

A Preliminary Analysis of H.R. 2652

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DISCLAIMER: This represents only a preliminary analysis of H.R. 2652; more analysis is needed before the ramifications can be fully understood.

On October 9, 1997, Chairman Coble introduced H.R. 2652, the Collections of Information Antipiracy Act. This database bill is designed as a misappropriation bill, not a sui generis protection bill. In other words, it in theory does not create a property right in the database; it simply prohibits the unfair use of the data one has collected. As this bill is drafted, though, there is little to distinguish it from a sui generis protection bill. Indeed, this bill arguably is worse than the previous database laws we've seen (the Database Directive, the WIPO Database Treaty, and last year's 3531) in that there is no term of protection; it continues so long as there is a market for the product.

Historically, the misappropriation approach in the U.S. is based on *INS v. AP*, 248 U.S. 215 (1918), where the Supreme Court held that the state common law of misappropriation was not preempted by the copyright law when it covered *hot news.* This doctrine was explained in the recent *NBA v. Motorola*, 105 F.3d 841 (2d Cir. 1997), where Judge Winters listed five conditions for misappropriation not be preempted. These factors are listed below, and compared with the conditions for misappropriation under H.R. 2652. This comparison shows that H.R. 2652 is far broader than the traditional misappropriation doctrine.

COMPARISON OF TRADITIONAL MISAPPROPRIATION WITH H.R. 2652

NBA v. Motorola (recent application of misappropriation doctrine)

1. Plaintiff generates or gathers information at a cost.
2. The information is time-sensitive.
3. Defendant's use of the information constitutes free-riding on plaintiff's efforts.
4. Defendant is in direct competition with a product or service offered by plaintiff.
5. The ability of other parties to free-ride on the efforts of the plaintiff would so reduce the incentive to produce the product or service that its existence or quality would be substantially threatened.

H.R. 2652

1. Plaintiff gathers, organizes or maintains a collection of information through the investment of substantial monetary or other resources.
2. ----
3. Defendant extracts or uses in commerce all or a substantial part of the collection of information.
4. ----
5. Defendant's use or extraction harms plaintiff's actual or potential market for a product or service that incorporates the collection of information and is offered in commerce.

Significantly, traditional misappropriation is limited to time sensitive information, while H.R. 2652

applies to all information. In other words, there is no term limit whatsoever. Further, traditional misappropriation applies only where there is direct competition and where the defendant's use threatens the plaintiff's incentive to create the work. Under H.R. 2652, liability would attach if there is any harm to the market for the product, a far lower threshold.

The statute is extremely vague. There is no definition for "substantial part" or "substantial monetary or other resources." Information, though, is defined extremely broadly: "facts, data, works of authorship, or any other intangible material capable of being collected and organized in a systematic way." Thus, an existing compilation protected by copyright would also be protected under H.R. 2652. Moreover, a copyrighted work (e.g., a novel) could be protected because it is a collection of words organized in a systematic way. There would, however, be no term limit under this statute.

The bill contains several exceptions and exclusions, but they are of little comfort. One can extract insubstantial parts of the collection (whatever that means), gather the information independently, or use the information for the sole purpose of verifying the accuracy of independently gathered information. Extraction or use is also permitted for non-profit educational, scientific, or research purposes, provided that the use "does not harm the actual or potential market for the product." This proviso renders the exception useless.

H.R. 2652 expressly does not extend to computer programs, but this exclusion "does not apply to a collection of information directly or indirectly incorporated in a computer program." This, of course, is completely ambiguous. Would a command structure -- a collection of commands -- be viewed as a collection of information incorporated in a program? What about a look-up table for translation purposes? One could argue that the phrase "collection of information ... incorporated in a computer program" refers to information related to the application rather than the functioning of the program itself. For example, in a program designed to determine structural stress, the engineering constants in the program would be protected, while the interface specifications would not. This interpretation, however, is not clear from the face of the statute.

Significantly, there is no reference to the treatment of sole source databases. Presumably the bill would permit monopoly pricing for such databases. Additionally, while H.R. 2652 would not apply to acts of extraction occurring prior to enactment, it would apply to databases created before enactment. Thus, the bill would apply to existing databases -- that is, databases created without the incentive provided by this bill.

Finally, H.R. 2652 contains civil and criminal penalties (\$500,000 penalty and 10 years in jail).

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