

Statement of James G. Neal
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on behalf of the

American Association of Law Libraries
American Library Association
Association of Research Libraries
Medical Library Association
Special Libraries Association

before the Subcommittee on Courts and Intellectual Property Committee on Judiciary
Hearing on "Collections of Information Antipiracy Act"

March 18, 1999

Mr. Chairman, I am James G. Neal, Dean, University Libraries, Johns Hopkins University and Past President of the Association of Research Libraries and a current member of the Executive Board of the American Library Association. I was a member of the U.S. delegation to the World Intellectual Property Organization in December 1996 as well.

I am testifying today on behalf of five of the Nation's major library associations: the American Association of Law Libraries, the American Library Association, the Association of Research Libraries, the Medical Library Association, and the Special Libraries Association. Collectively, we represent 80,000 librarians in research, academic, law, medical, public, state-based, and special libraries throughout North America. I very much appreciate the opportunity to appear before the Subcommittee again to share our views of H.R. 354, the "Collections of Information Antipiracy Act."

Mr. Chairman, we appreciate that H.R. 354 includes two new provisions which seek to address some of the concerns raised during the debate last year on H.R. 2652. These new provisions notwithstanding, with others in the public and private sectors, we have significant continuing concerns with H.R. 354. We believe that H.R. 354 as drafted would benefit a small number of companies while providing no comparable benefits to libraries and the public they serve. The preservation and continuation of balanced rights and privileges in the electronic environment are essential to the free flow of information.

We do believe, however, that there are other alternative approaches that could address the concerns of those seeking additional protections for databases while maintaining the important balance between producers and users. We support a more targeted approach to additional protections for collections of information and would be pleased to work with members of the Subcommittee to achieve such legislation.

Let me detail our concerns with H.R. 354. It is important to note that many of our concerns are reflected in the analyses and correspondence provided to members of Congress by the Department of Commerce (DOC, August 4, 1998), the Federal Trade Commission (FTC, September 28, 1998), and the Department of Justice (DOJ, July 28, 1998). Most if not all of these concerns remain valid, given the similarity between H.R. 2652 and H.R. 354.

Key Concerns

- The legislation is overbroad in scope and it represents a radical departure from the current intellectual property framework that protects expression, not investment.
- Provisions in H.R. 354 would allow a producer or publisher unprecedented control over the uses of information including downstream, transformative use of facts and government works in the collection.
- The exemption for education and research activities, although improved, remains far too narrow.
- The term of protection is in effect, perpetual, at least for dynamic compilations in electronic form, despite the addition of language that seeks to remedy this problem.
- The provision relating to government information requires modification to ensure a continued, robust public domain and to ensure that information in government-mandated databases is not covered by this legislation.
- Provisions in H.R. 354 do not address concerns regarding sole source databases. And,
- Provisions in the bill could lead to increased transaction costs in data use as noted by the Department of Commerce.

1) The legislation is overbroad in scope and it represents a radical departure from the current intellectual property framework that protects expression, not investment.

There is a constitutional obligation in the United States of protecting expression rather than facts. This imperative is based on a legal foundation that stimulates innovations in the public and private sectors, supports the educational process, and "promotes the progress of Science and the useful arts." The new regime proposed in H.R. 354 constitutes a radical departure from our current system - a regime that would permit the protection of factual information by virtue of the investment made in collecting the data. H.R. 354 would overturn over 200 years of our Nation's information policy which has consistently supported unfettered access to factual information. The Department of Justice noted that an earlier version of this legislation "would instead also provide protection to ordinary facts, which are not now subject to copyright protection and may be unsuited to such protection as a matter of constitutional law."¹ Indeed, H.R. 354 would provide more protection to databases and collections than is available for copyrighted works.

Given this significant departure from current policy, it is crucially important that, as the bill moves through the legislative process, a far more narrow, targeted approach be taken to ensure that there are no negative or unintended consequences for a vast public and private sector, including libraries, that properly relies on access to data and government works.

