

April 1, 1999

By Messenger

The Honorable Howard Berman
2330 Rayburn House Office Building
Washington, D.C. 20515-052

Re: Administration Testimony on H.R. 354

Dear Congressman Berman:

On behalf of some of the commercial entities concerned with the Collections of Information Antipiracy Act, including the Information Technology Association of America, the Online Banking Association, and the Computer and Communications Industry Association, I am replying to your request at the March 18 hearing for comments on the Administration's testimony on H.R. 354.

The Administration's testimony does three things: it articulates principles which should guide database legislation; it identifies problems with H.R. 354 from the perspective of those principles; and for some of these problems, recommends specific legislative solutions. As a general matter, we agree with the principles articulated; we agree that the problems identified are indeed problems; and we agree with many of the specific solutions proposed.

At the same time, although the Administration's testimony is generally very thoughtful, it has not addressed some significant problems with H.R. 354. For example, it does not address the liability of online service providers for the distribution of infringing databases. This issue needs to be addressed, whether or not the Administration's proposal to substitute "distribute" for "use" is adopted. The inclusion of a title limiting the copyright liability of service providers in the Digital Millennium Copyright Act demonstrates both that this is a significant issue and that it is capable of resolution.

Further, although the specific solutions proposed by the Administration will no doubt improve the bill, in several cases the solutions offered do not solve the problems they were intended to address. For instance, the Administration proposes changes to the core prohibition in Section 1402 that narrow its scope. However, these changes are not sufficient to preserve many legitimate uses of information.

As Professor Charles Phelps explains in Section III.C. of his testimony, H.R. 354 would impose liability for the taking of a qualitatively substantial, but quantitatively insubstantial, part of a database. While the statute specifically permits use of one item of information, the use of just two or three items of information could be prohibited. Moreover, H.R. 354 could prohibit use of these two or three items of information even if the database publisher invested minimal resources in the collection of these particular facts. H.R. 354 simply requires substantial investment in the database as a whole, not substantial investment in the part taken. Professor Phelps' specific proposals addressing this overbreadth warrant serious consideration.

Additionally, for some critical issues, the Administration testimony identifies the problem but does not propose a concrete solution. This is the case with permitted uses and sole source databases. The absence of proposed solutions is not surprising; these are perhaps the most serious problems with the bill, and they are not capable of easy resolution. At the hearing you jokingly referred to a compulsory license, but that may well be the only effective way of dealing with the sole source issue. This extreme relief is necessitated by the extreme prohibition contained in this legislation.

We directly disagree with the Administration testimony concerning a few significant issues. There has been no showing whatsoever that the civil liability created by H.R. 354 will be insufficient to prevent the

database piracy which is its target. Criminal sanctions, therefore, are completely unjustified. They are likely to cast a pall over lawful business activity without measurably deterring unlawful conduct. We also disagree with the testimony's support for protecting databases already in existence. Rather, we concur with the testimony's statement that "[b]ased on a strict economic analysis, coverage of such databases is not necessary -- the investment occurred without the legal protection." Administration Testimony at 21.

Finally, we disagree with the Administration's interpretation of what it calls the "minimalist" bill placed in the Congressional Record by Chairman Hatch. The Administration understands this bill "to bar only misappropriation of an entire database." Administration Testimony at 47 n.5. We read the bill more broadly -- as also barring misappropriation of discrete parts of a database that by themselves meet the definition of a database. This broader reading might cause the Administration to reverse its conclusion that the "minimalist" bill is "too narrow as a policy matter." Id. Indeed, we believe this alternative bill to be a more appropriate template for database protection than H.R. 354.

We look forward to working with the Subcommittee and the Administration on this important issue.

Sincerely,

Marc A. Pearl

cc: Chairman Howard Coble

Honorable Members of the Courts and Intellectual Property House Subcommittee

Mr. Andrew Pincus, General Counsel, Department of Commerce

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