rejected the protection under the Intellectual Property Clause. However, the Supreme Court struck down the first trademark law, enacted under the Intellectual Property Clause, because the Intellectual Property Clause applied to writings and discoveries.[3] The Court explained trademarks were neither. In contrast, databases are clearly writings and in fact generally receive limited copyright protection. They unquestionably fall within the scope of the Intellectual Property Clause, and Congress is therefore barred from en-

[1] See *Railway Labor Executives' Ass'n* v. *Gibbons,* 455 U.S. 457 (1982) (explaining that if Congress had the power to enact nonuniform bankruptcy laws pursuant to the Commerce Clause, the Court would eradicate from the Constitution a limitation on the power of Congress to enact bankruptcy laws required under the bankruptcy Clause)

[2] See Memorandum from William Michael Treanor, Deputy Assistant Attorney, United States Department of Justice, to William P. Marshall, Associate White House Counsel (July 28, 1998).

[3] See *U.S.* v. *Steffens,* 100 U.S. 82 (1879).

acting copyright-type protection for databases under the Commerce Clause.

The bill has other fundamental flaws. H.R 3261 provides a database producer perpetual protection for information in a database. It protects investment not just in the creation of the database, but also in the mere maintenance of a database. Routine updates would extend this protection indefinitely. H.R. 3261 also has a very liberal time sensitivity provision. So much so that it barely resembles time sensitivity provisions developed in misappropriation law. The time sensitivity provision in H.R 3261 would protect information as long as it retains commercial value. In contrast, true misappropriation protection, like that articulated by the Supreme Court in *INS* v. *AP,* 248 U.S. 215 (1918) and by the Second Circuit in *NBA* v. *Motorola Inc.,* 105 F.3d 841 (2nd Cir. 1997), provides limited protection for time sensitive information. In the *INS* case, protection extended for several hours; in the *NBA* case, protection extended for minutes. In contrast, the perpetual protection provided by H.R. 3261 even goes beyond the duration limits to protection under copyright law.

Further, many of the terms in H.R. 3261 are ambiguous and are certain to lead to litigation. This will put a chill on the use of factual information and in turn, the creation of innovative information products and services based on this information. The availability of double damages will only exacerbate this. There is also a real concern that database producers could use the right of action provided in the Act as an anticompetitive tool.

Committee action

The Committee opposes creating a new and untested protection for factual information when harm has not been demonstrated and there exist a number of Federal and state remedies to protect databases. As explained above, the Committee also questions the Constitutionality of H.R. 3261.

Because of the limited nature of the referral, the Committee on Energy and Commerce was unable to address the many problems raised by the bill as reported by the Committee on the Judiciary. Instead, the Committee introduced and passed H.R. 3872, the Consumer Access to Information Act of 2004. H.R 3872 offers more limited protection to databases while preserving consumer access to factual information.

H.R. 3872 is based on the 2nd Circuit Court of Appeals decision in *NBA* v. *Motorola*. It sets forth the following five factor test to establish a claim for misappropriation: (1) a person generates or collects the information in the database at some cost or expense; (2) the value of the information is highly time sensitive; (3) another person's use of the information constitutes free-riding on the first person's costly efforts to generate or collect it; (4) the other person's use of the information is in direct competition with a product or service offered by the first person; and, (5) the ability of other parties to free-ride on the efforts of the first person would so reduce the incentive to produce the product or service that its existence or quality would be substantially threatened. The bill provides that a violation of the act will be treated as an unfair or deceptive act or practice, enforced by the Federal Trade Commission under the Federal Trade Commission Act, 15 U.S.C. 57a(a)(1)(B).

H.R 3872 will offer protection for database producers while preserving important access to factual information. H.R 3872 should also pass Constitutional scrutiny because it tracks the strict misappropriation standards set forth by both the Supreme Court and the 2nd Circuit Court of Appeals.

