

DATABASE AND COLLECTIONS OF INFORMATION
MISAPPROPRIATION ACT

FEBRUARY 11, 2004.—Committed to the Committee of the Whole House on the State
of the Union and ordered to be printed

Mr. SENSENBRENNER, from the Committee on the Judiciary,
submitted the following

R E P O R T

together with

DISSENTING VIEWS

[To accompany H.R. 3261]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill
(H.R. 3261) to prohibit the misappropriation of certain databases,
having considered the same, reports favorably thereon with an
amendment and recommends that the bill as amended do pass.

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THE AMENDMENT

The amendment is as follows:

Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the “Database and Collections of Information Misappropriation Act”.

SEC. 2. DEFINITIONS.

In this Act:

(1) COLLECTIVE WORK.—The term “collective work” means a work, such as a periodical issue, anthology, or encyclopedia, in which a number of contributions, constituting separate and independent works in themselves, are assembled into a collective whole.

(2) COMMERCE.—The term “commerce” means all commerce which may be lawfully regulated by the Congress.

(3) COMPILATION.—The term “compilation” means a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship. The term “compilation” includes collective works.

(4) DATABASE.—

(A) IN GENERAL.—Subject to subparagraph (B), the term “database” means a collection of a large number of discrete items of information produced for the purpose of bringing such discrete items of information together in one place or through one source so that persons may access them.

(B) EXCLUSIONS.—The term database does not include any of the following:

(i) A work of authorship, other than a compilation or a collective work.

(ii) A collection of information that principally performs the function of addressing, routing, forwarding, transmitting, or storing digital online communications or receiving access to connections for digital communications, except that the fact that a collection of information includes or consists of online location designations shall not by itself be the basis for applying this clause.

(iii) A collection of information gathered, organized, or maintained to perform the function of providing schedule and program information for multichannel audio or video programming.

(iv) A collection of information gathered, organized, or maintained to register domain name registrant contact data maintained by a domain name registration authority, unless such registration authority takes appropriate steps to ensure the integrity and accuracy of such information and provides real-time, unrestricted, and fully searchable public access to the information contained in such collection of information.

(C) DISCRETE SECTIONS.—The fact that a database is a subset of a database shall not preclude such subset from treatment as a database under this Act.

(5) DOMAIN NAME.—The term “domain name” means any alphanumeric designation which is registered with or assigned by any domain name registrar, domain name registry, or other domain name registration authority as part of an electronic address on the Internet.

(6) IN CONCERT.—A person acts “in concert” with another person who makes a database available in commerce if the act of making available in commerce is planned, arranged, coordinated, adjusted, agreed upon, or settled between the two persons acting together, in pursuance of some design or in accordance with some scheme.

(7) INFORMATION.—The term “information” means facts, data, works of authorship, or any other intangible material capable of being generated or gathered.

(8) INTERNET.—The term “Internet” means the combination of computer facilities and electromagnetic transmission media, and related equipment and software, comprising the interconnected worldwide network of computer networks that employ the Transmission Control Protocol/Internet Protocol or any successor protocol to transmit information.

(9) **LEGAL ENTITY.**—The term “legal entity” means a person, other than an individual, including a firm, corporation, union, or other organization, which is organized under the laws of the United States, a State, the District of Columbia, or any commonwealth, territory, or possession of the United States, or the laws of a foreign country.

(10) **MAINTAIN.**—To “maintain” a database means to update, validate, or supplement the information contained in the database.

(11) **MAKING AVAILABLE IN COMMERCE TO OTHERS.**—The term “making available in commerce to others” means making available in commerce to—

(A) a substantial number of members of the public; or

(B) a number of persons that extends beyond—

(i) a family and its social acquaintances; or

(ii) those who could reasonably anticipate to have a database made available in commerce to them without a customary commercial relationship.

A court may take into account repeated acts directed to different persons by the same or concerted parties in determining whether the limits imposed by subparagraph (B)(ii) have been exceeded.

SEC. 3. PROHIBITION AGAINST MISAPPROPRIATION OF DATABASES.

(a) **LIABILITY.**—Any person who makes available in commerce to others a quantitatively substantial part of the information in a database generated, gathered, or maintained by another person, knowing that such making available in commerce is without the authorization of that other person (including a successor in interest) or that other person’s licensee, when acting within the scope of its license, shall be liable for the remedies set forth in section 7 if—

(1) the database was generated, gathered, or maintained through a substantial expenditure of financial resources or time;

(2) the unauthorized making available in commerce occurs in a time sensitive manner and inflicts injury on the database or a product or service offering access to multiple databases; and

(3) the ability of other parties to free ride on the efforts of the plaintiff would so reduce the incentive to produce or make available the database or the product or service that its existence or quality would be substantially threatened.

(b) **INJURY.**—For purposes of subsection (a), the term “inflicts an injury” means serving as a functional equivalent in the same market as the database in a manner that causes the displacement, or the disruption of the sources, of sales, licenses, advertising, or other revenue.

(c) **TIME SENSITIVE.**—In determining whether an unauthorized making available in commerce occurs in a time sensitive manner, the court shall consider the temporal value of the information in the database, within the context of the industry sector involved.

SEC. 4. PERMITTED ACTS.

(a) **INDEPENDENTLY GENERATED OR GATHERED INFORMATION.**—This Act shall not restrict any person from—

(1) independently generating or gathering information obtained by means other than extracting it from a database generated, gathered, or maintained by another person; and

(2) making that information available in commerce.

(b) **ACTS OF MAKING AVAILABLE IN COMMERCE BY NONPROFIT SCIENTIFIC OR RESEARCH INSTITUTIONS.**—Subject to section 9, the making available in commerce of a substantial part of a database by a nonprofit scientific or research institution, including an employee or agent of such institution acting within the scope of such employment or agency, for nonprofit scientific or research purposes shall not be prohibited by section 3 if the court determines that the making available in commerce of the information in the database is reasonable under the circumstances, taking into consideration the customary practices associated with such uses of such database by nonprofit scientific or research institutions and other factors that the court determines relevant.

(c) **HYPERLINKING.**—Nothing in this Act shall restrict the act of hyperlinking of one online location to another or the providing of a reference or pointer (including such reference or pointer in a directory or index) to a database.

(d) **NEWS REPORTING.**—Nothing in this Act shall restrict any person from making available in commerce information for the primary purpose of news reporting, including news and sports gathering, dissemination, and comment, unless the information is time sensitive and has been gathered by a news reporting entity, and

making available in commerce the information is part of a consistent pattern engaged in for the purpose of direct competition.

SEC. 5. EXCLUSIONS.

(a) **GOVERNMENT INFORMATION.**—

(1) **IN GENERAL.**—Except as provided in paragraph (2), protection under this Act shall not extend to—

(A) a database generated, gathered, organized, or maintained by a Federal, State, or local governmental entity, or by an employee or agent of such an entity, acting within the scope of such employment or agency; or

(B) a database generated, gathered, or maintained by an entity pursuant to and to the extent required by a Federal statute or regulation requiring such a database.

(2) **EXCEPTION.**—Nothing in this subsection shall preclude protection under this Act for a database gathered, organized, or maintained by an employee or agent of an entity described in paragraph (1) that is acting outside the scope of such employment or agency, or by a Federal, State, or local educational institution, or its employees or agents, in the course of engaging in education, research, or scholarship.

(b) **COMPUTER PROGRAMS.**—

(1) **PROTECTION NOT EXTENDED.**—Subject to paragraph (2), protection under section 3 shall not extend to computer programs, including any computer program used in the manufacture, production, operation, or maintenance of a database, or to any element of a computer program necessary to its operation.

(2) **INCORPORATED DATABASES.**—A database that is otherwise subject to protection under section 3 is not disqualified from such protection solely because it resides in a computer program, so long as the collection of information functions as a database within the meaning of this Act.

SEC. 6. RELATION TO OTHER LAWS.

(a) **OTHER RIGHTS NOT AFFECTED.**—

(1) **IN GENERAL.**—Subject to subsection (b), nothing in this Act shall affect rights, limitations, or remedies concerning copyright, patent, trademark, design rights, antitrust, trade secrets, privacy, access to public documents, and misuse.

(2) **RIGHT OF CONTRACT.**—Notwithstanding subsection (b), nothing in this Act shall affect rights, limitations, or remedies concerning the common law right of contract.

(b) **PREEMPTION OF STATE LAW.**—

(1) **LAWS REGULATING CONDUCT THAT IS SUBJECT OF THE ACT.**—On and after the effective date of this Act, no State statute, rule, regulation, or common law doctrine that prohibits or otherwise regulates conduct that is prohibited or regulated under this Act shall be effective.

(2) **CLARIFICATION OF INAPPLICABILITY TO CASES NOT INVOLVING COMMERCIAL COMPETITION.**—Paragraph (1) shall not apply to preempt actions under State law against a person for taking actions that—

(A)(i) disrupt the sources of data supply to a database; or

(ii) substantially impair the perceived accuracy, currency, or completeness of data in a database by inaccurate, untimely, or incomplete replication and distribution of such data; and

(B) do not involve the person making available in commerce the data from such database in competition with such database.

(c) **COMMUNICATIONS ACT OF 1934.**—Nothing in this Act shall affect the operation of section 222(e) or any other provision of the Communications Act of 1934 (47 U.S.C. 151 et seq.), or shall restrict any person from making available in commerce or extracting subscriber list information, as such term is defined in section 222(h)(3) of the Communications Act of 1934 (47 U.S.C. 222(h)(3)).

(d) **SECURITIES.**—Nothing in this Act shall—

(1) affect the operation of the Securities Act of 1933 (15 U.S.C. 78a et seq.), the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.), the Public Utility Holding Company Act of 1935 (15 U.S.C. 79a et seq.), the Trust Indenture Act of 1939 (15 U.S.C. 77aaa et seq.), the Investment Company Act of 1940 (15 U.S.C. 80a–1 et seq.), the Investment Advisers Act of 1940 (15 U.S.C. 80b et seq.), or the Securities Investor Protection Act of 1970 (15 U.S.C. 78aaa et seq.), or the rules or regulations thereunder;

(2) affect the authority of the Securities and Exchange Commission; or

(3) apply to information with respect to quotations for, or indications, orders, or transactions in, securities.

(e) **MISUSE.**—Judicial doctrines of misuse shall apply under this Act.

SEC. 7. CIVIL REMEDIES.**(a) CIVIL ACTIONS.—**

(1) **COMMENCEMENT OF ACTIONS.**—Any person who is injured by a violation of section 3 may bring a civil action for such a violation in an appropriate United States district court. Any action against a State governmental entity may be brought in any court that has jurisdiction over claims against such entity.

(2) **NOTICE OF COMMENCEMENT OF ACTIONS AND APPEALS.**—Any person who brings an action for such a violation, or who files an appeal from any final decision on such an action, shall transmit notice of such action or appeal to the Federal Trade Commission, the United States Patent and Trademark Office, and the Register of Copyrights, in accordance with subsection (i)(1).

