



Myths and Facts about S. 2291/Title V of H.R. 2281 (used to be H.R. 2652): The Collections Of Information Antipiracy Act

Myth: The database industry has suffered since the Supreme Court found "sweat of the brow" protection for compilations unconstitutional in 1991.

Fact: The database industry has grown at a phenomenal rate since 1991:

- Between 1991 and 1997, the number of database increased from 7637 to 10338, an increase of 35%;
- Between 1991 and 1997, the number of files contained within databases increased from 4 billion to 11.2 billion, an increase of 180%;
- Between 1991 and 1996, the number of online searches increased from 44.4 million to 79.9 million, an increase of 80%.

Just as significant as the growth of the industry is its changing structure. In 1977 government, academic, and non-profit entities produced 78% of all databases, while the private sector produced only 22%. By 1991, the government, academic, and non-profit share dropped to 30%, while the private sector share increased to 70%. Since 1991, this privatization has continued; by 1997, the government, academic and non-profit share had fallen to only 22%, while the private sector share soared to 78%. The shift in market structure, combined with the increase in the absolute numbers of databases, indicates that private investment in database creation has increased since *Feist*.

Myth: S. 2291/H.R. 2652 will not lead to an increase in the price of databases.

Fact: Between 1986 and 1996 the consumer price index increased 44%, and the price of health care increased 84%. The price of subscriptions to scholarly journals, which consist of "collections of information" and often are published by commercial firms, *increased by 148%*. If the price increased this much when there was no special database protection and competition was possible, imagine how much it will increase after S. 2291/H.R. 2652 grants database compilers a legal monopoly.

Myth: S. 2291/H.R. 2652 is necessary to ensure database publishers with an adequate return on their investment.

Fact: The Dutch-British conglomerate Reed Elsevier, one of the major supporters of S. 2291/H.R. 2652, publishes many scientific "collections of information." The profit margin of Reed Elsevier's science section in 1996 was almost 42% -- even higher the Microsoft's profit margin of 35.5%!

Myth: Existing law does not provide databases with sufficient protection.

Fact: The proponents of S. 2291 base their entire argument on one case: the Eleventh Circuit's decision in *Warren Publishing*. We believe that the Eleventh Circuit misapplied the copyright law in that case, and reached the wrong conclusion. But the courts have reached the right conclusion in the vast majority of the copyright decisions relating to databases -- cases never mentioned by S. 2291's proponents. For example, the Ninth Circuit recently found that copyright did reach the CPT database of the American Medical Association -- another of S. 2291's supporters. The Ninth Circuit withheld protection from the database, however, because the AMA *misused* its copyright. As it seeks to regain protection through S. 2291, the AMA neglects to mention that it disqualified itself from existing protections by virtue of its misconduct.

Furthermore, database publishers can rely on numerous other forms of protection, including trademark, trade secret, contract, state common law misappropriation, and technological protection. It should be noted that the Senate recently adopted S. 2037, which bolsters technological protections by prohibiting their circumvention.

Nonetheless, unfair commercial predation of databases should not be tolerated, and a statute directed specifically at this problem merits serious consideration.

Myth: S. 2291/H.R. 2652 simply tries to restore the *status quo* prior to the Supreme Court's 1991 *Feist* decision finding "sweat of the brow" protection unconstitutional.

Fact: The "sweat of the brow" doctrine -- granting copyright protection to the facts in a compilation as a reward for the effort invested in gathering the facts -- was never the prevailing approach for the protection of compilations; it existed in tandem with the more mainstream approach of protecting only the expression in the compilation. Sweat of the brow began to decline with Congress' adoption of the Copyright Act in 1976, and it was in full retreat by the 1980's. The *Feist* decision in 1991 was just the final blow. In short, S. 2291 tries to turn the clock back more than twenty years; since the 1976 Act, database publishers have known they could not rely upon the sweat of the brow doctrine.

Moreover, S. 2291 is far broader than the "sweat of the brow" doctrine. Courts created sweat of the brow as a stop gap measure to protect a narrow class of directories in which there was no protectable expression. S. 2291, by contrast, applies to collections of information even if they qualify for copyright. For this very large class of databases, S. 2291 allows publishers to charge more with no off-setting societal benefit. Further, S. 2291 prohibits transformative uses of the information -- re-use of the information in different kinds of products. Sweat of the brow was not applied in such a far reaching manner. S. 2291 thus represents a radical departure from the way information traditionally has been treated in the country.

Myth: S. 2291/H.R. 2652 is required to assure protection for U.S. databases in Europe.