HEARINGS

The Subcommittee on Commerce, Trade, and Consumer protection held a joint hearing with the Committee on the Judiciary's Subcommittee on Courts, the Internet, and Intellectual Property on a discussion draft of what would become H.R. 3261 on September 23, 2003. The Subcommittee received testimony from: David Carson, General Counsel, United States Copyright Office; Thomas J. Donohue, President and CEO, Chamber of Commerce; Keith Kupferschmid, Vice President, Intellectual Property Policy & Enforcement, Software & Information Industry Association; and William Wulf, President, National Academy of Engineering and Vice Chairman, National Research Council.

COMMITTEE CONSIDERATION

On March 3, 2004, the Committee met in open markup session and ordered H.R. 3261 unfavorably reported to the House, with an amendment, by voice vote, a quorum being present.

COMMITTEE VOTES

Clause 3(b) of rule XIII of the Rules of the House of Representatives requires the Committee to list the record votes on the motion to report legislation and amendments thereto. There were no record votes taken in connection with ordering H.R. 3261 unfavorably reported. A motion by Ranking Member Dingell to order H.R. 3261 unfavorably reported to the House, with an amendment, was agreed to by a voice vote.

COMMITTEE OVERSIGHT FINDINGS

Pursuant to clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee held a legislative hearing and made findings that are reflected in this report.

STATEMENT OF GENERAL PERFORMANCE GOALS AND OBJECTIVES

H.R. 3261 creates comprehensive and perpetual protection for databases.

NEW BUDGET AUTHORITY, ENTITLEMENT AUTHORITY, AND TAX EXPENDITURES

In compliance with clause 3(c)(2) of rule XIII of the Rules of the House of Representatives, the Committee finds that H.R. 3261, the Database and Collections of Information Misappropriation Act, would result in no new or increased budget authority, entitlement authority, or tax expenditures or revenues.

COMMITTEE COST ESTIMATE

The Committee adopts as its own the cost estimate prepared by the Director of the Congressional Budget Office pursuant to section 402 of the Congressional Budget Act of 1974.

CONGRESSIONAL BUDGET OFFICE ESTIMATE

Pursuant to clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, the following is the cost estimate provided by the Congressional Budget Office pursuant to section 402 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, March 8, 2004.

Hon. JOE BARTON,
Chairman, Committee on Energy and Commerce,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 3261, the Database and Collections of Information Misappropriation Act.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contacts are Melissa E. Zimmerman (for federal costs), Sarah Puro (for the state and local impact), and Paige Piper/Bach (for the private-sector impact).

Sincerely,

ELIZABETH M. ROBINSON
(For Douglas Holtz-Eakin, Director).

Enclosure.

H.R. 3261—Database and Collections of Information Misappropriation Act

H.R. 3261 would allow parties who create or maintain information databases to file civil suits in a United States district court against parties who misuse those databases. The bill would require the United States Patent and Trademark Office, the Federal Trade Commission, and the Register of Copyrights to accept and review notices submitted by individuals filing such suits. Under the bill, each agency also would be required to write a report regarding the impact of the law with recommendations for change. CBO estimates that implementing H.R. 3261 would have no significant effect on spending subject to appropriation and would not affect direct spending or revenues.

H.R. 3261 contains an intergovernmental mandate as defined in the Unfunded Mandates Reform Act (UMRA) because it would preempt state laws that protect the collection of information; however, CBO estimates that the resulting costs, if any, would not be significant and would not exceed the threshold established in UMRA ($60 million in 2004, adjusted annually for inflation).

H.R. 3261 would create a new private-sector mandate as defined in UMRA by prohibiting any person from making a substantial part of information in certain databases available to the public in commerce without proper authorization. Currently, certain types of information that may be contained in a database are not protected by copyright law, and such information may not be protected under individual state laws. H.R. 3261 would impose a mandate by creating a federal law of misappropriation that would subject to civil penalties any person who, without authority, makes a substantial portion of the information in a database publicly available. To avoid such penalties, a person must obtain the consent of the data-

base owner through a licensing or similar agreement. The person's ability to obtain a license from the proper authority would depend in part on the potential effects of such a license on competition with the licensor's database products or services. The cost of complying with the mandate could be either the cost of the license or the revenue forgone by not making the information publicly available.