(b) **TEMPORARY AND PERMANENT INJUNCTIONS.**—Any court having jurisdiction of a civil action under this section shall have the power to grant temporary and permanent injunctions, according to the principles of equity and upon such terms as the court may deem reasonable, to prevent or restrain a violation or attempted violation of section 3. Any such injunction may be served anywhere in the United States on the person enjoined, and may be enforced by proceedings in contempt or otherwise by any United States district court having jurisdiction over that person.

(c) MONETARY RELIEF.—

(1) **ACTUAL DAMAGES AND ATTRIBUTABLE PROFITS.**—When a violation of section 3 has been established in any civil action arising under this section, the plaintiff shall be entitled to recover the actual damages sustained by the plaintiff as a result of the violation and any profits of the defendant that are attributable to the violation and are not taken into account in computing the actual damages sustained by the plaintiff. The court shall assess such profits or damages or cause the same to be assessed under its direction. In assessing profits the plaintiff shall be required to prove defendant's gross revenue only and the defendant shall be required to prove all elements of cost or deduction claims.

(2) **ADDITIONAL DAMAGES.**—In addition to actual damages, the court may enter judgment for an additional amount not exceeding 2 times such actual damages after considering the following factors:

(A) Whether the plaintiff notified the defendant of the alleged violation and the defendant continued to violate section 3.

(B) The willfulness of the defendant's conduct.

(C) Whether the defendant has a history of database misappropriation.

(D) The defendant's ability to pay.

(E) Whether the alleged violation had a serious negative financial impact on the plaintiff.

(F) Any good faith effort by the defendant to rectify the misappropriation.

(G) Whether the assessment of additional damages is necessary in order to deter future violations.

(d) **IMPOUNDMENT.**—At any time while an action under this section is pending, including an action seeking to enjoin a violation, the court may order the impounding, on such terms as it deems reasonable, of all copies of contents of a database made available in commerce or attempted to be made available in commerce potentially in violation of section 3, and of all masters, tapes, disks, diskettes, or other articles by means of which such copies may be reproduced. The court may, as part of a final judgment or decree finding a violation or attempted violation of section 3, order the remedial modification or destruction of all copies of contents of a database made available in commerce or attempted to be made available in commerce in violation of section 3, and of all masters, tapes, disks, diskettes, or other articles by means of which such copies may be reproduced.

(e) **COSTS AND ATTORNEY'S FEES.**—The court in its discretion may award reasonable costs and attorney's fees to the prevailing party. The court shall award costs and fees if it determines that an action was brought or a defense was raised under this Act in bad faith.

(f) **ACTIONS AGAINST UNITED STATES GOVERNMENT.**—Subsections (b) and (d) shall not apply to any action against the United States Government.

(g) **RELIEF AGAINST STATE ENTITIES.**—The relief provided under this section shall be available against a State governmental entity to the extent permitted by applicable law.

(h) LIMITATION ON LIABILITY OF CERTAIN ENTITIES.—

(1) **LIMITATION ON LIABILITY.**—No provider of an interactive computer service shall be liable under section 3 for making available information that is provided by another information content provider.

(2) DEFINITIONS.—In this subsection, the terms “interactive computer service” and “information content provider” have the meanings given those terms in section 230(f) of the Communications Act of 1934 (47 U.S.C. 230(f)).

(3) CONSTRUCTION.—For purposes of section 230 of the Communications Act of 1934 and any other provision of law, the provisions of this Act shall not be construed to be a law pertaining to intellectual property.

(i) OVERSIGHT OF CIVIL REMEDIES BY FTC AND PTO.—

(1) NOTICE.—The Federal Trade Commission, the Director of the United States Patent and Trademark Office, and the Register of Copyrights shall, by regulation, prescribe the form and procedures by which persons shall transmit the notices required by subsection (a)(2).

(2) OVERSIGHT.—The Federal Trade Commission, the Director of the United States Patent and Trademark Office, and the Register of Copyrights shall review the actions conducted under this section for the purposes of identifying instances in which judicial interpretation of this Act adversely or otherwise materially affects the administration of laws and policies within their respective jurisdictions.

(3) AMICUS CURIAE BRIEFS.—The Federal Trade Commission, the Director of the United States Patent and Trademark Office, and the Register of Copyrights may, in appropriate instances, file briefs as friends of the court in appeals from final decisions of actions under this section.

(4) REPORTS.—The Federal Trade Commission, the Director of the United States Patent and Trademark Office, and the Register of Copyrights shall, within 18 months after the date of the enactment of this Act, each transmit a report to the Committee on the Judiciary and the Committee on Energy and Commerce of the House of Representatives and the Committee on the Judiciary and the Committee on Commerce, Science, and Transportation of the Senate on their operations under this subsection. Such reports shall include—

(A) a summary of any briefs filed under paragraph (3);

(B) an explanation of the impact, if any, of the judicial decisions reviewed on existing laws and policies within the jurisdiction of the Commission, the Director of the Patent and Trademark Office, or the Register of Copyrights, as the case may be; and

(C) any recommendations for legislative or other changes that the Commission, the Director of the Patent and Trademark Office, or the Register of Copyrights, as the case may be, considers appropriate.

SEC. 8. LIMITATION ON ACTIONS.

No civil action shall be maintained under this Act unless it is commenced within 2 years after the cause of action arises or claim accrues.

SEC. 9. EXCLUSION FROM LIABILITY FOR EDUCATIONAL INSTITUTIONS AND RESEARCH LABORATORIES.

(a) EXCLUSION.—Except as provided in subsection (d), no liability shall be imposed under this Act on—

(1) any accredited nonprofit postsecondary educational institution or any nonprofit research laboratory,

(2) any employee of such educational institution or laboratory acting within the scope of his or her employment, or

(3) any student enrolled in such educational institution acting in furtherance of the supervised activities or programs of the institution, by reason of activities undertaken for nonprofit education, scientific, or research purposes.

(b) ACCREDITATION.—For purposes of this section, accreditation shall be as determined by a regional or national accrediting agency recognized by the Council on Higher Accreditation or the United States Department of Education.

(c) NONPROFIT RESEARCH LABORATORY.—For purposes of this section, a nonprofit research laboratory is a nonprofit research organization that is primarily engaged in basic or applied scientific research, or both, and that is a qualified organization as defined in section 41(b)(6)(B) of the Internal Revenue Code of 1986 for purposes of the research credit determined under section 41 of such Code.

(d) EXCEPTION.—Subsection (a) does not apply to an institution, laboratory, employee of such institution or laboratory, or student of such institution to the extent that the institution, laboratory, employee, or student makes available substantially all of a database in direct commercial competition with a person who made the substantial expenditure described in section 3(a)(1).

SEC. 10. EFFECTIVE DATE.

(a) **IN GENERAL.**—This Act shall take effect on the date of the enactment of this Act, and shall apply to acts of making available in commerce on or after that date with respect to databases existing before, on, or after that date.

(b) **PRIOR ACTS NOT AFFECTED.**—No person shall be liable under section 3 for making available in commerce on or after the date of the enactment of this Act a quantitatively substantial part of the information in a database in violation of that section, when the information was lawfully extracted from the database before the date of the enactment of this Act, by that person or by that person's predecessor in interest.

SEC. 11. NONSEVERABILITY.

(a) **IN GENERAL.**—If the Supreme Court of the United States holds that the provisions of section 3, relating to prohibition against misappropriation of databases, are invalid under Article I of, or the First Amendment to, the Constitution of the United States, then this Act is repealed, effective as of the date of the Supreme Court decision.

(b) **TERMINATION.**—Subsection (a) shall cease to be effective at the end of the 10-year period beginning on the date of the enactment of this Act.

PURPOSE AND SUMMARY

H.R. 3261, the “Database and Collections of Information Misappropriation Act,” creates a comprehensive Federal protection system for databases. This redress will supplement a patchwork of existing state and Federal remedies that do not, individually nor collectively, offer adequate protection.

Accurate databases are critical to our information economy. Databases affect the flow of information in a number of important fields and endeavors, including law, medicine, public health, and consumer matters. “Free-riders”—those who steal databases—do not invest the time, money, and other resources necessary to produce databases. The protections offered under H.R. 3261 will ensure that lawful database owners retain an incentive to produce and maintain their compilations, while American consumers and businesses will benefit from the availability and accuracy of these publications.

BACKGROUND AND NEED FOR THE LEGISLATION**IN GENERAL**

Electronic collections, and other collections of factual material, are indispensable to the United States in the new information economy. These information products put a wealth of data in a convenient and organized form at the fingertips of businesses, scientists, scholars, and consumers, enabling them to retrieve specific factual information needed to solve a particular economic, research, or educational problem. Whether the focus is on financial, scientific, legal, medical, bibliographic, or other information, databases improve productivity.

Developing, compiling, distributing and maintaining commercially significant collections requires substantial investments of time, personnel, effort, and money. Information companies, small and large, must dedicate substantial resources to gathering and verifying factual material, presenting it in a user-friendly way, and keeping it current and useful to customers. American firms have been the global leaders in this field. They have brought to market a wide range of valuable collections that meet the information needs of businesses, professionals, researchers, and consumers

worldwide. But several recent legal and technological developments threaten to derail this progress by eroding the incentives for continued investment needed to maintain and build upon the U.S. lead in world markets for electronic information resources.

Historically, protection of collections of information has always been recognized as a branch of copyright law. Databases or compilations have been protected by copyright in some form since 1790, when the first U.S. Copyright Act was enacted. As courts applied copyright law to compilations, two distinct rationales for protection emerged. One, known as “sweat of the brow doctrine,” viewed the compiler’s effort and investment (much as in trademark law) as the basis for copyright protection. In 1976, the Copyright Act was amended to require that compilations contain an element of creativity or originality in addition to effort and investment. Despite this amendment, many courts have continued to apply the “sweat of the brow” doctrine in determining copyright protection.

In *Feist Publications, Inc., v. Rural Telephone Service Co.*,¹ the Supreme Court affirmed that originality and creativity (in addition to investment and effort) are required for protection under the Copyright Act, and that a related form of protection would have to be created to more fairly protect compilations or portions of compilations in which there is effort and investment, but not a threshold level of originality or creativity. While *Feist* reaffirmed that most—although not all—commercially significant databases satisfy the “originality” requirement for protection under copyright, the Court emphasized that this protection is necessarily “thin.”² Several subsequent lower court decisions have underscored that copyright cannot stop a competitor from lifting massive amounts of factual material from a copyrighted database to use as the basis for its own competing product. This casts doubt on the ability of a database proprietor to use contractual provisions to protect itself against unfair competition from “free riders.”

Similar to other legislative initiatives since in the 104th Congress, H.R. 3261 responds to *Feist*. Although not based on a copyright or other property right model, the bill offers database owners protection for their compilations that is more comprehensive and uniform than the inadequate patchwork system of state and Federal laws currently available.

Beyond these legal and commercial developments in the United States, there is reason to protect American-generated databases in the world market. To illustrate, a 6-year legislative process culminated in the issuance of a European Union Directive on Legal Protection of Databases in 1996. Among other things, the directive creates a new *sui generis* form of property right for the legal protection of databases to supplement copyright. However, it denies this new protection to collections of information originating in the United States or other countries unless the other country offers “comparable” protection to collections originating in the European Union. When fully implemented, the European Directive could place U.S. firms at an enormous competitive disadvantage throughout the entire European market.

