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## **Administration Letter on H.R. 2652 / S. 2291**

August 4, 1998

Honorable Patrick J. Leahy  
Ranking Minority Member  
Committee on the Judiciary  
United States Senate  
Washington, DC 20510-6275

Dear Senator Leahy:

In the coming weeks, the Senate may consider S. 2291, the Senate counterpart to H.R. 2652, the "Collections of Information Antipiracy Act."

The Administration supports legal protection against commercial misappropriation of collections of information. We believe that there should be effective legal remedies against "free-riders" who take databases gathered by others at considerable expenses and reintroduce them into commerce as their own. This situation has arisen in recent case law and we believe that digital technology may increase opportunities for such abuses.

At the same time, the Administration has a number of concerns with H.R. 2652, including the concern that the Constitution imposes significant constraints upon Congress's power to enact legislation of this sort.

From a policy perspective, the Administration believes that legislation addressing collections of information should be crafted with the following principles in mind:

1. A change in the law is desirable to protect commercial database developers from commercial misappropriation of their database products where other legal protections and remedies are inadequate.
2. Because any database misappropriation regime will have effects on electronic commerce, any such law should be predictable, simple, minimal, transparent, and based on rough consensus in keeping with the principles expressed in the Framework for Global Electronic Commerce. Definitions and standards of behavior should be reasonably clear to data producers and users prior to the development of a substantial body of case law.
3. Consistent with Administration policies expressed in relevant Office of Management and Budget (OMB) circulars, databases generated with Government funding generally should not be placed under exclusive control, de jure or de facto, of private parties.
4. Any database misappropriation regime must carefully define and describe the protected interests and prohibited activities, so as to avoid unintended consequences; legislation should not affect

established contractual relationships and should apply only prospectively and with reasonable notice.

5. Any database misappropriation regime should provide exceptions analogous to "fair use" principles of copyright law; in particular, any effects on non-commercial research should be de minimis.
6. Consistent with the goals of the World Trade Organization (WTO) and U.S. trade policy, legislation should aim to ensure that U.S. companies enjoy available protection for their database products in other countries on the same terms as enjoyed by nationals of those countries.

With these principles in mind, the Administration has several specific concerns with the present provisions of S. 2291 and H.R. 2652, including the following:

- The Administration is concerned that aspects of H.R. 2652 may increase transaction costs in data use, particularly in situations where larger collections integrate datasets originating from different parties or where different parties have added value to a collection through separate contributions of gathering, refining, and/or maintaining the data. This is especially important for large-scale data management activities, where public investment has leveraged contributions from the private and non-profit sectors.
- The Administration agrees with section 1204(a)'s general intent that data collected with taxpayer funds not be subject to any database protection regime. However, we are concerned that H.R. 2652 does not fully take into account the data policies set forth in relevant OMB circulars and the many different arrangements under which government-funded data are gathered, maintained, and/or organized or under which the data may be subsequently redistributed. It is important that legislation not create inappropriate opportunities of incentives to "capture" government information or government-funded data with relatively small investments in maintenance, organization, or supplemental data.
- Given the difficulty of foreseeing how "substantiality," "extraction" and other terms in H.R. 2652 will play out in a complex and rapidly changing environment, we are concerned that H.R. 2652 lacks a balancing mechanism analogous to the fair use doctrine in copyright sufficient to address the wide range of circumstances in which information is aggregated, used, and reused. We are especially concerned that the section 1203(d) exception for non-commercial research and educational uses does not ensure that legitimate non-commercial research and educational activities are not disrupted by the prohibition against commercial misappropriation. Equitable issues of access and use may be especially important in markets exclusively served by a single data producer. Finally, we believe it is important to make clear that the legitimate data-gathering activities of law enforcement and intelligence agencies will not be affected by the bill.
- While the Administration appreciates the efforts of the House Judiciary Committee to define "potential" markets as used in section 1202, we remain concerned that this definition may be broader than market definitions used in other areas of the law, that the definition could be subject to manipulation by private entities, and that potentially the definition too easily exposes legitimate business practices to substantial liability, especially given the provisions for calculating damages. Congress should carefully consider how encompassing "potential markets" may affect entrepreneurs who develop new products and services that add significant value and do not compete directly with the original.
- While we agree with the House Judiciary Committee's decision to shield non-profit researchers and educators from any criminal liability under section 1207, we believe that the existing criminal provisions could be further refined, particularly by drawing a distinction between misdemeanor and felony conduct and requiring minimum amounts of damage under each.