CBO cannot estimate the total cost of the mandate because we do not have enough information to determine the scope and impact of the prohibition against misappropriation of certain databases. While court decisions have identified collections of information that failed to meet the creative expression standard under existing copyright law, those decisions are of limited use in identifying all of the types of collections to which H.R. 3261 could extend protection. Database providers may have been unaware of unauthorized use or, even if aware of such activity, may not have chosen to test their rights in court.

On February 10, 2004, CBO transmitted a cost estimate for H.R. 3261 as ordered reported by the House Committee on the Judiciary on January 21, 2004. The two versions of the legislation are identical, as are the cost estimates.

The CBO staff contacts for this estimate are Melissa E. Zimmerman (for federal costs), Sarah Puro (for the state and local impact), and Paige Piper/Bach (for the private-sector impact). The estimate was approved by Robert A. Sunshine, Assistant Director for Budget Analysis.

FEDERAL MANDATES STATEMENT

The Committee adopts as its own the estimate of Federal mandates prepared by the Director of the Congressional Budget Office pursuant to section 423 of the Unfunded Mandates Reform Act.

ADVISORY COMMITTEE STATEMENT

No advisory committees within the meaning of section 5(b) of the Federal Advisory Committee Act were created by this legislation.

CONSTITUTIONAL AUTHORITY STATEMENT

Pursuant to clause 3(d)(1) of rule XIII of the Rules of the House of Representatives, and subject to the discussion above, the Committee finds that the Constitutional authority for this legislation may be provided in Article I, section 8, clause 3, which grants Congress the power to regulate commerce with foreign nations, among the several States, and with the Indian tribes.

APPLICABILITY TO LEGISLATIVE BRANCH

The Committee finds that the legislation does not relate to the terms and conditions of employment or access to public services or accommodations within the meaning of section 102(b)(3) of the Congressional Accountability Act.

SECTION-BY-SECTION ANALYSIS OF THE LEGISLATION

Section 1. Short title

Section 1 establishes the short title of the Act as the "Database and Collections of Information Misappropriation Act."

Section 2. Definitions

Section 2 sets forth definitions of terms used in the legislation, including "collective work," "database," and "making available in commerce to others."

Section 3. Prohibition against misappropriation of databases

Section 3 prohibits the making available to others of a quantitatively substantial part of the information in a database generated, gathered, or maintained by another person, with knowledge that the making available is without the database producer's authorization, if (a) the database was generated, gathered, or maintained through a substantial expenditure of financial resources or time; (b) the making available occurs in a time-sensitive manner, considering the temporal value of the information in the database within the context of the industry sector involved; (c) the making available inflicts injury on the database by serving as a functional equivalent in the same market as the database in a manner that causes displacement of sources of revenue; and, (d) the ability of parties to "free-ride" on the efforts of the plaintiff so reduces the incentive to produce or make available the database that its existence or quality is substantially threatened.

Section 4. Permitted acts

Section 4 provides the act shall not restrict acts of making available of the information in a database by: (a) any person who independently generates or gathers information; (b) a nonprofit scientific, or research institution, for nonprofit scientific or research purposes, if a court determines that the making available in commerce of the information is reasonable under the circumstances; (c) by the act of hyper-linking of one online location to another or providing of a reference or a pointer in a directory or index; or (d) for the primary purpose of news reporting, including news and sports gathering, dissemination, and comment, unless the information is time-sensitive and has been gathered by a news-reporting entity, and the making available is part of a consistent pattern engaged in for the purpose of direct competition.