To that end, it will be important to better define key terms. For example, the Department of Justice commented that, "...many of the critical, proposed statutory terms are not well-defined. Because of the ambiguity of many of these terms, it is impossible to know for certain how wide-ranging H.R. 2652's applications would be."²

H.R. 354 has not remedied this serious concern. Key terms and concepts remain undefined. For example, what constitutes "a substantial part, measured quantitatively or qualitatively?" What threshold qualifies as "investment of substantial monetary or other resources?" What is "harm" to the actual or potential market?"

2) Provisions in H.R. 354 would allow a producer or publisher unprecedented control over uses of a database including downstream, transformative use of facts and government works in the collection.

The success of our Nation's education and research systems is dependent upon the ability of researchers to access data and information for multiple purposes. Scientific and research progress depends upon the ability to use public domain information, combine public and proprietary data to create new databases, and reuse existing data. Researchers typically create new knowledge by building upon the work of others. This practice, often described as, "standing upon the shoulders of giants" is the basis for our Nation's global leadership in the research and education arenas which fuels all sectors of the economy. Surely, we want this long-standing practice to continue and not be disrupted.

Researchers need access to *large and small* amounts of data. Yet H.R. 354 prohibits the extraction, or use in commerce, of "a substantial part, measured either quantitatively or qualitatively, of a collection of information...." By allowing the database producer to prevent reuses of "qualitatively" substantial parts of a database, the legal standard which is at the heart of H.R. 354, the bill effectively prevents the reuse of any information. Why? Because the researcher has no way of knowing which bits of information the producer considers "qualitatively substantial." As noted by the FTC, "users might not be able to judge whether a particular use of information is *qualitatively* substantial."³ The FTC states that, "this definition may not give a user sufficient guidance to reasonably determine whether a particular use of a collection of information would be *quantitatively* substantial enough to trigger civil and potentially criminal liability."⁴

In addition, libraries have yet another concern with the broad sweep of this legislation. If we have made information lawfully available to a researcher, can we or the researcher be held liable for subsequent reuse of that information by third parties? Unless this ambiguity is resolved in the negative, the chilling effect on the research enterprise will be further exaggerated.

In sum, these provisions would greatly discourage the use, reuse, and recompilation of data -- the foundation of the research and education enterprise and would prevent libraries from supporting these endeavors.

3) The exemption for education and research activities, although improved, remains far too narrow.

H.R. 354 includes a new provision for "reasonable uses" which did not appear in H.R. 2652. This provision is a modest step in the right direction in addressing a serious concern of the library community, and we do appreciate its inclusion in H.R. 354. Yet, the provision as drafted falls short of what the library and academic communities require to continue to conduct a wide range of research and education activities.

Section 1403 states that "no person shall be restricted from extracting or using information for nonprofit educational, scientific, or research purposes in a manner that does not harm directly the actual market for the product or service." Very often, however, libraries and educational institutions are, in fact, the only market for particular databases or collections. Thus by definition research use of the content of such collections could be held to "harm directly the actual market" making the exemption of little practical value for the vast bulk of research and educational uses.

In addition, the new reasonable use exemption applies only to an "individual act of use or extraction of information done for illustration, explanation, example, comment, criticism, teaching, research, or analysis, in an amount appropriate and customary for that purpose." As already noted however, researchers routinely build upon prior knowledge by using selected items from particular databases on multiple occasions over time. This practice would not be covered by the exemption. I would note that this practice, so crucial to the research enterprise, entails limited, selective use of particular data items; it does not entail copying entire databases and competing head to head in the commercial marketplace with the producer of the first database.

Finally, the new reasonable use exception is limited according to certain criteria. The fourth criteria

states, "whether the collection from which the use or extraction is made is primarily developed for or marketed to persons engaged in the same field or business as the person making the use or extraction." Most uses in the library and education communities would fall outside the scope of this exemption because as noted above, many times, the library and education communities are the only market for these collections.

Fueling our concern with this provision is the claim by proponents of the legislation that *any* harm, even one lost sale, could trigger liability under this statutory regime.

We do appreciate the inclusion of language that would reduce or remit monetary relief if an individual in a nonprofit educational, scientific, or research institution or library or archives believes that his or her conduct was permissible. Nevertheless, the exemption under this new regime for nonprofit institutions would not permit the library and education communities to engage in many activities that are lawful today.