¹ 499 U.S. 340 (1991).

² *Id.* at 349.

In cyberspace, technological developments represent a threat as well as an opportunity for collections of information, just as for other works. Copying factual material from a third party's collection and rearranging it to form a competing information product—behavior that copyright protection alone may not effectively prevent—is cheaper and easier than ever through digital technology that is now in widespread use. Furthermore, piracy and personal theft of collections developed through the resources of a third party is easy to achieve and will be rampant without better protection for database owners.

Taken together, these factors strongly suggest that the Congress should implement a new Federal system to protect developers against piracy and unfair competition, and thereby encourage continued investment in the production and distribution of valuable commercial collections of information. Such legislation will improve the market climate for collections of information in the United States; ensure protection for U.S. collections abroad on an equitable basis; place the United States on the leading edge of an emerging international consensus; and provide a balanced and measured response to the new challenges of digital technology. This bill seeks to advance those goals.

H.R. 3261 fosters legitimate commercial incentives that the Committee believes will ensure the continued growth, vitality, and success of the market for important information products, while securing the continued legitimate use of collections of information for scientific, research, educational, and other purposes. The Committee further believes that preventing producers from having to rely on a hodgepodge of individual state laws is essential to advancing this goal.

As noted, the bill does not adopt a structure like copyright, rather, it embraces a misappropriation model. H.R. 3261 prohibits a third party from selling a “quantitatively substantial” portion of a database, provided the owner made a substantial investment of time or money in developing the database. The owner must also establish that the misappropriation occurred in a time-sensitive manner that caused injury and that the free use of the database will reduce the incentive to maintain it. There are other exclusions and qualifications to this basic prohibition to protect universities and research institutions, developers of electronic program guides, and those who use government databases, among others.

In sum, H.R. 3261 represents a narrow and balanced response to the growing problem of database piracy. The high threshold that an owner must satisfy to establish liability—a total of 10 criteria must be met—in addition to the exclusions or exemptions set forth in the bill ensure that it will only be used to dissuade genuinely bad actors from indulging in piracy.

DATABASE INITIATIVES: 104TH CONGRESS-107TH CONGRESS

104th Congress. Former Representative Carlos Moorhead, then Chairman of the Committee on the Judiciary's Subcommittee on Courts and Intellectual Property, introduced H.R. 3531, the “Database Investment and Intellectual Property Antipiracy Act.” No action was taken on the bill.

105th Congress. Representative Howard Coble, then Chairman of the Subcommittee on Courts and Intellectual Property, introduced H.R. 2652, the “Collections of Information Antipiracy Act.” H.R. 2652 passed the House twice, once as a stand-alone bill and once as part of the Digital Millennium Copyright Act (DMCA).³ The final version of the DMCA that became law did not include the database provision.

106th Congress. Representative Coble introduced H.R. 354, the “Collections of Information Antipiracy Act.” H.R. 354 was approved by the Committee on the Judiciary and was sequentially referred to the Committee on Commerce. Representative Tom Bliley, Chairman of the Commerce Committee, introduced H.R. 1858, the “Consumer and Investor Access to Information Act.” H.R. 1858 was approved by the Committee on Commerce and was sequentially referred to the Committee on the Judiciary. No further action was taken on either bill.

107th Congress. In an effort to avoid the stalemate of the 106th Congress, Representative F. James Sensenbrenner, Jr., Chairman of the Judiciary Committee, and Representative W.J. (Billy) Tauzin, Chairman of the Commerce Committee, agreed to participate in deliberations that would produce a consensus bill. The process included stakeholder discussions and negotiations followed by closed-door negotiations between the staffs of the two Committees. At the conclusion of the 107th Congress, the staffs made progress but did not reach an agreement on the final text of a bill. As a result, Chairman Sensenbrenner and Chairman Tauzin sent a letter to the Speaker, requesting that negotiations continue apace until April 15, 2003.

As introduced by Representative Coble on October 8, 2003, H.R. 3261 constitutes the final negotiation product as contemplated by Chairman Sensenbrenner and Chairman Tauzin in advance of Subcommittee and Committee markup.

HEARINGS

The Committee’s Subcommittee on Courts, the Internet, and Intellectual Property, along with the Committee on Commerce’s Subcommittee on Commerce, Trade, and Consumer Protection, held a joint hearing on the Discussion Draft of what would become H.R. 3261 on September 23, 2003. Testimony was received from four individuals representing four organizations, with additional materials submitted by other individuals and organizations.

COMMITTEE CONSIDERATION

On October 16, 2003, the Subcommittee on Courts, the Internet, and Intellectual Property met in open session and ordered favorably reported the bill H.R. 3261, with an amendment, by a recorded vote of 10 to 3, a quorum being present. On January 21, 2004, the Committee met in open session and ordered reported favorably the bill H.R. 3261, with an amendment, by a recorded vote of 16 to 7, a quorum being present.

³Pub. L. 105–304.

VOTE OF THE COMMITTEE

In compliance with clause 3(b) of rule XIII of the Rules of the House of Representatives, the Committee notes that the following rollcall votes occurred during the Committee's consideration of H.R. 3261.

1. Boucher amendment regarding Internet service provider (ISP) liability to the Coble amendment regarding the same matter to the amendment in the nature of a substitute to H.R. 3261. By a rollcall vote of 17 yeas to 7 nays and one pass, the amendment passed.

ROLLCALL NO. 1

	Ayes	Nays	Present
Mr. Hyde			
Mr. Coble		X	
Mr. Smith		X	
Mr. Gallegly			
Mr. Goodlatte	X		
Mr. Chabot	X		
Mr. Jenkins	X		
Mr. Cannon	X		
Mr. Bachus			
Mr. Hostettler	X		
Mr. Green		X	
Mr. Keller		X	
Ms. Hart	X		
Mr. Flake			
Mr. Pence			
Mr. Forbes	X		
Mr. King		X	
Mr. Carter			
Mr. Feeney	X		
Mrs. Blackburn		X	
Mr. Conyers		X	
Mr. Berman			
Mr. Boucher	X		
Mr. Nadler			
Mr. Scott	X		
Mr. Watt	X		
Ms. Lofgren	X		
Ms. Jackson Lee	X		
Ms. Waters			
Mr. Meehan	X		
Mr. Delahunt			
Mr. Wexler			
Ms. Baldwin	X		
Mr. Weiner			
Mr. Schiff			Pass
Ms. Sánchez	X		
Mr. Sensenbrenner, Chairman	X		
Total	17	7	1 Pass

2. Boucher amendment regarding retroactive application of the bill's provisions to the amendment in the nature of a substitute to H.R. 3261. By a rollcall vote of 8 yeas to 18 nays, the amendment was defeated.

ROLLCALL NO. 2

	Ayes	Nays	Present
Mr. Hyde			

ROLLCALL NO. 2—Continued

	Ayes	Nays	Present
Mr. Coble		X	
Mr. Smith		X	
Mr. Gallegly			
Mr. Goodlatte		X	
Mr. Chabot		X	
Mr. Jenkins		X	
Mr. Cannon		X	
Mr. Bachus		X	
Mr. Hostettler		X	
Mr. Green		X	
Mr. Keller		X	
Ms. Hart			
Mr. Flake			
Mr. Pence			
Mr. Forbes		X	
Mr. King		X	
Mr. Carter		X	
Mr. Feeney		X	
Mrs. Blackburn		X	
Mr. Conyers		X	
Mr. Berman			
Mr. Boucher	X		
Mr. Nadler			
Mr. Scott	X		
Mr. Watt	X		
Ms. Lofgren	X		
Ms. Jackson Lee	X		
Ms. Waters			
Mr. Meehan	X		
Mr. Delahunt			
Mr. Wexler			
Ms. Baldwin	X		
Mr. Weiner			
Mr. Schiff		X	
Ms. Sánchez	X		
Mr. Sensenbrenner, Chairman		X	
Total	8	18	

3. Motion to report H.R. 3261, as amended by the amendment in the nature of a substitute, as amended. By a rollcall vote of 16 yeas to 7 nays, the motion was agreed to.

ROLLCALL NO. 3

	Ayes	Nays	Present
Mr. Hyde			
Mr. Coble	X		
Mr. Smith	X		
Mr. Gallegly			
Mr. Goodlatte			
Mr. Chabot	X		
Mr. Jenkins	X		
Mr. Cannon	X		
Mr. Bachus	X		
Mr. Hostettler	X		
Mr. Green	X		
Mr. Keller	X		
Ms. Hart			
Mr. Flake			
Mr. Pence			
Mr. Forbes	X		

ROLLCALL NO. 3—Continued

	Ayes	Nays	Present
Mr. King	X		
Mr. Carter	X		
Mr. Feeney			
Mrs. Blackburn	X		
Mr. Conyers		X	
Mr. Berman			
Mr. Boucher		X	
Mr. Nadler			
Mr. Scott		X	
Mr. Watt		X	
Ms. Lofgren			
Ms. Jackson Lee		X	
Ms. Waters			
Mr. Meehan		X	
Mr. Delahunt			
Mr. Wexler			
Ms. Baldwin		X	
Mr. Weiner			
Mr. Schiff	X		
Ms. Sánchez	X		
Mr. Sensenbrenner, Chairman	X		
Total	16	7	

COMMITTEE OVERSIGHT FINDINGS

In compliance with clause 3(c)(1) of Rule XIII of the Rules of the House of Representatives, the Committee reports that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of Rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

NEW BUDGET AUTHORITY AND TAX EXPENDITURES

Clause 3(c)(2) of House rule XIII is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

In compliance with clause 3(c)(3) of Rule XIII of the Rules of the House of Representatives, the Committee sets forth, with respect to the bill, H.R. 3261, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, February 10, 2004.

Hon. F. JAMES SENSENBRENNER, Jr., *Chairman,*
Committee on the Judiciary,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 3261, the "Database and Collections of Information Misappropriation Act."

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contacts are Melissa E. Zimmerman (for Federal costs), who can be reached at 226-2860, Sarah Puro (for the State and local impact), who can be reached at 225-3220, and Paige Piper/Bach (for the private-sector impact), who can be reached at 226-2940.

Sincerely,

DOUGLAS HOLTZ-EAKIN.

Enclosure

cc: Honorable John Conyers, Jr.
Ranking Member

H.R. 3261—Database and Collections of Information Misappropriation Act.

H.R. 3261 would allow parties who create or maintain information databases to file civil suits in a United States district court against parties who misuse those databases. The bill would require the United States Patent and Trademark Office, the Federal Trade Commission, and the Register of Copyrights to accept and review notices submitted by individuals filing such suits. Under the bill, each agency also would be required to write a report regarding the impact of the law with recommendations for change. CBO estimates that implementing H.R. 3261 would have no significant effect on spending subject to appropriation and would not affect direct spending or revenues.

H.R. 3261 contains an intergovernmental mandate as defined in the Unfunded Mandates Reform Act (UMRA) because it would preempt State laws that protect the collection of information; however, CBO estimates that the resulting costs, if any, would not be significant and would not exceed the threshold established in UMRA (\$60 million in 2004, adjusted annually for inflation).

