

H.R. 2652: New Property Right in Databases

Disappointing Action in the House - Attention turns to the Senate

We are sorry to report that Tuesday afternoon, May 19th, the House approved H.R. 2652 the "Collection of Information Anti-Piracy Act" by a voice vote with no time allowed for a floor debate. The sweeping legislation which will greatly expand the protection now afforded to compilers of online and paper-based databases was presented as "non controversial" and rushed to a vote despite vigorous opposition from, among others, the American Association for the Advancement of Science (AAAS), the Institute of Electrical and Electronic Engineers (IEEE), the Association for Computing Machinery (ACM), the Information Technology Association of America (ITAA), the Online Banking Association, the Digital Future Coalition (DFC) and individual universities and libraries across the country.

As presently worded, this bill creates new rights in all kinds of data and has the potential to chill many forms of information use. It is backed by the relatively small, but very powerful, group of companies of the Information Industry Association (e.g., West Publishing, Reed-Elsevier and others). Because of its overbreadth, enactment of this legislation would have serious adverse consequences for providers and users of data in science and the academic community generally.

Despite the hurried approval by the House, the fight is not yet lost. The academic, scientific, library and corporate communities who have expressed concerns about this legislation will now turn their efforts to the Senate. It is not clear when the Senate will consider this legislation but efforts are already underway to try to ensure a thorough and complete debate when that time comes.

Below are some comments focused on the impact of the database legislation on the research community.

NEGATIVE IMPACT ON SCIENCE AND BASIC RESEARCH

Data is the life blood of academic research, and access to more data (be they records of physical observations or historical discoveries) is better than access to less. Under current copyright doctrine, decisions about what information to include in a collection or how to arrange that information may be protected -- no one can copy the manner in which a particular compilation is presented. Importantly, the data which make up contents of compilations are not subject to protection. Instead, they remain available for all to use. The current state of the law has been a positive one for scientific research. At it now stands, that law provides researchers with no incentive to withhold information in order to create conditions of scarcity. Rather, it encourages every researcher to make his or her factual findings available, by means of publication, as part of a common pool of knowledge from which all those working in the field are free to draw. Maintaining such an open information environment is critically important to the progress of research and development efforts in the public and private sectors.

H.R. 2652 now threatens this basic paradigm of data exchange, by providing unprecedented new legal protection for information. Under its provisions, anyone who collects information (whether self-generated or generated by others) may be entitled to assert rights against others for the unauthorized "extraction" or "use" of the collection's contents.

THE BILL WILL CONTRIBUTE TO SPIRALING COSTS

With H.R. 2652, data will tend to be "licensed" rather than shared. The new level of protection is likely to create a kind of economic "chain reaction" within the research community; for every set of research results which is made available pursuant to license, other researchers will experience new costs of data acquisition, leading them (in turn) to consider what additional revenues they may be able to derive from

the licensing of their own findings. Ominously, it is precisely the data which have the greatest immediately scientific, medical or social importance, and on which others depend more heavily, which are most likely to be subjected to this treatment.

Similar "chain reaction" stories will play out beyond the research community as this legislation will increase the cost of information for small businesses, libraries, schools and consumers. Fees for access to online databases have already rocketed skyward over the last ten years. This legislation will worsen what is already a problem.

THE LEGISLATION GOES BEYOND UNFAIR COMPETITION

The bill's prohibitions would apply far beyond activities which are commercially competitive with those of the original compiler of an information collection. Under H.R. 2652, not only could a researcher be required to obtain a license in order to republish all or some of another's data, but a license may be required to analyze or manipulate the data to reach research conclusions. This new layer of licensing will stifle innovations in research.

H.R. 2652 IS ANTI-COMPETITIVE AND OVERBROAD

In the information products area, value-added resellers of information will feel the pinch as many new arrangements of existing data (e.g. online indices, specialized directories, mailing lists) will be subject to licensing restraints of the underlying data sources. And not only does the bill apply to *new* compilations but also applies retroactively to databases created up to 15 years ago! So even new releases of existing information products may require license negotiations. The result will be that fewer small players will be able to afford to serve the information services market.

Most databases are already protected from "piracy" by copyright law due to their creative selection and arrangement of raw data and their incorporation of elements which are individually protected by copyright (e.g. articles, images). These copyright-protected databases will also automatically receive the broad protection afforded by H.R. 2652.

Moreover, databases receive protection under contract law, trade secret law and the misappropriation doctrine, as well as from ever-emerging technical measures.

Because databases are already protected by these other means, H.R. 2652 can be viewed as a windfall enabling tighter control and higher prices and creating an even stronger tendency toward monopolization in information publishing and services.

THE EXCEPTIONS FOR SCIENCE AND EDUCATION ARE INEFFECTIVE

As currently drafted the exception for nonprofit educational, scientific or research uses allows "extraction and use of information" for nonprofit purposes "in a manner that does not harm the actual or potential market for the product or service[.]" This exception is circular and hollow. It fails to point out that since the primary market for many databases is the nonprofit sector, this exception will rarely apply. In effect, it is merely a reverse restatement of H.R. 2652's standard for liability.

While the bill provides that data rights do not "restrict any person from independently gathering information or using information" not obtained from a protected collection, this qualification on protection has little meaning for the research community. Among scientists, in particular, new work strives to incorporate and move beyond previous results, rather than merely to reproduce them. Significantly, H.R. 2652 does not impose any limitations on the availability of protection for collections which are the "sole source" of particular kinds of information and therefore, much like "blocking patents," can easily become an expensive hurdle to progress.

The relief H.R. 2652 offers academic researchers from potential criminal liability (as well the allowance

for remission of civil damages where a researcher has made a good faith error in believing his or her use to be permissible) does little if anything of practical importance to address the adverse consequences of data protection for the research enterprise.

ALTERNATIVES ARE AVAILABLE

The adverse consequences of the proposed H.R. 2652 for science and education could be avoided if the bill were revised to incorporate a true "misappropriation" approach, focusing on the regulation of unfair competitive practices among commercial firms providing data to consumers. H.R. 2652 goes further than applicable misappropriation case law by providing fact compilers with the right to control all downstream uses of any modest portion of their material even if the new use does not compete with the compiler's own database.

For the text of the bill see [http://thomas.loc.gov/cgi-bin/query/z?c105:H.R.2652:](http://thomas.loc.gov/cgi-bin/query/z?c105:H.R.2652)

[ARL's Web Page on Database Legislation](#)

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