Fact: While the European Database Directive will deny *sui generis* protection for U.S. databases if similar protection does not exist here, the Directive will still afford copyright protection to those U.S. databases. And since several European countries currently do not offer adequate copyright protection for databases, the Directive will actually improve matters for U.S. databases relative to the *status quo*. In other words, U.S. companies will be no worse off that they are now, and indeed might be better off. Also, U.S. companies can receive *sui generis* protection if they simply establish subsidiaries in Europe -- something many of the proponents of S. 2291 already have. Finally, as its proponents have admitted, S. 2291 probably would *not* satisfy the Database Directive's reciprocity requirement, because it is based on a tort rather than a property approach.

In any event, we should not let the European Community dictate what our laws should be. To the contrary, we should challenge the Database Directive's reciprocity provision before the World Trade Organization.

Myth: S. 2291/H.R. 2652 will protect small businesses.

Fact: While S. 2291 may benefit a few small database publishers, it will harm far more. Most small database publishers are value added publishers; they extract information from existing databases and add value by inserting new information or arranging the information in a new way. S. 2291 will allow the large upstream database publishers to drive the small value-added publishers out of business. Thus, it should come as no surprise that the driving forces behind this legislation are Reed Elsevier and Thomson (the Canadian company which bought West Publishing) -- two of the world's largest publishing houses.

Myth: S. 2291/H.R. 2652 will not harm research activities.

Fact: S. 2291 is opposed by the American Association for the Advancement of Science, the Institute of Electrical and Electronics Engineers, and many universities because of the negative impact it will have on the collaborative methodology of research. Currently, observation made by different scientists in different institutions are pooled together in databases which form the basis for analysis by still other scientists. S. 2291 will create disincentives for the sharing of data, which in turn will retard the advancement of knowledge. S. 2291 will also erect barriers to the writing of survey articles and textbooks; when the author of a textbook extracts data from a scientific article, he is harming the "potential market" for a product including that data -- a textbook written by the scientist who wrote the article.

To be sure, S. 2291 does include an exception for non-profit research, but that exception is circular. It applies only if the extraction or use does not harm the actual or potential market for the information -- the basic test for all extractions and uses under the bill, and a test which as noted above many research uses cannot meet.

Myth: S. 2291/H.R. 2652 will not harm businesses outside the database industry.

Fact: S. 2291 will increase the costs of information for all businesses. Additionally, S. 2291 will allow database publishers to control the use of information by its business customers. Currently, businesses buy information such as customer lists and reconfigure them for internal use. Under S. 2291, a database publisher can claim that this recompilation harms a "potential market" for its database. Further, companies which rely on scientific will suffer from S. 2291's adverse impact on science.

Myth: S. 2291/H.R. 2652 does not protect information -- just collections of information.

Fact: H.R. 2652 prohibits the extraction or use of a quantitatively or *qualitatively* substantial part of a collection of information. A relatively small amount of information could be considered "qualitatively substantial." Moreover, the second comer would have no way of knowing in advance what information he could extract before crossing the line; thus, as a practical matter, S. 2291 affords protection to a relatively small amount of information within a collection.

Myth: S. 2291/H.R. 2652 contains sufficient safeguards against monopoly pricing by sole source databases.

Fact: The only safeguard provided by H.R. 2652 is a savings clause that the antitrust laws apply to sole source databases. This provides little comfort, given the expense and duration of antitrust litigation and the prevalence of sole source databases. Most database markets are so small that they are served by one supplier.

Myth: Potential adverse impacts of S. 2291/H.R. 2652 have been grossly exaggerated because it does not prevent people from gathering the information themselves.

Fact: In many cases, the publisher of the database controls the underlying information, making independent compilation impossible. For example, one of the databases the AMA seeks to protect is its membership list. The AMA maintains such a list as part of its function as the organization that represents and regulates the medical profession in the U.S.; it would be a practical impossibility for another entity to create a list of all the doctors in the U.S. from scratch. Similarly, the New York Stock Exchange maintains information on all the stock quotations as part of its function of administering the stock market. There is no practical way for an entity other than the stock exchange to assemble a complete set of stock quotes. Additionally, historic data often is available only from publishers who have been in business for a long time; old court decisions are available only from West and Lexis-Nexis, which copied West's databases. Ironically, Lexis-Nexis, part of Reed Elsevier, now seeks to prevent the very sort of copying that allow it to create its database in the first place.

Beyond the impossibility of recreating a database in some cases, there is the fundamental information policy question of whether we want to require people to invest time and energy in recollecting information that has already been collected -- reinventing the wheel. For over two hundred years, the answer has been no. The Senate must decide if now is the time to change this bedrock principle.

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