H.R. 3261 would create a new private-sector mandate as defined in UMRA by prohibiting any person from making a substantial part of information in certain databases available to the public in commerce without proper authorization. CBO cannot estimate the total cost of the mandate because we do not have enough information to determine the scope and impact of the prohibition.

Currently, certain types of information that may be contained in a database are not protected by copyright law, and such information may not be protected under individual State laws. H.R. 3261 would impose a mandate by creating a Federal law of misappropriation that would subject to civil penalties any person who, without authority, makes a substantial portion of the information of the database publicly available. To avoid such penalties, a person must obtain the consent of the database owner through a licensing or similar agreement. The cost of complying with the mandate would be either the cost of the license or the revenue forgone by not making the information publicly available. The person's ability to obtain a license from the proper authority would depend in part on the potential effects on competition with the database products or services.

CBO cannot estimate the total cost of the mandate because we do not have enough information to determine the scope and impact

of the prohibition against misappropriation of certain databases. While court decisions have identified collections of information that failed to meet the creative expression standard under existing copyright law, those decisions are of limited use in identifying all of the types of collections to which H.R. 3261 could extend protection. Database providers may have been unaware of unauthorized use or, even if aware of such activity, may not have chosen to test their rights in court.

The CBO staff contacts for this estimate are Melissa E. Zimmerman (for Federal costs), who can be reached at 226–2860, Sarah Puro (for the State and local impact), who can be reached at 225–3220, and Paige Piper/Bach (for the private-sector impact), who can be reached at 226–2940. The estimate was approved by Peter H. Fontaine, Deputy Assistant Director for Budget Analysis.

PERFORMANCE GOALS AND OBJECTIVES

H.R. 3261 does not authorize funding. Therefore, clause 3(c)(4) of Rule XIII of the Rules of the House of Representatives is inapplicable.

CONSTITUTIONAL AUTHORITY STATEMENT

Pursuant to clause 3(d)(1) of Rule XIII of the Rules of the House of Representatives, the Committee finds the authority for this legislation in article 1, section 8, of the Constitution.

SECTION-BY-SECTION ANALYSIS AND DISCUSSION

Section 1. Short Title. This Act may be cited as the “Database and Collections of Information Misappropriation Act.”

Section 2. Definitions. Section 2 sets forth definitions of miscellaneous terms, including “database,” “legal entity,” and “making available in commerce to others.”

Section 3. Prohibition Against Misappropriation of Databases. Section 3 prohibits the making available to others of a quantitatively substantial part of the information in a database, with knowledge that the making available is without the database producer’s authorization, if—

- the database was generated, gathered, or maintained through a substantial expenditure of financial resources or time;
- the making available occurs in a time-sensitive manner;
- the making available inflicts injury on the database by serving as a functional equivalent in the same market as the database in a manner that causes displacement of sources of revenue; and
- the ability of parties to “free-ride” on others threatens the existence or quality of the database.

As noted, a prospective plaintiff must satisfy a number of stringent criteria to be successful in a piracy suit for damages, impoundment, or injunctive relief. Failure to meet even one condition will result in a finding for the defendant. This high threshold will protect legitimate third-party use of databases. Section 3 is

aimed at combating the most egregious of bad actors and will therefore not generate unnecessary or illegitimate litigation.

Section 4. Permitted Acts. Section 4 provides the Act shall not restrict acts of making available the information in a database—

- by any person who independently generates or gathers information;
- by a nonprofit educational, scientific, or research institution, if a court determines that the making available in commerce of the information is reasonable under the circumstances, taking into consideration the customary practices of the nonprofit educational, scientific or research institution;
- by the act of hyper-linking of one online location to another or providing of a reference or a pointer; or
- for the primary purpose of news reporting (including news and sports gathering and dissemination) unless the information is time-sensitive and has been gathered by a news-reporting entity, and the making available is part of a consistent pattern engaged in for the purpose of direct competition.

Section 5. Exclusions. Section 5 protection under the bill is unavailable for—

- information generated, gathered, organized, or maintained by a governmental entity or pursuant to a Federal statute or regulation; and
- computer programs (but databases incorporated into computer programs will receive protection).

Section 6. Relation to Other Laws. Section 6—

- preserves the law of copyrights, patents, trademarks, design rights, antitrust, trade secrets, privacy, access to public documents, misuse, and contract law;
- preempts state law that is the subject of the Act but does not preempt for cases involving something other than commercial competition;
- affirms the “savings” clause for the Communications Act of 1934, along with securities laws, regulations, or market data; and
- clarifies that judicial doctrines of misuse apply.

Section 7. Civil Remedies. Section 7 includes the following remedies:

- a private right of action that may be brought in an appropriate U.S. district court for injunctive relief or actual damages, with double damages available when there is willful conduct, a history of database misappropriation, or a of necessity to deter future violations;
- an award of court costs and attorney’s fees to the prevailing party; and
- oversight by the Federal Trade Commission, the Copyright Office, and the Patent and Trademark Office.

Empowering an individual to prevent the misappropriation of his or her database through commencement of a civil action is eminently fair. In addition, section 7 permits the “prevailing” party to petition the court for costs and attorney’s fees. Thus, an owner’s right to bring suit is balanced with the specter of having to pay the defendant if the suit is meritless. The oversight function provided by the Federal Trade Commission, Register of Copyrights, and Director of the Patent and Trademark Office will also prevent frivolous litigation. All three Federal entities will essentially review the state of database litigation and offer their insights as to whether the public interest is served through enforcement of H.R. 3261.

Section 7 of the bill was amended at the full Committee markup regarding the liability of Internet service providers (ISPs) under the terms of the bill. Representative Coble offered an amendment to exempt ISPs based on a description of their operations. The Coble amendment was substantially revised, however, by a second-degree amendment offered by Representative Rick Boucher. The Boucher amendment states that no “provider of an interactive computer service [i.e., an ISP] shall be liable under section 3 for making available information that is provided by another information content provider.” In other words, the Boucher amendment essentially exempts an ISP from any liability based on its status as an ISP if it acts as a mere conduit when transferring information over the Internet provided by a third party source, such as a subscriber.

Section 8. Limitation on Actions. Section 8 provides that no civil action shall be maintained under this Act unless it is commenced within 2 years after the cause of action arises or claim accrues.

Section 9. Exclusion From Liability for Educational Institutions. Section 9 excludes any “accredited nonprofit post-secondary educational institution or any nonprofit research laboratory” from liability under the Act. An exception to this exclusion lies if any shielded entity “makes available substantially all of a database in direct commercial competition” with a database owner as described in Section 3.

The exclusion under section 9 was further expanded at full Committee markup when Representative Coble offered an amendment clarifying that the exclusion applies to the work of a student “acting in furtherance of supervised activities or programs.” The amendment also more accurately defines a “nonprofit” research laboratory.

Section 10. Effective Date. Section 10 provides that the Act shall take effect on the date of the enactment of the Act, and shall apply to violations on or after that date with respect to databases existing before, on, or after that date.

Section 11. Nonseverability. This section provides that if, within 10 years from the date of enactment, the Supreme Court of the United States holds that the provisions of section 3 are invalid under article I of the Constitution, then this Act is repealed, effective as of the date of the Supreme Court decision.

Section 11 offers consolation to critics who assert that the bill violates the Copyright Clause of the U.S. Constitution (article I, section 8, clause 8). The Committee believes that the bill is constitutionally sound and is not a derivation of or an expansion to copyright since it is based on a misappropriation model. The Com-

mittee further notes that the Congress is fully empowered to legislate in this area based on its Commerce Clause power (article I, section 8, clause 3).

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of Rule XIII of the Rules of the House of Representatives, the Committee notes that this bill does not change existing law.

MARKUP TRANSCRIPT
BUSINESS MEETING
WEDNESDAY, JANUARY 21, 2004

HOUSE OF REPRESENTATIVES,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice, at 10:05 a.m., in Room 2141, Rayburn House Office Building, Hon. F. James Sensenbrenner, Jr. [Chairman of the Committee] presiding.

[Intervening business.]

Chairman SENSENBRENNER. The next item on the agenda is H.R. 3261, the "Database and Collections of Information Misappropriation Act."

The Chair recognizes the gentleman from Texas, Mr. Smith, the Chairman of the Subcommittee on Courts, the Internet, and Intellectual Property.

Mr. SMITH. Mr. Chairman, the Subcommittee on Courts, the Internet, and Intellectual Property reports favorably the bill H.R. 3261 with a single amendment in the nature of a substitute and moves its favorable recommendation to the full House.

Chairman SENSENBRENNER. Without objection, the bill will be considered as read and open for amendment at any point. And the Subcommittee amendment in the nature of a substitute which the Members have before them will be considered as read, considered as the original text for purposes of amendment, and open for amendment at any point.

[The amendment in the nature of a substitute follows:]

**AMENDMENT IN THE NATURE OF A SUBSTITUTE
TO H.R. 3261
AS REPORTED BY THE SUBCOMMITTEE ON
COURTS, THE INTERNET, AND INTELLECTUAL
PROPERTY**

Strike all after the enacting clause and insert the following:

1 **SECTION 1. SHORT TITLE.**

2 This Act may be cited as the “Database and Collec-
3 tions of Information Misappropriation Act”.

4 **SEC. 2. DEFINITIONS.**

5 In this Act:

6 (1) **COLLECTIVE WORK.**—The term “collective
7 work” means a work, such as a periodical issue, an-
8 thology, or encyclopedia, in which a number of con-
9 tributions, constituting separate and independent
10 works in themselves, are assembled into a collective
11 whole.

12 (2) **COMMERCE.**—The term “commerce” means
13 all commerce which may be lawfully regulated by the
14 Congress.

15 (3) **COMPILATION.**—The term “compilation”
16 means a work formed by the collection and assem-
17 bling of preexisting materials or of data that are se-

1 lected, coordinated, or arranged in such a way that
2 the resulting work as a whole constitutes an original
3 work of authorship. The term “compilation” includes
4 collective works.

5 (4) COVERED ENTITY.—The term “covered en-
6 tity” means a legal entity that is—

7 (A) a telecommunications carrier engaged
8 in the provision of a telecommunications serv-
9 ice;

10 (B) a person engaged in the business of
11 providing an Internet access service;

12 (C) a person engaged in the business of
13 providing an Internet information location tool;
14 and

15 (D) a person similarly engaged in the
16 transmission, storage, retrieval, hosting, for-
17 matted, or translation (or any combination
18 thereof) of a communication made by another
19 person, without selection or alteration of the
20 content of the communication, except that such
21 person’s deletion of a particular communication
22 or material made available in commerce by an-
23 other person in violation of section 3 shall not
24 constitute such selection or alteration of the
25 content of the communication.

1 (5) DATABASE.—

2 (A) IN GENERAL.—Subject to subpara-
3 graph (B), the term “database” means a collec-
4 tion of a large number of discrete items of in-
5 formation produced for the purpose of bringing
6 such discrete items of information together in
7 one place or through one source so that persons
8 may access them.

