

April 5, 1999

The Honorable Howard Coble, Chairman
The Honorable Howard L. Berman,
Ranking Member
Subcommittee on Courts and
Intellectual Property
Committee on the Judiciary
U.S. House of Representatives
Rayburn House Office Building, B-351
Washington, D.C. 20515-6219

Dear Chairman Coble and Congressman Berman:

The Association of American Universities, American Council on Education and National Association of State Universities and Land-Grant Colleges (the "higher education associations") are pleased to offer these comments on the Administration's testimony presented by Andrew J. Pincus, General Counsel of the Department of Commerce, at the March 18, 1999 hearing on H.R. 354 (the "Pincus Statement"). These comments are submitted for the record of that hearing in response to requests made by members of the Subcommittee at the hearing.

The higher education associations agree wholeheartedly with the basic principles and concerns presented in the Pincus Statement. The position articulated by Mr. Pincus and the issues that he identifies are fully consistent with the principles and concerns set forth in the testimony of University of Rochester Provost Charles E. Phelps on behalf of the higher education associations. In particular, we share the Administration's views that:

- The focus of new database protection legislation should be "effective legal remedies against 'free riders' who take databases gathered by others at considerable expense and reintroduce them into commerce as their own" (pages 5, 7-8).
- Any database law "should be predictable, simple, minimal, transparent and based on rough consensus" (page 6).
- The bill "must carefully define the protected interests and prohibited activities, so as to avoid unintended consequences" (page 6).
- "[A]ny effects on non-commercial research should be de minimis." (page 6).
- The prohibition against "extraction" or "use" is not "appropriate in the database context. As a policy matter we must weigh the need to protect database creators against the potential impact on scientific research in particular, and the dissemination of information within society generally" (page 7).
- "[A] simpler, more predictable legal schema would be produced by eliminating 'maintaining' [and 'organizing' and substituting 'collecting' for 'gathering'] and making it the sole basis for protected investment" (pages 23-24).
- "Congress should craft U.S. database protection to meet the needs of the American economy," rather than crafting legislation to meet the perceived requirements of the European Directive (page 32).

We also share the Administration's concerns (at 9) that the change from a requirement of "harm" to a requirement of "substantial harm" deserves careful consideration. We support such a change.

The Administration and the higher education associations have identified similar concerns with the concepts of "actual" and "potential" market. *Compare* Pincus Statement at 10 *with* Phelps' Testimony at 10-11. We also are concerned by the concept of "neighboring market," and suggest that the Subcommittee limit the focus of H.R. 354 to "*the* primary market" or "*a* primary market" for the database product.

We are considering with interest the suggestion by the Administration (at 12) suggesting the possibility of a notice system to warn users when a database producer is asserting protection under the law. We have not yet determined how such a notice system would work in this context, and what the effect of failure to include notice should be.

We are also considering the Administration's suggestions with respect to government-produced data. Our initial reaction is to agree that a database owner claiming protection should be obligated to identify the source of government-created data included in the database with sufficient detail that it may be easily found by the user.

We are concerned, however, by the Administration's suggestion that databases created by state universities and colleges should be subject to the same exclusion of protection as databases created by other governmental agencies. The higher education associations do not believe that the relationship between state universities and state governments is relevant to the policy questions of database ownership and protection. Both public and private universities need access to database information to support their research and teaching missions; this is the focus of the higher education testimony presented by Provost Phelps. But it is also the case that universities, public and private, should be accorded the same appropriately crafted database protection that other database owners are granted when universities elect to market databases they have created. Public universities and colleges should not be placed at a disadvantage compared to their private counterparts. The relationship between certain state universities and state governments should not be used as a basis for an inappropriate policy outcome.

The higher education associations share the Administration's concern about *de facto* perpetual protection. *Compare* Pincus Statement at 24-27 *with* Phelps testimony at 15. We also agree with the suggestion (at 27) that a database proprietor who seeks protection for a database that has been protected in an earlier form for 15 years be required to make the older, unprotected, database available. We disagree, however, that this requirement be limited to newer databases that have "substantial elements in common" with their ancestor. If this condition is placed on the defense, a user will not be able to determine whether the defense is available. Further, the obligation to make the ancestor available will further the public's interest in the availability of information and may still be useful to the user. We also disagree with the suggestion (at 38) that the old database need not be "as available" as the new version. Congress should not invite those seeking expanded database protection to engage in a game of cat and mouse to the detriment of public access.

The higher education associations agree with the Administration's proposal (at 29-31) to harmonize the "additional reasonable uses" section with fair use law. We prefer, however, the implementation contained in the Phelps testimony (at 12-14) to the language offered by Mr. Pincus. We are particularly concerned that the language presented by Mr. Pincus' retains the "individual act" limitation, which effectively nullifies the exception. We also continue to support a clear exception for non-profit educational, scientific and research activities such as that proposed at page 12 of the Phelps testimony.

We share the Administration's concern about non-competitive suppliers of database products. *Compare* Pincus Statement at 27-29 *with* Phelps testimony at 14-15. We agree that it is "important that any database protection legislation incorporate provisions that guard against the possibility that sole-source database providers will employ their new rights to the detriment of competition in related markets." Pincus Statement at 28. We also believe there is a real threat that the new-found protection

could be exploited in a manner that leads to unreasonable costs for information products. Congress should not enact legislation that creates market-distorting power in the market for information products. Avoiding such a market impact is especially important with respect to database protection legislation, where the lack of a bright line between data and databases requires particular assurances that Constitutionally mandated access to information is preserved. We agree with the Administration that antitrust law alone is not sufficient to address this issue and believe a creative approach is necessary. We commend to the Subcommittee the approaches suggested at page 15 of the Phelps testimony and the recognition of a misuse defense suggested by Mr. Pincus (at 28).

In light of the uncertainties about the effect of the proposed legislation and the dynamic but uncertain evolution of the digital environment, we support Mr. Pincus' suggestion (at 34-35) that the bill provide for ongoing monitoring of the effects of the legislation. Although it is critical that database legislation be, from the outset, carefully crafted, specifically targeted and protective of core principles of information access, the studies proposed by the Administration will provide valuable opportunities for evaluation and review.

There are certain issues identified by the higher education associations in the Phelps testimony that are not addressed by the Administration. Without attempting to present an exhaustive list, these include issues such as the need for a clear definition of protected collections (Phelps testimony at 7-8), concerns with the standard of substantiality (Phelps testimony at 8-10), the need for a clear exception for non-profit activities (Phelps testimony at 11-12), the need to ensure that institutions that act as online service providers are not subjected to liability for the conduct of users of their systems (Phelps testimony at 15-16), and clarification of the provisions relating to monetary relief and criminal liability (Phelps testimony at 16-17). We believe our proposals to address these issues are fully consistent with the goals presented by the Administration.

We commend the Subcommittee for the open, deliberate, and thoughtful process you are employing to develop legislation governing the important, complicated issues concerning database protection. We appreciate this opportunity to comment on the Administration's proposals, and we look forward to continuing to work with the Subcommittee to develop effective, balanced legislation governing database protection.

Sincerely

John C. Vaughn
Executive Vice President
Association of American Universities

cc: Members of the Subcommittee

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