Section 5. Exclusions

Section 5(a) provides that protection under the legislation does not extend to a database generated, gathered, organized, or maintained by a governmental entity or pursuant to, and to the extent required by, a Federal statute or regulation requiring such a database. The section does not preclude protection for an employee or agent acting outside of the scope of employment or agency. Neither does it preclude protection for a governmental educational institution, or its employees or agents, in the course of engaging in education, research, or scholarship.

Section 5(b) excludes computer programs from protection. However, databases incorporated in a computer program are not precluded from protection.

Section 6. Relation to other laws

Subject to the preemption provision of section 6(b), section 6(a) preserves the rights, limitations and remedies of copyright, patent, trademark, design rights, antitrust, trade secrets, privacy, access to

public documents, misuse, and contract. Section 6(b) preempts state law that prohibits or otherwise regulates conduct that is prohibited or regulated under the Act. However, it does not preempt for cases not involving commercial competition. Specifically, these are actions under State law involving the disruption of the sources of data supply to a database or impairment of the perceived accuracy, currency or completeness of a database by inaccurate, untimely, or incomplete replication or distribution of the database.

Sections 6(c) and (d) include savings clauses for the Communications Act of 1934 as well as securities laws, regulations, and market data.

Section 6(f) applies judicial doctrines of misuse to the Act.

Section 7. Civil remedies

Section 7 provides for enforcement of the legislation. Section 7(a) creates a private right of action. Any person who brings an action under this section, must submit notice of the commencement of the action, or any derivative appeal, to the Federal Trade Commission (FTC), the United States Patent and Trademark Office (PTO), and the Registry of Copyrights (RoC). The agencies shall, by regulation, prescribe rules by which notice must be transmitted. Sections 7(b) and (c) provide that relief for a violation of section 3, may be in the form of temporary of permanent injunctions or actual damages and attributable profits. The court may double the damages after it considers whether: the violation continued after notice by the plaintiff; the conduct was willful; the defendant has a history of database misappropriation; the defendant is able to pay; the violation has had a negative financial impact on the plaintiff; there were any good faith efforts by the defendant to rectify the misappropriation; or double damages are necessary to deter future violations.

Section 7(d) provides for impoundment of all copies of contents of the database made in violation of section 3, at the court's discretion. Neither injunctive relief nor impoundment is a remedy available against the Federal government. All relief under section 7 is available against state entities to the extent permitted by applicable law.

Section 7(e) provides for costs and attorney's fees to the prevailing party, at the court's discretion.

Section 7(h) provides a limitation on liability for a provider of interactive computer service for making available information that is provided by another information content provider. Interactive computer service and information content provider have the same meanings given to the terms under section 230(f) of the Communications Act of 1934.

Section 7(i) provides oversight authority to the FTC, PTO and RoC for purposes of identifying instances in which judicial interpretations of this Act materially affects the administration of laws or policies in their respective jurisdictions. It also permits each agency to submit amicus curiae briefs and requires them to report to Congress on any briefs filed and the impact of any decisions on their areas of jurisdiction.

Section 8. Limitation on actions

Section 8 provides that no civil action shall be maintained under the act unless it is commenced within 2 years after the cause of action arises or claim accrues.

Section 9. Exclusion from liability for educational institutions

Section 9 excludes from liability under the act accredited nonprofit post-secondary educational institutions, nonprofit research laboratories, and employees or students associated with each. The exclusion does not apply if any shielded entity makes available substantially all of a database in direct commercial competition with a database owner as described in section 3.

Section 10. Effective date

Section 10 provides that the Act shall take effect on the date of the enactment of the Act, and shall apply to violations on or after that date with respect to databases existing before, on, or after that date.

Section 11. Nonseverability

Section 11 provides that if, within 10 years from the date of enactment, the U.S. Supreme Court holds that the provisions of section 3 are invalid under article I of, or the First Amendment to, the Constitution, the Act is repealed effective as of the date of the Supreme Court decision. The provision sunsets ten years from the day of enactment of the act.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

This legislation does not amend any existing Federal statute.

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