- The Administration believes that, given our limited understanding of the future digital environment and the evolving markets for information, it would be desirable for the bill to include a provision for an interagency review of the law's impact at periodic intervals following implementation of the law. This would be consistent with laws and proposed laws in other emerging technologies where Congress has mandated examination of a new law's economic impact. Such a study might be conducted under the auspices of the Secretary of Commerce in consultation with the Office of Science and Technology Policy and the Register of Copyrights.
- The Department of Justice has serious constitutional concerns that the First Amendment restricts Congress's ability to enact legislation such as H.R. 2652, and that the Intellectual Property Clause also may impose some constraints on legislation of this sort. We note that those constitutional concerns are closely related, in many instances, to some of the points described above, particularly fair use, the effects on potential markets and transformative uses of data.

We would be happy to elaborate on these constitutional questions and policy aspects of H.R. 2652 and S. 2291. Thank you for your time and consideration.

Sincerely,

Andrew J. Pincus  
General Counsel  
United States Department of Commerce  
Washington, DC 20230

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Submitted to ARL by:

Alexander Fowler  
Director of Public Affairs, [Electronic Frontier Foundation](#)

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## **American Statistical Association (ASA) Statement on H.R. 2652**

January 30, 1998

The Honorable Howard Coble, Chairman (R-NC)  
House Subcommittee on Courts and Intellectual Property  
2239 RHOB  
Washington, DC 20515-3306

Dear Congressman Coble;

As in our letter to you of October 29, 1997, the American Statistical Association (ASA) is grateful for the opportunity to comment for the record on H.R. 2652 - the Collections of Information Antipiracy Act. We applaud your continuing concern with both the public and scientific access to high quality data and also suitable protection of database intellectual property in an age of increasing technological possibilities of piracy.

As an affiliated society of the American Association for the Advancement of Science (AAAS), we have endorsed that body's Statement on Intellectual Property Protection for Databases. It is posted on the web at <http://www.aaas.org/spp/dspp/sfrr/aaasdb.htm>. Our letter and endorsing Statement are enclosed. In them, we stress concerns about potential unintended consequences for the practice of statistics and, indeed, of scientific and engineering analysis generally. A perception that new legislation may make

certain types of statistical and other analyses litigously risky could have a seriously chilling effect on our profession. It could also endanger the role of science and engineering as contributors to the technology engine which is so powerfully propelling our economy. Among other applications, statistical methods are crucial to scientific and engineering research.

The ASA is the largest statistical association in the world with approximately 18,000 members. Our members are leading professionals in statistical analysis throughout science and engineering, in policy analysis, economics, sports statistics, biomedical research and public health, marketing, and political polling. In short, there is no aspect of American life, business, or policy which does not benefit from the high quality of statistical professionalism promoted by ASA. Our work depends both on access to sound databases and on the right to analyze them.

Sincerely,

David S. Moore, Ph.D.  
President  
American Statistical Association

Enclosure:

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January 12, 1998

Mildred S. Dresselhaus, Ph.D.  
President  
American Association for the Advancement of Science  
1200 New York Avenue, NW  
Washington, D.C. 20005

Dear President Dresselhaus;

In response to your letter of November 6, 1997, I am pleased to report that the Board of Directors of the American Statistical Association voted unanimously on December 6, 1998 to endorse the AAAS Statement on Intellectual Property Protection for Databases, while expressing additional concerns. A copy of our statement of endorsement is enclosed. The statements will also be included on our web page for ready access by our members and other persons interested in professional application of statistical methods.

We are grateful for the leadership and coordination provided by Mark Frankel, Ph.D. and Alex Fowler of your Program on Scientific Freedom, Responsibility, and Law. We also appreciate the inclusion of our representative, John S. Gardenier, D.B.A., in the AAAS Working Group on Database Intellectual Property Rights. We understand that AAAS is continuing its efforts in this area along with the National Research Council under NAE President William Wulf and Paul Uhlir. As an AAAS affiliate with broad interests in science, economics, policy, public health, environment, and sports, we hope to stay informed and involved as deliberation on these important issues progresses.

In addition to the importance of sound intellectual property principles to the conduct of scientific research and other statistical applications, the current debate has important additional moral and economic consequences, as you probably realize:

- Democracy depends on an informed citizenry; restrictive access to policy-relevant databases damages the capacity for informed debate on issues of general public interest.
- Some proposals would inhibit information product innovation and market differentiation, which can

damage U. S. global economic competitiveness.

- Restrictive pricing would also exacerbate the separation of informational "haves" and "have nots" globally, thereby retarding needed economic development and increasing international tensions.