9 (B) EXCLUSIONS.—The term database
10 does not include any of the following:

11 (i) A work of authorship, other than
12 a compilation or a collective work.

13 (ii) A collection of information that
14 principally performs the function of ad-
15 dressing, routing, forwarding, transmit-
16 ting, or storing digital online communica-
17 tions or receiving access to connections for
18 digital communications, except that the
19 fact that a collection of information in-
20 cludes or consists of online location des-
21 ignations shall not by itself be the basis for
22 applying this clause.

23 (iii) A collection of information gath-
24 ered, organized, or maintained to perform
25 the function of providing schedule and pro-

1 gram information for multichannel audio
2 or video programming.

3 (iv) A collection of information gath-
4 ered, organized, or maintained to register
5 domain name registrant contact data
6 maintained by a domain name registration
7 authority, unless such registration author-
8 ity takes appropriate steps to ensure the
9 integrity and accuracy of such information
10 and provides real-time, unrestricted, and
11 fully searchable public access to the infor-
12 mation contained in such collection of in-
13 formation.

14 (C) DISCRETE SECTIONS.—The fact that a
15 database is a subset of a database shall not pre-
16 clude such subset from treatment as a database
17 under this Act.

18 (6) DOMAIN NAME.—The term “domain name”
19 means any alphanumeric designation which is reg-
20 istered with or assigned by any domain name reg-
21 istrar, domain name registry, or other domain name
22 registration authority as part of an electronic ad-
23 dress on the Internet.

24 (7) IN CONCERT.—A person acts “in concert”
25 with another person who makes a database available

1 in commerce if the act of making available in com-
2 merce is planned, arranged, coordinated, adjusted,
3 agreed upon, or settled between the two persons act-
4 ing together, in pursuance of some design or in ac-
5 cordance with some scheme.

6 (8) INFORMATION.—The term “information”
7 means facts, data, works of authorship, or any other
8 intangible material capable of being generated or
9 gathered.

10 (9) INTERNET.—The term “Internet” means
11 the combination of computer facilities and electro-
12 magnetic transmission media, and related equipment
13 and software, comprising the interconnected world-
14 wide network of computer networks that employ the
15 Transmission Control Protocol/Internet Protocol or
16 any successor protocol to transmit information.

17 (10) INTERNET ACCESS SERVICE.—The term
18 “Internet access service” means a service that en-
19 ables users to access content, information, electronic
20 mail, or other services offered over the Internet, and
21 may also include access to proprietary content, infor-
22 mation, and other services as part of a package of
23 services offered to consumers. Such term does not
24 include telecommunications services.

1 (11) INTERNET INFORMATION LOCATION
2 TOOL.—The term “Internet information location
3 tool” means a service that refers or links users to
4 an online location on the World Wide Web. Such
5 term includes directories, indices, references, point-
6 ers, and hypertext links.

7 (12) LEGAL ENTITY.—The term “legal entity”
8 means a person, other than an individual, including
9 a firm, corporation, union, or other organization,
10 which is organized under the laws of the United
11 States, a State, the District of Columbia, or any
12 commonwealth, territory, or possession of the United
13 States, or the laws of a foreign country.

14 (13) MAINTAIN.—To “maintain” a database
15 means to update, validate, or supplement the infor-
16 mation contained in the database.

17 (14) MAKING AVAILABLE IN COMMERCE TO
18 OTHERS.—The term “making available in commerce
19 to others” means making available in commerce to—

20 (A) a substantial number of members of
21 the public; or

22 (B) a number of persons that extends
23 beyond—

24 (i) a family and its social acquaint-
25 ances; or

1 (ii) those who could reasonably antici-
2 pate to have a database made available in
3 commerce to them without a customary
4 commercial relationship.

5 A court may take into account repeated acts directed
6 to different persons by the same or concerted parties
7 in determining whether the limits imposed by sub-
8 paragraph (B)(ii) have been exceeded.

9 (15) TELECOMMUNICATIONS.—The term “tele-
10 communications” means the transmission, between
11 or among points specified by the user, of informa-
12 tion of the user’s choosing, without change in the
13 form or content of the information as sent and re-
14 ceived.

15 (16) TELECOMMUNICATIONS CARRIER.—The
16 term “telecommunications carrier” means any pro-
17 vider of telecommunications services, except that
18 such term does not include any person that, in the
19 ordinary course of its operations, makes telephones
20 available to the public or to transient users of its
21 premises, for interstate telephone calls using a pro-
22 vider of operator services.

23 (17) TELECOMMUNICATIONS SERVICE.—The
24 term “telecommunications service” means the offer-
25 ing of telecommunications for a fee directly to the

1 public, or to such classes of users as to be effectively
2 available directly to the public, regardless of the fa-
3 cilities used.

4 **SEC. 3. PROHIBITION AGAINST MISAPPROPRIATION OF**
5 **DATABASES.**

6 (a) **LIABILITY.**—Any person who makes available in
7 commerce to others a quantitatively substantial part of the
8 information in a database generated, gathered, or main-
9 tained by another person, knowing that such making avail-
10 able in commerce is without the authorization of that
11 other person (including a successor in interest) or that
12 other person’s licensee, when acting within the scope of
13 its license, shall be liable for the remedies set forth in sec-
14 tion 7 if—

15 (1) the database was generated, gathered, or
16 maintained through a substantial expenditure of fi-
17 nancial resources or time;

18 (2) the unauthorized making available in com-
19 merce occurs in a time sensitive manner and inflicts
20 injury on the database or a product or service offer-
21 ing access to multiple databases; and

22 (3) the ability of other parties to free ride on
23 the efforts of the plaintiff would so reduce the incen-
24 tive to produce or make available the database or

1 the product or service that its existence or quality
2 would be substantially threatened.

3 (b) INJURY.—For purposes of subsection (a), the
4 term “inflicts an injury” means serving as a functional
5 equivalent in the same market as the database in a man-
6 ner that causes the displacement, or the disruption of the
7 sources, of sales, licenses, advertising, or other revenue.

8 (c) TIME SENSITIVE.—In determining whether an un-
9 authorized making available in commerce occurs in a time
10 sensitive manner, the court shall consider the temporal
11 value of the information in the database, within the con-
12 text of the industry sector involved.

13 **SEC. 4. PERMITTED ACTS.**

14 (a) INDEPENDENTLY GENERATED OR GATHERED IN-
15 FORMATION.—This Act shall not restrict any person from
16 independently generating or gathering information ob-
17 tained by means other than extracting it from a database
18 generated, gathered, or maintained by another person and
19 making that information available in commerce.

20 (b) ACTS OF MAKING AVAILABLE IN COMMERCE BY
21 NONPROFIT SCIENTIFIC OR RESEARCH INSTITUTIONS.—
22 Subject to section 9, the making available in commerce
23 of a substantial part of a database by a nonprofit scientific
24 or research institution, including an employee or agent of
25 such institution acting within the scope of such employ-

1 ment or agency, for nonprofit scientific or research pur-
2 poses shall not be prohibited by section 3 if the court de-
3 termines that the making available in commerce of the in-
4 formation in the database is reasonable under the cir-
5 cumstances, taking into consideration the customary prac-
6 tices associated with such uses of such database by non-
7 profit scientific or research institutions and other factors
8 that the court determines relevant.

9 (c) HYPERLINKING.—Nothing in this Act shall re-
10 strict the act of hyperlinking of one online location to an-
11 other or the providing of a reference or pointer (including
12 such reference or pointer in a directory or index) to a
13 database.

14 (d) NEWS REPORTING.—Nothing in this Act shall re-
15 strict any person from making available in commerce in-
16 formation for the primary purpose of news reporting, in-
17 cluding news and sports gathering, dissemination, and
18 comment, unless the information is time sensitive and has
19 been gathered by a news reporting entity, and making
20 available in commerce the information is part of a con-
21 sistent pattern engaged in for the purpose of direct com-
22 petition.

23 **SEC. 5. EXCLUSIONS.**

24 (a) GOVERNMENT INFORMATION.—

1 (1) IN GENERAL.—Except as provided in para-
2 graph (2), protection under this Act shall not extend
3 to—

4 (A) a database generated, gathered, orga-
5 nized, or maintained by a Federal, State, or
6 local governmental entity, or by an employee or
7 agent of such an entity, acting within the scope
8 of such employment or agency; or

9 (B) a database generated, gathered, or
10 maintained by an entity pursuant to and to the
11 extent required by a Federal statute or regula-
12 tion requiring such a database.

13 (2) EXCEPTION.—Nothing in this subsection
14 shall preclude protection under this Act for a data-
15 base gathered, organized, or maintained by an em-
16 ployee or agent of an entity described in paragraph
17 (1) that is acting outside the scope of such employ-
18 ment or agency, or by a Federal, State, or local edu-
19 cational institution, or its employees or agents, in
20 the course of engaging in education, research, or
21 scholarship.

22 (b) COMPUTER PROGRAMS.—

23 (1) PROTECTION NOT EXTENDED.—Subject to
24 paragraph (2), protection under section 3 shall not
25 extend to computer programs, including any com-

1 puter program used in the manufacture, production,
2 operation, or maintenance of a database, or to any
3 element of a computer program necessary to its op-
4 eration.

5 (2) INCORPORATED DATABASES.—A database
6 that is otherwise subject to protection under section
7 3 is not disqualified from such protection solely be-
8 cause it resides in a computer program, so long as
9 the collection of information functions as a database
10 within the meaning of this Act.

11 **SEC. 6. RELATION TO OTHER LAWS.**

12 (a) OTHER RIGHTS NOT AFFECTED.—

13 (1) IN GENERAL.—Subject to subsection (b),
14 nothing in this Act shall affect rights, limitations, or
15 remedies concerning copyright, patent, trademark,
16 design rights, antitrust, trade secrets, privacy, ac-
17 cess to public documents, and misuse.

18 (2) RIGHT OF CONTRACT.—Notwithstanding
19 subsection (b), nothing in this Act shall affect
20 rights, limitations, or remedies concerning the com-
21 mon law right of contract.

22 (b) PREEMPTION OF STATE LAW.—

23 (1) LAWS REGULATING CONDUCT THAT IS SUB-
24 JECT OF THE ACT.—On or after the effective date
25 of this Act, no State statute, rule, regulation, or

1 common law doctrine that prohibits or otherwise reg-
2 ulates conduct that is prohibited or regulated under
3 this Act shall be effective.

4 (2) CLARIFICATION OF INAPPLICABILITY TO
5 CASES NOT INVOLVING COMMERCIAL COMPETI-
6 TION.—Paragraph (1) shall not apply to preempt ac-
7 tions under State law against a person for taking ac-
8 tions that—

9 (A)(i) disrupt the sources of data supply to
10 a database; or

11 (ii) substantially impair the perceived accu-
12 racy, currency, or completeness of data in a
13 database by inaccurate, untimely, or incomplete
14 replication and distribution of such data; and

15 (B) do not involve the person making
16 available in commerce the data from such data-
17 base in competition with such database.