4) The term of protection is, in effect, perpetual, at least for dynamic compilations in electronic form, despite the addition of language that seeks to remedy this problem.

A new provision in H.R. 354 attempts to correct a serious problem identified in its predecessor, H.R. 2652. Proponents argue that the mere maintenance of a database or collection on a server should trigger another 15 year cycle of protection. The new provision in H.R. 354 attempts to correct this serious problem, by making older versions of databases available for use even though newer ones remain protected. The new language, however, falls short of fully addressing our concerns. Where dynamic electronic databases are concerned, the older versions may, as a practical matter, be unavailable - making the right of access recognized in the new language a hollow one.

Even if the new language were to be interpreted to permit librarians and researchers to extract 15-year old data items from the current or updated version of the database in which they are contained, there is no system in place whereby a librarian or user can determine which portion of a database is more than fifteen years old, thus no longer subject to protection. And if such a system could be established, as was debated last fall during the negotiations sponsored by Sen. Hatch, implementation would be impractical and the economic implications for libraries and educational institutions would be enormous. A library would need to check every use of information contained in a database to determine when the information was entered into the collection thus when it was no longer subject to protection. The burden on the institutions would be costly and extremely time consuming to discharge. It is staggering to imagine the implications for thousands of researchers and libraries across the country trying to determine if each and every use was permitted.

Finally, the FTC notes that "it is unclear that a 15-year term is necessary in order to protect incentives to produce all types of databases."⁵ In particular, in some high-tech markets, product cycles are 6-18 months. The useful commercial life of some data, like stock prices, can expire in a matter of hours, if not minutes. The Commission also comments that the limited legal protection afforded to information to date has been provided only to time sensitive or "hot" information such as current stock quotations, sports statistics, and the like.

Thus, the new language incorporated in H.R. 354 does not solve one of the fundamental problems of database legislation of this type. Like its predecessor, the practical effect of H.R. 354 would be to jeopardize the continued existence of a vital "public domain" of information. Under such legislation, the movement of information from commercial sources would be slow and uncertain, at best. At the same time, as explained below, the approach taken in such legislation would threaten the continued availability of public domain government information for general public use and - specifically - for research and educational purposes.

5) The provision relating to government information requires modification to ensure a

continued, robust public domain and to ensure that information in government-mandated databases is not covered by this legislation.

The library community supports the intent of the drafters to make more government information publicly available without restriction. Yet it will be important to ensure that the significant part of the universe of government information -- data collected under statutory mandate -- is not subject to these protections in any final legislation.

Many statutes mandate the collection and dissemination of certain types of data, e.g. securities information, environmental data, and labor statistics. This information is part of the public record and should be available for all to use. Moreover, the number of public and private partnerships in data collection is increasing. Under the terms of this legislation, companies which provide data to the government could exert property rights over this data. Thus some government information would become the intellectual property of private companies. Significant collections of government-mandated information which have been publicly available could become unavailable, available for a fee, and / or available with significant constraints on use and reuse.

This latter point is especially important. These companies would have the ability to exert downstream control over information in government-mandated databases under the terms of this bill. For example, almost any kind of transformative use, such as abstracting from one of these databases or combining some of the data from one collection with information from other sources to create a new and useful database, could trigger liability for third parties. The Department of Commerce states, "It is important that legislation not create inappropriate opportunities of incentives to "capture" government information or government-funded data with relatively small investments in maintenance, organization, or supplemental data."⁶

6) Provisions in H.R. 354 do not address concerns regarding sole source databases.

Although the bill permits individuals to collect information independently in order to compete in the commercial marketplace, such independent collection often is virtually impossible or is economically infeasible. Historical data or data for field experiments are two common examples. We understand that tackling this issue is extremely difficult. But by failing to address the sole source issue, the bill could create monopoly control over information of certain kinds.

For libraries and users there would be little recourse. The publisher or database producer is not obligated to permit transformative uses in a license nor is there any leverage in negotiating the license to moderate costs or permit downstream activities.

7) Provisions in the bill could lead to increased transactions costs in data use as noted by the Department of Commerce.