Yours truly,

David S. Moore  
1998 President  
American Statistical Association

Cc: Richard Nicholson, Executive Officer  
American Association for the Advancement of Science

Mark Frankel  
Alex Fowler  
John Gardenier  
William Wulf  
Paul Uhler

Enclosure

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**Endorsement by the American Statistical Association of the Statement on  
Intellectual Property Protection for Databases by the American Association for  
the Advancement of Science**

At its December 6, 1997 meeting, the American Statistical Association (ASA) Board of Directors voted unanimously to endorse the enclosed Statement on Intellectual Property Protection for Databases from the American Association for the Advancement of Science (AAAS). We appreciate the leadership shown by AAAS and by the National Research Council in efforts to protect the Constitutional balance of respect both for the public's right to knowledge and for the rights of intellectual property owners in the face of advancing information technologies.

In addition to the principles laid out in the AAAS statement, ASA feels compelled to emphasize a potential unintended danger to the right of independent statistical analysis. Under both "investment protection" and "sui generis" principles of database protection, proposed treaties and laws have sought to safeguard the economic interests of makers or owners of databases beyond the mere publication of single database products. They would protect the owners' database rights in both actual and ipotential markets perpetually. There is no evidence of any intent to preclude or restrict the rights of statisticians to analyze databases, which in their raw form might be quite daunting to review and analyze. Still, it is clear that the publication or other dissemination of a competent statistical analysis or summary of the major information content of large databases could, in some cases, reduce the market scope for the raw data itself. This would not be true of databases where the major value comes from the accessibility of individual items, such as physicians' specialties and addresses in a physician directory.

An example of an analysis potentially harming a database owner's economic interest is as follows. Suppose that a database publisher has compiled nonproprietary geographic data on the distributions of family size and income relative to distance from various commercial locations for a metropolitan area with the intent of supporting marketing analysis by various commercial businesses. Assume that the database consists of long tables of accurate records showing the locations and incomes of families and the locations of commercial centers. There is a query system with it, but no summary treatment of the data. Suppose further that a statistician with legitimate access to the database turns this into one or more

map-based spatial diagrams of densities of commercial activity and densities of families grouped by income. The motivation to do so might be either scholarly or commercial.

Marketing researchers for businesses in any of the commercial centers could tell instantly by looking at these diagrams the relative distances from their locations of various income clusters of families. Factoring in local knowledge of the transportation corridors, they could quickly assess the effort it would take to appeal to potential customers of different income levels. If they do not already own the original database, are they likely to buy it? If they bought it, they would have to figure out how to analyze it. The statistician's product is likely both to be much cheaper than the database and to be directly interpretable without further number-crunching. Hence, the market for the database would decrease. (It would still be bought by those who are unaware of the statistical product or who feel they need the detailed data or who are not convinced that the summary is accurate.)

The statistical product is not strictly a value-added product because it does not contain the original data. (It would be piracy if it did contain it without permission.) It is not a database product at all. It may not even be directed at the market for the original data. In spite of all of these factors which would appear to support its innocence, it does threaten the economic value of the original database. Under proposed regimes, the database maker might be able to sue and win. In a court challenge, a judge could rule that the statistician was in violation of law for damaging the economic rights of the database owner. Should this occur, the common, valuable, and well-respected practice of statistical analysis could be "chilled" by the threat of lawsuits.

This example was constructed for general public understanding and for its statistical character. The danger it represents, however, potential restriction or chilling of scientifically based analysis and publication, threatens the work of scientists and engineers more generally. Science builds on the seminal work of earlier authors. If owners of scientific databases were to have exclusive rights to analyze and publish information derivable from their databases, scientific progress would be greatly restricted. If the owners of databases of structural materials properties were to have the exclusive rights to apply those properties to the analysis and design of structures, engineering innovation would be seriously hindered.

In science and engineering, when database owners wish to protect their analytic rights, they delay publication of the raw data until they can publish their own analyses. Once the data have been released, anyone is free to perform competing or alternative analyses of the same data. This practice is essential to science and to public input into policy analysis and decision making. **THE RIGHT TO PERFORM STATISTICAL (OR OTHER SCIENTIFIC AND ENGINEERING) ANALYSES MUST NOT BE ABRIDGED BY DATABASE PROTECTION REGIMES.**

The ASA has another concern, as well. Proposed new database protection regimes properly tend to exempt government data from access restrictions. It should also be recognized that the private sector in some cases contributes databases to the public domain under principles of full and open access to factual data - either unilaterally or during the course of work in government-industry partnerships. The latter might be termed "government-equivalent" data because of its contribution to the freely accessible public store of knowledge. **NEITHER GOVERNMENT DATA NOR PRIVATELY DONATED GOVERNMENT-EQUIVALENT DATA SHOULD BE SUBJECT TO RESTRICTIONS ON REPRODUCTION OR USAGE - EITHER IN ORIGINAL DISSEMINATION OR THROUGH INCORPORATION INTO SUBSEQUENT VALUE-ADDED PRODUCTS OF DATABASE ENTREPRENEURS.**

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**Last Modified:** August 19, 1998