18 (c) COMMUNICATIONS ACT OF 1934.—Nothing in
19 this Act shall affect the operation of section 222(e) or any
20 other provision of the Communications Act of 1934 (47
21 U.S.C. 151 et seq.), or shall restrict any person from mak-
22 ing available in commerce or extracting subscriber list in-
23 formation, as such term is defined in section 222(h)(3)
24 of the Communications Act of 1934 (47 U.S.C.
25 222(h)(3)).

1 (d) SECURITIES.—Nothing in this Act shall—

2 (1) affect the operation of the Securities Act of
3 1933 (15 U.S.C. 78a et seq.), the Securities Ex-
4 change Act of 1934 (15 U.S.C. 78a et seq.), the
5 Public Utility Holding Company Act of 1935 (15
6 U.S.C. 79a et seq.), the Trust Indenture Act of
7 1939 (15 U.S.C. 77aaa et seq.), the Investment
8 Company Act of 1940 (15 U.S.C. 80a–1 et seq.), the
9 Investment Advisers Act of 1940 (15 U.S.C. 80b et
10 seq.), or the Securities Investor Protection Act of
11 1970 (15 U.S.C. 78aaa et seq.), or the rules or reg-
12 ulations thereunder;

13 (2) affect the authority of the Securities and
14 Exchange Commission; or

15 (3) apply to information with respect to
16 quotations for, or indications, orders, or transactions
17 in, securities.

18 (e) MISUSE.—Judicial doctrines of misuse shall apply
19 under this Act.

20 **SEC. 7. CIVIL REMEDIES.**

21 (a) CIVIL ACTIONS.—

22 (1) COMMENCEMENT OF ACTIONS.—Any person
23 who is injured by a violation of section 3 may bring
24 a civil action for such a violation in an appropriate
25 United States district court. Any action against a

1 State governmental entity may be brought in any
2 court that has jurisdiction over claims against such
3 entity.

4 (2) NOTICE OF COMMENCEMENT OF ACTIONS
5 AND APPEALS.—Any person who brings an action
6 for such a violation, or who files an appeal from any
7 final decision on such an action, shall transmit no-
8 tice of such action or appeal to the Federal Trade
9 Commission, the United States Patent and Trade-
10 mark Office, and the Register of Copyrights, in ac-
11 cordance with subsection (i)(1).

12 (b) TEMPORARY AND PERMANENT INJUNCTIONS.—
13 Any court having jurisdiction of a civil action under this
14 section shall have the power to grant temporary and per-
15 manent injunctions, according to the principles of equity
16 and upon such terms as the court may deem reasonable,
17 to prevent or restrain a violation or attempted violation
18 of section 3. Any such injunction may be served anywhere
19 in the United States on the person enjoined, and may be
20 enforced by proceedings in contempt or otherwise by any
21 United States district court having jurisdiction over that
22 person.

23 (c) MONETARY RELIEF.—

24 (1) ACTUAL DAMAGES AND ATTRIBUTABLE
25 PROFITS.—When a violation of section 3 has been

1 established in any civil action arising under this sec-
2 tion, the plaintiff shall be entitled to recover the ac-
3 tual damages sustained by the plaintiff as a result
4 of the violation and any profits of the defendant that
5 are attributable to the violation and are not taken
6 into account in computing the actual damages sus-
7 tained by the plaintiff. The court shall assess such
8 profits or damages or cause the same to be assessed
9 under its direction. In assessing profits the plaintiff
10 shall be required to prove defendant's gross revenue
11 only and the defendant shall be required to prove all
12 elements of cost or deduction claims.

13 (2) ADDITIONAL DAMAGES.—In addition to ac-
14 tual damages, the court may enter judgment for an
15 additional amount not exceeding 2 times such actual
16 damages after considering the following factors:

17 (A) Whether the plaintiff notified the de-
18 fendant of the alleged violation and the defend-
19 ant continued to violate section 3.

20 (B) The willfulness of the defendant's con-
21 duct.

22 (C) Whether the defendant has a history of
23 database misappropriation.

24 (D) The defendant's ability to pay.

1 (E) Whether the alleged violation had a se-
2 rious negative financial impact on the plaintiff.

3 (F) Any good faith effort by the defendant
4 to rectify the misappropriation.

5 (G) Whether the assessment of additional
6 damages is necessary in order to deter future
7 violations.

8 (d) IMPOUNDMENT.—At any time while an action
9 under this section is pending, including an action seeking
10 to enjoin a violation, the court may order the impounding,
11 on such terms as it deems reasonable, of all copies of con-
12 tents of a database made available in commerce or at-
13 tempted to be made available in commerce potentially in
14 violation of section 3, and of all masters, tapes, disks,
15 diskettes, or other articles by means of which such copies
16 may be reproduced. The court may, as part of a final judg-
17 ment or decree finding a violation or attempted violation
18 of section 3, order the remedial modification or destruc-
19 tion of all copies of contents of a database made available
20 in commerce or attempted to be made available in com-
21 merce in violation of section 3, and of all masters, tapes,
22 disks, diskettes, or other articles by means of which such
23 copies may be reproduced.

24 (e) COSTS AND ATTORNEY'S FEES.—The court in its
25 discretion may award reasonable costs and attorney's fees

1 to the prevailing party. The court shall award costs and
2 fees if it determines that an action was brought or a de-
3 fense was raised under this Act in bad faith.

4 (f) ACTIONS AGAINST UNITED STATES GOVERN-
5 MENT.—Subsections (b) and (d) shall not apply to any ac-
6 tion against the United States Government.

7 (g) RELIEF AGAINST STATE ENTITIES.—The relief
8 provided under this section shall be available against a
9 State governmental entity to the extent permitted by ap-
10 plicable law.

11 (h) LIMITATION ON LIABILITY OF CERTAIN ENTI-
12 TIES.—A covered entity shall not be liable for a violation
13 under section 3 unless—

14 (1) the person who made the database available
15 in commerce in violation of section 3 is an officer,
16 employee, or agent of the covered entity acting with-
17 in the scope of the actor’s duties or agency;

18 (2) an officer, employee, or agent of the covered
19 entity, acting within the scope of the actor’s duties
20 or agency, actively directs or induces the act of mak-
21 ing available in commerce in violation of section 3 by
22 another person, or acts in concert with the person
23 who made the database available in commerce in vio-
24 lation of section 3; or

1 (3) the covered entity receives a financial gain
2 or benefit that—

3 (A) is directly attributable to the making
4 available in commerce of the database, or the
5 content thereof, in violation of section 3; and

6 (B) is in excess of the ordinary compensa-
7 tion for the rendering of the services described
8 in subparagraph (A), (B), (C), or (D) of section
9 2(4) that are provided by the covered entity.

10 (i) OVERSIGHT OF CIVIL REMEDIES BY FTC AND
11 PTO.—

12 (1) NOTICE.—The Federal Trade Commission,
13 the Director of the United States Patent and Trade-
14 mark Office, and the Register of Copyrights shall,
15 by regulation, prescribe the form and procedures by
16 which persons shall transmit the notices required by
17 subsection (a)(2).

18 (2) OVERSIGHT.—The Federal Trade Commis-
19 sion, the Director of the United States Patent and
20 Trademark Office, and the Register of Copyrights
21 shall review the actions conducted under this section
22 for the purposes of identifying instances in which ju-
23 dicial interpretation of this Act adversely or other-
24 wise materially affects the administration of laws
25 and policies within their respective jurisdictions.

1 (3) AMICUS CURIAE BRIEFS.—The Federal
2 Trade Commission, the Director of the United
3 States Patent and Trademark Office, and the Reg-
4 ister of Copyrights may, in appropriate instances,
5 file briefs as friends of the court in appeals from
6 final decisions of actions under this section.

7 (4) REPORTS.—The Federal Trade Commis-
8 sion, the Director of the United States Patent and
9 Trademark Office, and the Register of Copyrights
10 shall, within 18 months after the date of the enact-
11 ment of this Act, each transmit a report to the Com-
12 mittee on the Judiciary and the Committee on En-
13 ergy and Commerce of the House of Representatives
14 and the Committee on the Judiciary and the Com-
15 mittee on Commerce, Science, and Transportation of
16 the Senate on their operations under this subsection.
17 Such reports shall include—

- 18 (A) a summary of any briefs filed;
19 (B) an explanation of the impact, if any, of
20 the judicial decisions reviewed on existing laws
21 and policies within its jurisdiction; and
22 (C) any recommendations for legislative or
23 other changes that the Commission, the Direc-
24 tor of the Patent and Trademark Office, or the

1 Register of Copyrights, as the case may be, con-
2 siders appropriate.

3 **SEC. 8. LIMITATION ON ACTIONS.**

4 No civil action shall be maintained under this Act un-
5 less it is commenced within 2 years after the cause of ac-
6 tion arises or claim accrues.

7 **SEC. 9. EXCLUSION FROM LIABILITY FOR EDUCATIONAL IN-**
8 **STITUTIONS.**

9 (a) EXCLUSION.—Except as provided in subsection
10 (e), no liability shall be imposed under this Act on any
11 accredited nonprofit postsecondary educational institution
12 or any nonprofit research laboratory, or on any employee
13 of such institution or laboratory acting within the scope
14 of his or her employment, by reason of activities under-
15 taken for nonprofit education, scientific, or research pur-
16 poses.

17 (b) ACCREDITATION.—For purposes of this section,
18 accreditation shall be as determined by a regional or na-
19 tional accrediting agency recognized by the Council on
20 Higher Accreditation or the United States Department of
21 Education.

22 (c) EXCEPTION.—Subsection (a) does not apply to an
23 institution, laboratory, or employee of such institution or
24 laboratory to the extent that the institution, laboratory,
25 or employee makes available substantially all of a database

1 in direct commercial competition with a person who made
2 the substantial expenditure described in section 3(a)(1)
3 with respect to the database, or such person's successor
4 in interest.

5 **SEC. 10. EFFECTIVE DATE.**

6 (a) IN GENERAL.—This Act shall take effect on the
7 date of the enactment of this Act, and shall apply to acts
8 of making available in commerce on or after that date with
9 respect to databases existing before, on, or after that date.

10 (b) PRIOR ACTS NOT AFFECTED.—No person shall
11 be liable under section 3 for making available in commerce
12 on or after the date of the enactment of this Act a quan-
13 titatively substantial part of the information in a database
14 in violation of that section, when the information was law-
15 fully extracted from the database before the date of the
16 enactment of this Act, by that person or by that person's
17 predecessor in interest.

18 **SEC. 11. NONSEVERABILITY.**

19 (a) IN GENERAL.—If the Supreme Court of the
20 United States holds that the provisions of section 3, relat-
21 ing to prohibition against misappropriation of databases,
22 are invalid under Article I of, or the First Amendment
23 to, the Constitution of the United States, then this Act
24 is repealed, effective as of the date of the Supreme Court
25 decision.

1 (b) TERMINATION.—Subsection (a) shall cease to be
2 effective at the end of the 10-year period beginning on
3 the date of the enactment of this Act.

○

Chairman SENSENBRENNER. The Chair recognizes the gentleman from Texas, Mr. Smith, to strike the last word.