Finally, the library community shares the concern included in the Department of Commerce letter regarding the increased costs in use of data. The library community acquires and licenses well over **\$2 billion** of information resources **each year**. We do not seek information for free and we understand that unauthorized digital copying can lead to piracy. America's libraries depend, in part, upon the well-being of those publishers. Throughout our history, libraries have been among the most voracious, lawful acquirers of published works. But we cannot support legislation that would impose new economic and administrative burdens on our institutions and on the Nation's research enterprise.

As noted in the Administration's letter of August 4, 1998 there are grounds for concluding that aspects of the "Collections of Information Antipiracy Protection Act," "may increase transaction costs in data use, particularly in situations where larger collections integrate datasets originating from different parties or where different parties have added value to a collection through separate contribution of gathering, refining, and/or maintaining the data. This is especially important for large-scale data

management activities, where public investment has leveraged contributions from the public and non-profit sectors."⁷

In closing Mr. Chairman, we believe that if this legislation is enacted in its current form and with the current approach, it would fundamentally change the research enterprise and how members of this community use information and at what cost. The approach taken in H.R. 354 could lead to a licensing framework where facts, government information, and other information could not be used without permission and with additional costs for each use. The ability to tightly control uses of information including downstream, transformative uses would be at odds with a culture of building upon prior research and could undermine the basic mechanisms of scientific and educational data exchange.

Another model which has widespread support in the library, education, and commercial sectors is a more narrowly tailored bill. This draft, the Database Fair Competition and Research Promotion Act, is focused on outlawing the parasitical copying of commercial databases. This alternative would prohibit a person from fully duplicating a database and then engaging in head to head competition in the marketplace. It also would bar non-commercial online distribution of large quantities of data extracted from commercial databases. In addition, the draft tackles the thorny issue of sole source databases and monopolistic practices. And finally, and most importantly the draft bill would permit transformative, downstream uses of information contained in protected databases.

We look forward to working with the Subcommittee on these issues to ensure the appropriate balance between all communities and sectors.

The American Library Association is a nonprofit educational organization of 57,000 librarians, library trustees, and other friends of libraries dedicated to improving library services and promoting the public interest in a free and open information society.

The American Association of Law Libraries is a nonprofit educational organization with over 5,000 members dedicated to serving the legal information needs of legislators and other public officials, law professors, and students, attorneys, and members of the general public.

The Association of Research Libraries is an Association of 122 research libraries in North America. ARL programs and services promote equitable access to and effective use of recorded knowledge in support of teaching, research, scholarship, and community service.

The Medical Library Association is an organization of over 3,800 individuals and 1,200 institutions in the health sciences information field. MLA members serve society by developing new information delivery systems, fostering educational and research programs for health sciences information professionals, and encouraging an enhanced public awareness of health care issues.

The Special Libraries Association is an international association representing the interests of nearly 15,000 information professionals in 60 countries. Special librarians are information resource experts who collect, analyze, evaluate, package and disseminate information to facilitate accurate decision-making in corporate, academic, and governmental settings. The Association offers a myriad of programs and services designed to help its members serve their customers more effectively and succeed in an increasingly challenging environment of information management and technology. SLA is committed to the professional growth and success of its membership.

¹ U.S. Department of Justice, Office of Legal Counsel, "Constitutional Concerns Raised by the Collections of Information Antipiracy Act, H.R. 2652," July 28, 1998, page 4.

² U.S. Department of Justice, Office of Legal Counsel, "Constitutional Concerns Raised by the Collections of Information Antipiracy Act, H.R. 2652," July 28, 1998, page 3.

³ Federal Trade Commission, Letter to Chairman Bliley from Chairman Pitofsky, FTC, September 28, 1998, page 4.

⁴ Federal Trade Commission, Letter to Chairman Bliley from Chairman Pitofsky, FTC, September 28, 1998, page 3.

⁵ Federal Trade Commission, Letter to Chairman Bliley from Chairman Pitofsky, FTC, September 28, 1998, page 3.

⁶ U.S. Department of Commerce, Letter to Sen. Leahy from Andrew Pincus, General Counsel, August 4, 1998, page 2.

⁷ Department of Commerce, Letter to Sen. Leahy from Andrew Pincus, General Counsel, August 4, 1998, page 2.

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