



The End of History Comments on HR 2652

The following is a piece by Jonathan Band, Morrison and Forrester, regarding the database bill, HR 2652. While this example illustrates the implications of the bill for research in the field of history, a similar argument could be made for the consequences in any academic field.

The Collections of Information Antipiracy Act, H.R. 2652, now pending in Congress, would place a major obstacle in the way of the development of knowledge because it would prohibit the reuse of information in different products. Consider the following example.

A graduate student writing his doctoral dissertation on the criminal prosecution of slaves in antebellum North Carolina does extensive research at three county courthouses in North Carolina, poring over dusty, long neglected records. His dissertation includes several charts which summarize his research; the charts list the number of prosecutions for each offense, the conviction rate, the sex of the defendant and the victim, and other relevant information. As with all dissertations by its graduate students, the History Department posts an abstract of his dissertation on its website, and makes copies available to anyone who pays the photocopying cost.

Another graduate student does similar research in Texas, producing an article which also includes summary charts. A history professor then conducts her own research on criminal prosecutions in Alabama, and writes a book which compares her results with the findings from North Carolina and Texas. Her book of necessity includes all the facts contained in the summary charts from the earlier article and dissertation. Her presentation of the information differs from that of the article and dissertation, but she properly attributes the source of her information. Because of the heightened interest in the antebellum South, the history professor succeeds in finding a prestigious academic publisher for her book which sells it aggressively in both the academic and general markets.

The history professor has violated the provisions of H.R. 2652. She has extracted and used in commerce a substantial part of collections of information (the charts in the article) gathered and organized by another person. Further, her use has harmed the market for the article and dissertation. Now that she has published her book, demand for reprints of the article will go down. Further, although the book's reliance on the dissertation enhanced the graduate student's reputation and helped him land a tenure-track position, the graduate student (now assistant professor) decided against investing the effort necessary to prepare the dissertation for publication because the book already recited his core discoveries. The book also caused him to abandon plans to expand his dissertation into a comparative analysis.

The defense for non-profit educational, scientific, or research use would not apply. The publisher offers the book to regular bookstores, and the sales will generate modest royalties for the professor. Even if the

publisher distributed the book only through academic bookstores, it would still produce some royalties for the author, and therefore fall out of the educational exception. Moreover, assuming the use could somehow meet the non-profit requirement, the exception still would not apply because the use harms the market for the dissertation and the article.

Notwithstanding the harm to the market, one would be hard pressed to argue that the professor has "stolen" the information from the article or the dissertation. As a matter of public policy, we want authors to use knowledge uncovered by others. Requiring the professor to go to the courthouses in North Carolina and Texas to redo the research already done by the graduate students is wasteful. Similarly, requiring the professor to obtain a license from the graduate students is impractical and in time will significantly increase the price of research. And what happens if a fire in one of the North Carolina courthouses destroys the records, making the dissertation the only source of the information? Or what if the author of the article refuses to permit the history professor to use the information because of professional rivalry?

One can change the discipline from history to sociology to biochemistry. In all fields of knowledge, people rely on information gathered by their predecessors. As a society we want people to stand, in Isaac Newton's words, on the shoulders of giants. We do not want them to reinvent the wheel.

To be sure, in many instances the researcher would not need to use a "substantial part" of a particular collection of information, but how is a researcher to know how much she can use, particularly when the test is qualitative, not quantitative, substantiality? Even her intellectual property attorney will have no basis for providing guidance. In contrast, a non-fiction author can fairly easily handle copyright's fair use privilege. If he is going to quote more than a few sentences, he just paraphrases the source. And in those gray areas, where the author believes he needs to quote more than a few sentences, his copyright lawyer has over a hundred years of fair use case law on which to rely.

H.R. 2652 will harm not only academic researchers or independent non-fiction authors, but also many commercial organizations such as consulting firms which issue reports. For example, Laura Tyson, the former director of the National Economic Council, was retained by Reed Elsevier and Thomson to prepare an economic analysis supporting H.R. 2652. As an appendix, Dr. Tyson included several tables extracted from an article on databases written by Dr. Martha Williams, a professor at the University of Illinois. These tables represent a significant portion of the information Dr. Williams presented in her article. Dr. Williams could bring an action under H.R. 2652 against Dr. Tyson, contending that Dr. Tyson's use harmed a potential market for a product that incorporated her information -- a report by Dr. Williams on the need for database legislation. In other words, H.R. 2652 would allow a database publisher to tie its consulting services to the sale of its databases.

The bottom line is that H.R. 2652 would make everyone more hesitant to use information. This, of course, defeats the very objective of the Information Age.

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