Mr. SMITH. Mr. Chairman, electronic compilations and other collections of factual material are indispensable to the American economy. These information products place a wealth of data at the fingertips of businesses, professionals, scientists, scholars, and consumers. Databases are essential tools for improving productivity, advancing education and training, and creating a more informed citizenry. But several recent legal and technological developments threaten to reduce incentives for investments needed to maintain and expand databases.

Introduced by our colleague Representative Coble, H.R. 3261 will provide protection for databases and incentives for their creators to continue producing these valuable tools, a product of much negotiation and compromise—

Mr. SCOTT. Mr. Chairman we are having trouble hearing down on this end.

Mr. SMITH. A product of much negotiation and compromise, the legislation is narrowly tailored to target bad actors while preserving the ability of consumers to access and use information.

Mr. Chairman, I will yield the balance of my time to the gentleman from North Carolina, the originator of the legislation.

Mr. COBLE. I thank the gentleman for yielding.

Mr. Chairman, let me give the Members a little background. This has gone around the block several times. I think in the 105th Congress, the bill passed the House only to languish in the Senate. And in the waning days of that session, I received commitment and promises from a Democrat Senator and a Republican Senator, and they assured me it would be the first order of business when the next session convened. Well, that never came to pass.

We have many people, influential interested supporters and advocates for each side of this issue. And when that occurs, Mr. Chairman, as you know, the result usually is compromise. This bill before us today is not only a compromise, it is a very watered-down version compared to the initial bill. I can live with it, and I hope most of the others can. But I do believe databases have value, they are worth protecting. Individuals and businesses would not have devoted time, energy, and financial resources were it otherwise. And, sadly, free riders would not try to steal databases if their compilations lacked value.

Finally, I want to assure the Members that no one has tried to “bull rush” this matter through.

Mr. Chairman, I thank you and the Ranking Member. I thank the Chairman of the Commerce Committee, Mr. Tauzin. You all conducted several open discussions. I was in absentia most of those because, for other reasons, I was not assigned to the IP committee at that time. But I am told that those sessions were productive. And I think what we have here is, as I say, a watered-down compromised version. There are a number of accommodations that have been made for the benefit of those who were less enthusiastic about reform. The amount of additional damages have been lowered; the criminal penalties have been deleted; we have established a knowledge standard as a precursor to liability; and, finally, we

expand current exemptions for universities, research entities, news reporting, et cetera.

Mr. Chairman, this is a product of compromise and give and take. It is, in fact, a poster child of sorts for the legislative process. I hope that we can ultimately and finally put the database issue to bed, at least on the House side, by enacting this bill, and I urge its adoption and yield back the balance of my time.

Chairman SENSENBRENNER. The time belongs to the gentleman from Texas, Mr. Smith.

Mr. COBLE. I yield back to the gentleman from Texas.

Mr. SMITH. Mr. Chairman, and I yield back the balance of my time.

Chairman SENSENBRENNER. Who wishes to give the opening statement on the minority side? The gentleman from Virginia, Mr. Boucher, is recognized for 5 minutes.

Mr. BOUCHER. Well, thank you very much, Mr. Chairman.

I am rising in opposition to this measure because I frankly think it is not needed, and I am very concerned that if this bill is passed into law there will be a truly mischievous consequence. Genuine damage can be done to the ability of the public to have access to facts that are necessary for carrying on many commercial and non-commercial activities.

First let me say that the remedies herein contained simply is not necessary. Copyright law has been interpreted by the courts to provide remedies in many of the instances where people are seeking protection for created databases. The realtors, for example, have been able to protect their multiple listing service through traditional copyright principles. The courts have found that there is enough originality in the creation of the multiple listings that copyright applies and protection has been accorded.

Thompson and Thompson was able to obtain through traditional copyright and trademark remedies protection for trademark databases organized by word, organized by mark, and by combinations of word and mark.

Another remedy frequently applied to provide relief has been common-law trespass causes of action. And eBay has succeeded in having its databases protected from parties that were intruding into the server on a frequent basis under a common-law theory of trespass. Misappropriation of property has been used very successfully by those who were claiming protection for databases.

Beyond that, principles of contract can apply. And where there are subscription license agreements between the creator of the database and the subscriber, those legal theories also offer adequate protection.

The Digital Millennium Copyright Act also offers protection because it makes it unlawful to circumvent a technical protection measure that guards access to a copyrighted work. And where the creator has created a database and then encrypts that, the DMCA offers a measure of protection with respect to those who would seek to circumvent that technical protection measure.

Not only is this not needed, but its enactment into law truly would be mischievous. I am quite concerned that people involved in scientific research and other kinds of research in the creation of information that is shared on a daily basis in our society would be

badly inhibited from their ability in order to engage in that normal discourse and in the compilation of reports and other documents that are very useful in our society.

I think if this bill becomes law, there is going to be lots of litigation. The experience of the European Union which adopted a database protection measure several years ago is not encouraging in this respect. More than 100 reported cases have emanated from that provision so far, and many of the results in these reported cases are conflicting. And so a great deal of confusion and an enormous amount of litigation has certainly been the experience in the European Union. I daresay we would have a similar experience here in the United States.

A very large coalition of interested parties has announced opposition to this bill, ranging from the chamber of commerce and financial services companies, Internet companies such as AOL, AT&T, Yahoo, Internet service providers including Verizon and SBC, and public interest organizations including a large number of associations representing libraries. Even the National Academy of Sciences has urged that this measure not be adopted because of the adverse effect that it can have on the conduct of legitimate scientific research.

I think the measure is unnecessary. I think that if Members of the House Commerce Committee, who I know to some extent were involved in discussions regarding the bill that is before the Committee today, were consulted, very few if any Members of that Committee would actually say they support the passage of this bill, and I think the general sentiment in the House at large is not inconsistent with what one would expect from the House Commerce Committee.

Mr. Chairman, today I am going to offer some amendments that hopefully would improve the measure some. I hope at the end of that process it would be the pleasure of this Committee not to report the bill.

Thank you, Mr. Chairman. And I yield back.

Chairman SENSENBRENNER. Without objection, all Members' opening statements will be included in the record at this point.

Chairman SENSENBRENNER. Are there amendments? The gentleman from North Carolina, Mr. Coble.

Mr. COBLE. I have an amendment at the desk, Mr. Chairman.

Chairman SENSENBRENNER. The clerk will report the amendment.

Mr. COBLE. Number 572.

The CLERK. Amendment to the amendment in the nature of a substitute.

Chairman SENSENBRENNER. Without objection, the amendment is considered as read and open for amendment at any point.

[The amendment to the amendment in the nature of a substitute follows:]

**AMENDMENT TO THE AMENDMENT IN THE
NATURE OF A SUBSTITUTE TO H.R. 3261
OFFERED BY MR. COBLE**

Strike section 9 and insert the following:

1 **SEC. 9. EXCLUSION FROM LIABILITY FOR EDUCATIONAL IN-**
2 **STITUTIONS AND RESEARCH LABORATORIES.**

3 (a) **EXCLUSION.**—Except as provided in subsection
4 (d), no liability shall be imposed under this Act on—

5 (1) any accredited nonprofit postsecondary edu-
6 cational institution or any nonprofit research labora-
7 tory,

8 (2) any employee of such educational institution
9 or laboratory acting within the scope of his or her
10 employment, or

11 (3) any student enrolled in such educational in-
12 stitution acting in furtherance of the supervised ac-
13 tivities or programs of the institution,

14 by reason of activities undertaken for nonprofit education,
15 scientific, or research purposes.

16 (b) **ACCREDITATION.**—For purposes of this section,
17 accreditation shall be as determined by a regional or na-
18 tional accrediting agency recognized by the Council on

1 Higher Accreditation or the United States Department of
2 Education.

3 (c) NONPROFIT RESEARCH LABORATORY.—For pur-
4 poses of this section, a nonprofit research laboratory is
5 a nonprofit research organization that is primarily en-
6 gaged in basic or applied scientific research, or both, and
7 that is a qualified organization as defined in section
8 41(b)(6)(B) of the Internal Revenue Code of 1986 for pur-
9 poses of the research credit determined under section 41
10 of such Code.

11 (d) EXCEPTION.—Subsection (a) does not apply to
12 an institution, laboratory, employee of such institution or
13 laboratory, or student of such institution to the extent that
14 the institution, laboratory, employee, or student makes
15 available substantially all of a database in direct commer-
16 cial competition with a person who made the substantial
17 expenditure described in section 3(a)(1).

Chairman SENSENBRENNER. At this time, the Chair will declare a recess for Members to go to lunch. Since the votes are going to start momentarily, I would ask the Members to return to the Committee meeting promptly after the last of the series of four votes, where we will resume consideration of this legislation. I would like to get this legislation, which is somewhat controversial, concluded in the Committee, as well as H.R. 3291 which is the cooperative research and technology bill before we adjourn today. I understand that the second bill is not very controversial. But if we can get both of these bills resolved today, it will make our work next week much better.

Mr. CONYERS. Mr. Chairman.

Chairman SENSENBRENNER. The gentleman from Michigan.

Mr. CONYERS. Might I just inquire, are there any prospective plans for the Committee for next week?

Chairman SENSENBRENNER. The Chair has announced that the items on the markup agenda that are not concluded today will be considered at a markup next Wednesday.

Mr. WEINER. Mr. Chairman.

Chairman SENSENBRENNER. The gentleman from New York.

Mr. WEINER. Just so I understand, because I have an interest in this bill, what you just said is we are going to come back after the last vote for the week?

Chairman SENSENBRENNER. Yes. And we will finish this bill up and hopefully finish up the research and—Cooperative Research and Technology Act.

The Committee stands recessed until after the last vote. Members will return promptly.

[Whereupon, at 12:07 p.m., the Committee recessed, to reconvene at 1:10 p.m., the same day.]

AFTERNOON SESSION.

Chairman SENSENBRENNER. The Committee will be in order.

When the Committee recessed earlier today, pending was a motion to report favorably the bill H.R. 3261. The bill was considered as read and open for amendment at any point, and the Subcommittee amendment in the nature of a substitute was moved and was considered as the original text for purposes of amendment. There was an amendment that was offered, an amendment to the substitute amendment that was offered by the gentleman from North Carolina, Mr. Coble, which was read. The gentleman from North Carolina is recognized for 5 minutes.

Mr. COBLE. I thank the Chairman.

Mr. Chairman, the Database Coalition and representatives of the University and Research Entity Community developed this amendment to section 9 of the bill which excludes educational institutions and research labs from liability under H.R. 3261. The amendment clarifies that the exclusion applies to the work of a student, quote, acting in furtherance of supervised activities or programs, close quote. The amendment also more accurately defines a nonprofit research lab, and this is essentially a perfecting amendment that was worked out between the affected parties. It is noncontroversial, and I urge its adoption.

Chairman SENSENBRENNER. The question is on agreeing to the amendment to the amendment in the nature of a substitute offered by the gentleman from North Carolina.

Those in favor will say aye.

Opposed, no.

The ayes appear to have it. The ayes have it. The amendment to the amendment in the nature of a substitute is agreed to.

The gentleman from North Carolina.

Mr. COBLE. I have another amendment at the desk.

Chairman Sensenbrenner. The clerk will report the amendment.

Mr. BOUCHER. Mr. Chairman, I have an amendment to this amendment.

