

# **Andrew J. Pincus Letter to Chairman Henry Hyde - Committee on the Judiciary, House of Representatives**

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The Honorable Henry Hyde  
Chairman, Committee on the Judiciary  
House of Representatives  
Washington, DC 20515

Dear Mr. Chairman:

This letter sets forth the Administration's position on H.R. 354, the "Collections of Information Antipiracy Act", as reported by the Subcommittee on Courts and Intellectual Property on May 20, 1999. We greatly appreciate the efforts made by Chairman Coble, Congressman Berman, Congressman Delahunt, and their respective staffs to address the numerous concerns identified by the Administration in testimony before the Subcommittee.

We have had a preliminary opportunity to review the new provisions of the bill and are very pleased that the Subcommittee has addressed the great majority of the Administration's concerns. We are especially cognizant of the considerable progress that has been made in narrowing the "basic prohibition" established in section 1402 of the bill. We also appreciate the Subcommittee's work to integrate the suggestions we made concerning the general "reasonable uses" provision so that it now provides protection for research, educational, and other purposes that is at least equivalent to "fair use" under the copyright law.

In sum, we believe that the bill reported by the Subcommittee does a much better job of focusing on the "free-riding" problem to be addressed here --- the wrongful taking and distribution of database material with the resulting infliction of harm on the database creator. At the same time, there are some aspects of the bill that we believe require further attention.

First, we applaud the removal of "use" from the basic prohibition set out in section 1402 and, based on Congressman Berman's statement at the mark-up, we understand that the new formulation of "mak[ing] available to others" is intended to capture the spirit of our March recommendation, more closely parallel misappropriation doctrine, and, therefore, greatly reduce any potential adverse impact on scientific research. We are very concerned, however, that the new section 1402(b) makes any extraction subject to liability if it materially harms the primary market of the database product. Section 1402(b) goes far beyond the focus of commercial misappropriation and unfair competition. We strongly recommend that it be deleted from the bill. Second, sections 1408(a) and (b) are new sections that are intended to address the Administration's recommendations on, respectively, the "perpetual protection" problem and ensuring wide availability of government-generated data. These are significant steps forward, but we believe the protection offered should not be limited to "monetary relief." Users who cannot determine whether the collection of information is protected will be chilled from making a legitimate, transformative use of that data, notwithstanding section 1408(a), if the price of an erroneous guess could be an injunction that destroys the value of the user's own investment. As the heading of section 1408(a) indicates, this should be a true affirmative defense. The same analysis applies to 1408(b). We strongly recommend that, in each case, "[n]o monetary relief shall be available for a violation of section 1402" be replaced with "[t]here shall be no violation of section 1402."

Third, it is not clear to us why the provision addressing the resolution of the sole source problem for government-generated data (section 1408(c)(2)) is limited to collections of information produced prior to

the enactment of this bill. The sole source problem could be better addressed by supplementing this provision with an express acknowledgment that there may be a place for courts to use the intellectual property misuse doctrine in the database context.

On all these issues, these policy concerns are bolstered by our view that tightly focusing the bill on commercial misappropriation will also help to address First Amendment issues that have been raised about this type of legislation. In addition, we would also like to work with you to sharpen provisions with which we seem to have no substantive disagreement, such as the definition of "related markets"; to include a provision for a study of the effects of new database legislation upon database production as well as scientific research, competition, and innovation; to ensure that the harm standard is an adequately high threshold; and to craft legislative history, particularly with respect to "making available," the treatment of data generated with government funding and the interpretation of the permitted uses provision. The Department of Justice is continuing to review the provisions of the bill, and we will notify you of any additional concerns or comments resulting from that review.

The Administration looks forward to continuing to work with you on this legislation, so that we can provide the legal protection needed for collections of information and the substantial investments integral to their development while ensuring adequate protection for scientific research, competition, and innovation.

We have been advised by the Office of Management and Budget that there is no objection to the submission of this letter to the Congress from the standpoint of the Administration's program.

Sincerely,

Andrew J. Pincus

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