



Competition and Database Protection

COMPETITION AND DATABASE PROTECTION

S. 2291 proposes to add to existing copyright and misappropriation law new prohibitions on access to and use of compilations of information that are very similar in substance and effect to those once available under the so-called "sweat of the brow" doctrine of copyright law. That doctrine arose early in this century, was the object of persistent scholarly criticism, fell from favor by the 1980s, and in 1991 was held to be unconstitutional by the Supreme Court.

In an effort to avoid the near-certain conclusion that this kind of restriction will be found unconstitutional under the Copyright Clause of the Constitution for the same reasons the Supreme Court so ruled in 1991, the bill's proponents assert that it is not intellectual property protection at all but rather Commerce Clause regulation directed to "unfair" competition. The bill's origins in the intellectual property subcommittee and the draft report language being circulated by that subcommittee reveal that the bill is, in fact, simply an effort to revive "sweat of the brow" copyright protection.

Intellectual property protections are, of course, authorized by the Patent and Copyright Clause of the Constitution to be creatures of statute, granted by the government solely to create incentives to publicly beneficial innovation and creativity. In this important sense, then, when we talk about "intellectual property rights" we are really talking about privileges, not rights. Just as the antitrust laws are said to protect America's interest in competition, not individual competitors, so too the intellectual property laws exist to protect the interests of all Americans in innovation and creation, not the profits of proprietors of intellectual property. Intellectual property protections function by creating limited monopolies that are intended to allow inventors and other creators an opportunity to get a sufficient economic return on their output to induce them to produce useful things. Given our society's general aversion to the costs and inefficiencies inherent in all monopolies, intellectual property monopolies must be no broader--and the return no greater--than minimally necessary to achieve the desired incentives to invent and create. The American law of intellectual property thus seeks to strike a balance between the interest of all Americans in unrestricted access to information and ideas on the one hand, and the limits on such access absolutely necessary to provide incentives to produce information and ideas. The goal is to make sure that the societal benefit from an intellectual property monopoly equals or exceeds the social cost inevitably imposed by the monopoly. For example, patents often expire when they still have enormous commercial value because of the constitutional requirement to give no more of a monopoly than minimally necessary to give inventors the incentive to invent.

Because intellectual property protections are legal monopolies, they inherently conflict with our country's long-standing aversion to monopoly--an aversion reflected primarily in the antitrust laws. This conflict has been traditionally resolved by balancing the conflicting policies and ensuring that the monopolies created in the interest of intellectual property restrain no more commerce than necessary.

S. 2291 does not reflect this balance. It will have the effect of curtailing non-parasitical, non-destructive uses of preexisting compilations of factual data in order to preserve the monopoly revenue stream currently enjoyed by the first publishers of those compilations. Its effect will be to impede commerce, not encourage it. A monopoly will thus be granted to the beneficiaries of the bill without the corresponding benefit to society necessary to justify the government's grant of such a monopoly.

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