

ITAA Letter to Mitch Glazier, Chief Counsel - Courts and Intellectual Property Subcommittee

May 19, 1999

Mr. Mitchell Glazier
Chief Counsel
Courts and Intellectual Property Subcommittee
House Judiciary Committee
B-351A Rayburn House Office Building
Washington, DC 20515-6219

Re: Comments on Revisions to H.R. 354

Dear Mitch:

Thank you very much for sharing with us Chairman Coble's proposed *Amendment in the Nature of a Substitute to HR 354*. In response to your request, we have prepared an initial "overnight" assessment of the changes. As you of course realize, this is an extremely complex issue, and we have not had the opportunity to run the draft and these comments by every member of our organization or the coalition, nor have we analyzed it thoroughly or determined all the ramifications and potential unintended consequences of the new proposal. These comments, therefore, are both brief and preliminary.

Moreover, the comments represent only the perspective of some of us who represent the non-profit and commercial critics of the original bill who met with you yesterday. There are, of course, many other companies and organizations who could not provide comments at this time. Suffice it to say, we believe that many of the issues raised need more than just a cursory makeover, and it is our hope that the Committee will engage in serious deliberations before moving too quickly in marking up the legislation. We would hope that you would welcome the input of other interested organizations and companies who would like to have an opportunity to weigh in on your proposal.

At the outset, we trust that you will convey to Chairman Coble, as well as to Representatives Berman and Delahunt, our collective belief that the proposal represents a meaningful and positive step forward. We greatly appreciate the Subcommittee's efforts to respond to the concerns raised by the Administration and the AAU in the incorporating of some of their proposed amendments.

At the same time, a number of very serious concerns with the bill remain. It is important to point out that these are not new concerns, but ones many of us identified in HR 2652 last Congress. As I am sure you will appreciate, the order in which these issues are raised below does not reflect a uniform view among those present yesterday regarding the relative importance of these items.

1. **SOLE SOURCE DATABASES.** All along, this has been one of our most significant concerns. The antitrust laws are simply too slow and costly to deal effectively with this problem. As discussed yesterday, we would like the Subcommittee to consider limiting the remedies available to a sole source publisher to a reasonable royalty. A statutory limitation of remedies will lead to a market-based solution that prevents piracy without creating unnecessary inefficiency and waste. Additionally, protection under this law should not be available to a publisher who misuses the protection.

- 2. TRANSFORMATIVE USES.** We very much appreciate the amendments in the definitions, the basic prohibition, and the reasonable use provision. These amendments, taken together, could make it less likely that a creator of a transformative database would ultimately be found liable under this bill, but they also make it less clear just when liability would attach. As a result, there would be a significant period of uncertainty for proprietors and users of databases as courts determine how to apply these relatively ambiguous and potentially broad terms. Just as the proponents of HR 354 invest large sums in the development of their databases, so too do many of the critics invest large sums in the development of their value added databases. HR 354 would chill this investment at least until the legal environment is clarified. We also see a nontrivial potential for the courts to interpret these provisions in a way that winds up being no less restrictive of productive and beneficial transformative uses than the current language of HR 354.

This problem flows from the overall structure of the bill. Additional tinkering with the definitions of such terms as "substantial part" and "primary and related markets" may help, but only at the margin. With all respect for the efforts that you and your colleagues have invested in the current draft, many of us continue to share the belief that it would be better to start with a codification of traditional misappropriation doctrine and try to update it, than to start as your approach does with a revival of the sweat-of-the brow doctrine and then try to limit it.

- 3. OTHER ACTS OF EXTRACTING.** The fact that the bill still covers activities of end-users of databases, rather than restricting itself to unfair market practices, remains a major difficulty. We continue to believe that the case has not been made for the necessity of such far-reaching legislation, and that a more narrowly tailored prohibition could reach and resolve all the real-world problems which database proprietors have described. Sweeping end-users under the bill's prohibitions and penalties is a guarantee of further and unnecessary controversy.
- 4. PERPETUAL PROTECTION.** The new provision that disallows damages when the user cannot determine when a collection was first offered for sale is a step in the right direction to solve the perpetual protection problem. We believe that it would be more effective if converted into a true exemption from all remedies rather than an affirmative defense to damages alone, so that a plaintiff would have the burden to prove in the first instance that it had taken sufficient steps to give notice of the vintage of its data that the finder of fact could conclude that the defendant knew or should have known the vintage of the data. So long as a publisher can still secure injunctive relief, he has little incentive to find a mechanism for making clear which part of the collection is more than 15 years old. While we understand the motivations for the 15 year period of protection, we continue to believe that it is too long for many if not most databases.
- 5. CRIMINAL LIABILITY.** We still see no need or justification for criminal provisions at this time.
- 6. ONLINE SERVICE PROVIDER LIABILITY.** We are happy to hear that the Subcommittee is considering an OSP liability exemption. At the same time, we feel that it is premature to establish a notice and takedown regime along the lines of the DMCA. Despite its many vagaries, both content providers and service providers have enough experience with copyright to make a notice and takedown regime work. By contrast, no one has any experience with database protection. Publishers may provide notice in inappropriate cases, and the service provider will have little basis for assessing the validity of the claim of violation. Until everyone has more experience with this new protection, service providers should receive a complete exemption from liability, along the lines of Section 230 of the Telecommunications Act.

Additionally, we appreciate your willingness to amend the Digital Online section to reflect the potential problem with DNS issues.

Once again, we appreciate being given the opportunity to comment on this proposal, and we thank you and your colleagues for your efforts to address some of our concerns.

Sincerely,

Marc A. Pearl
Senior Vice President and General Counsel

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