Chairman SENSENBRENNER. The procedure is for the clerk to report the amendment, the gentleman from North Carolina to be recognized for 5 minutes, and then the Chair will recognize the gentleman from Virginia and he can offer his amendment to the amendment.

Mr. BOUCHER. Thank you, Mr. Chairman.

Chairman SENSENBRENNER. Without objection, the amendment offered by Mr. Coble is considered as read and open for amendment at any point. And the gentleman from North Carolina is recognized for 5 minutes.

[The amendment to the amendment in the nature of a substitute follows:]

**AMENDMENT TO THE AMENDMENT IN THE
NATURE OF A SUBSTITUTE TO H.R. 3261
OFFERED BY MR. COBLE**

In section 2—

(1) strike paragraphs (4), (10), (11), (15), (16), and (17); and

(2) strike paragraph (14) and insert the following:

1 (11) MAKING AVAILABLE IN COMMERCE TO
2 OTHERS.—(A) The term “making available in com-
3 merce to others” means making available in com-
4 merce to—

5 (i) a substantial number of members of the
6 public; or

7 (ii) a number of persons that extends
8 beyond—

9 (I) a family and its social acquaint-
10 ances; or

11 (II) those who could reasonably antici-
12 pate to have a database made available in
13 commerce to them without a customary
14 commercial relationship.

15 (B) A court may take into account repeated
16 acts directed to different persons by the same or

1 concerted parties in determining whether the limits
2 imposed by subparagraph (A)(ii)(II) have been ex-
3 ceeded.

4 (C) Except as provided in subparagraphs (E)
5 and (F), the term “making available in commerce to
6 others” shall not include—

7 (i) the transmission of a database by a
8 legal entity through its system or network by
9 means of an automated technical process, if
10 such transmission is initiated by or at the direc-
11 tion of a person other than the legal entity and
12 the intended recipients of the transmission are
13 determined solely by such person;

14 (ii) the routing of a transmission to other
15 persons by a legal entity through its system or
16 network by means of an automated technical
17 process, if the routed transmission was initiated
18 by or at the direction of a person other than
19 the legal entity and the intended recipients of
20 the transmission are determined by such per-
21 son;

22 (iii) the storage, caching, or hosting by a
23 legal entity of a database that resides on its
24 system or network, if such storage, caching, or
25 hosting was initiated by or at the direction of

1 a person other than the legal entity and the re-
2 cipients of the database are determined solely
3 by such person;

4 (iv) the provision of hyperlinking from one
5 online location to another by a legal entity or
6 its provision of a reference or pointer (including
7 such reference or pointer in a directory or
8 index) to a database; or

9 (v) any combination of clauses (i) through
10 (iv).

11 (D) In determining whether an exception in
12 subparagraph (C) applies—

13 (i) the intended recipients of a database
14 may be considered as being determined solely
15 by a person other than a legal entity when such
16 person makes the database available to a lim-
17 ited number of other persons, makes the data-
18 base available to members of the public without
19 limitation, or makes the database available in
20 an area that the legal entity restricts to certain
21 individuals, such as clubs or user groups; and

22 (ii) an act of transmission, storage, or
23 caching by a legal entity shall not be considered
24 to be initiated by a legal entity if that entity
25 merely moves the database, along with other

1 content residing on its system or network, to a
2 different server or servers in order to improve
3 the operation or efficiency of its system or net-
4 work.

5 (E) The term “making available in commerce to
6 others” shall include any act described in subpara-
7 graph (C) that is carried out by a legal entity if the
8 legal entity—

9 (i) receives any financial gain or benefit
10 which it knows is directly attributable to the
11 making available in commerce of the database
12 and such gain or benefit is in excess of the ordi-
13 nary compensation for the rendering of the
14 service described in subparagraph (C); or

15 (ii) actively directs or induces the act of
16 making available in commerce of the database
17 by another person, or acts in concert with the
18 person who made the database available in com-
19 merce.

20 (F) The fact that an act by a legal entity is not
21 considered to be an act of “making available in com-
22 merce to others” under subparagraph (C) shall not
23 prevent the customer or user of the legal entity’s
24 services from being liable for that act.

Redesignate the remaining paragraphs accordingly.

In section 4, strike subsection (c) and redesignate the succeeding subsections accordingly.

In section 7, strike subsection (h) and redesignate the succeeding subsections accordingly.

Mr. COBLE. I thank the Chairman.

Mr. Chairman and Members of the Committee, my amendment addresses the treatment of Internet service providers or ISPs under the bill. First, I want to thank my friend from Virginia, Mr. Boucher, for his keen interest in this subject. And by the way, Mr. Boucher, you mentioned earlier about the realtors. The realtors are some of my most vocal supporters for this proposal. And Mr. Chairman, at this time I would like to ask unanimous consent to submit for the record the list of members of the Database Coalition.

Chairman SENSENBRENNER. Without objection.

[The material referred to follows:]

SAMPLING OF DATABASE COALITION SUPPORTERS

Thompson Publishing
 Reed-Elsevier
 Software Information Industry Association
 E-Bay
 American Association of Publishers
 McGraw Hill
 Monster.com
 Newspaper Association of America
 American Medical Association
 National Association of Realtors

Mr. COBLE. Which is impressive, if you will pardon my modesty.

When it became clear that the ISP representatives were dissatisfied with the treatment of their industry as set forth in H.R. 3261, we attempted to develop an amendment that would satisfy their demands without compromising the core provisions of the bill. I want to thank the members of the Database Coalition and the ISP community, for that matter, for trying to resolve the differences in advance of the markup. Whatever the outcome of this debate, I renew my pledge to work with Mr. Boucher and others and the affected constituents with language acceptable to both sides that could be incorporated in a manager's amendment in advance of floor consideration.

My amendment stands for the proposition that an ISP should not be liable for indulging in normal ISP activity under the bill. It excludes an ISP from any liability when it is transmitting, retrieving, routing a transmission, caching or hosting a database on behalf of its users. It furthermore clarifies that an ISP cannot be held liable for hyperlinking and related activities. Some ISPs have taken issue with the enumeration of the listing of activity that should be exempted, arguing that the list should not cover activities that are unforeseen at this time and which ISPs may subsequently adopt. My response to that is that, given this, the ISP community, it appears, wants to acquire immunization based on its status within an industry, not based on what the members of that industry may do. If ISPs are exempted in this way, we will have unwittingly, I believe, created a major loophole that will allow bad actors or pirates, if you will, to steal databases and claim immunity under a meaningless exception.

I supplement this point, Mr. Chairman, by adding that the amendment precludes any entity from claiming the ISP exemption when the entity benefits from a pirating of a database or acts in concert with a pirate. A good-faith ISP would never meet those conditions it seems to me.

My amendment cannot forecast how the ISP community will operate in all respects, years, or even months, from this date. But I believe it is a good-faith attempt to accord ISPs fair treatment under a bill that has been greatly watered down, as I said before, through the years, probably 8 or 9 years this has been kicking around, at the expense of the affected database owners. I urge my Members to adopt this amendment, and yield back the balance of my time.

Mr. BOUCHER. Mr. Chairman.

Chairman SENSENBRENNER. The gentleman from Virginia.

Mr. BOUCHER. Thank you very much, Mr. Chairman. I have an amendment to the amendment offered by the gentleman from North Carolina.

Chairman SENSENBRENNER. The clerk will report the amendment to the amendment.

Mr. BOUCHER. And it is listed as Boucher 027.

The CLERK. Amendment to the amendment.

Mr. BOUCHER. And Mr. Chairman, I ask unanimous consent that the amendment be considered as read.

Chairman SENSENBRENNER. Without objection, so ordered. And the gentleman from Virginia is recognized for 5 minutes.

[The amendment to the amendment to the amendment in the nature of a substitute follows:]

AMENDMENT TO THE AMENDMENT TO THE AMENDMENT
IN THE NATURE OF A SUBSTITUTE TO H.R. 3261
OFFERED BY MR. BOUCHER

Strike on page one, from "(2) strike paragraph (14) and insert the following" through page 5, line four and insert the following:

"In section 7, strike subsection (h) (page 18, line 11 through page 19, line 9) and insert the following:

(H) LIMITATION ON LIABILITY OF CERTAIN ENTITIES.—

(1) LIMITATION ON LIABILITY.— No provider of an interactive computer service shall be liable under section 3 for making available information that is provided by another information content provider.

(2) DEFINITIONS.— In this subsection, the terms "interactive computer service" and "information content provider" have the meaning given to those terms in section 230(f) of the Communications Act of 1934 (47 U.S.C. 230(f)).

(3) CONSTRUCTION.—For purposes of section 230 of the Communications Act of 1934 and any other provision of law, the provisions of this Act shall not be construed to be a law pertaining to intellectual property."

Redesignate paragraphs accordingly.

Mr. BOUCHER. Thank you very much, Mr. Chairman.

This amendment also would provide an exemption to Internet service providers. It is very simple in its construction. It basically tracks the provision in the Digital Millennium Copyright Act that largely resulted from the efforts in 1998 of our colleague on this Committee, Mr. Goodlatte, which exempts from liability mere conduits of information, such as Internet service providers who merely operate the electronic facilities that transmit data. These electronic conduits have no role in the creation of the data in question; they do not monitor the data in question; they merely operate as the electronic service that enables the movement of that data into commerce. And just as they were exempted from liability under the provisions of the DMCA, an exemption, which, by the way, worked very well in practice, they should be exempted by the same basic, very clean and straightforward approach in the bill that we have under consideration today. The amendment that I am offering to Mr. Coble's amendment would provide that exemption.

The problem that I have with Mr. Coble's bill and his efforts in providing an ISP exemption is the language that appears on page 4 of his amendment, lines 15 through 19. And in that language, there first of all I think is some ambiguity as to its application. The language that I am offering would be somewhat more straightforward. The major problem is that a person who is working for an Internet service provider could well be described in the language that I have just identified on lines 15 through 19, someone who actively directs the activity of the Internet service provider, the major function of which is to make sure that data does flow through those facilities. And there is certainly room to interpret that the very activity of operating the ISP could fall within the ambient of this language. And if it were so interpreted, then the ISP would not be able to take advantage of the exemption that the gentleman from North Carolina is proposing.

I think the one that I am offering offers an unambiguous, very direct approach, and as I indicated it is very consistent with the approach we took with respect to mere conduits under the DMCA, and I would hope it would be the privilege of this Committee to accept it.

Ms. LOFGREN. Would the gentleman yield?

Mr. BOUCHER. And I would be happy to yield to the gentlewoman from California.

Ms. LOFGREN. I would just like to express my support of your amendment to the amendment, and note that in the amendment proposed by our friend from North Carolina, there are a whole series of definitions that I think inevitably will lead to litigation and sometimes yield results not likely intended, as we have discovered with the DMCA itself.

The language proposed in the amendment to the amendment, on the other hand, has already been out in the marketplace, it has to some extent been tested. I think it is clear and unlikely to lead to substantial litigation and I think does achieve the goals that I think is the intention of Mr. Coble. And I commend the gentleman for his amendment and look forward to supporting it. And I yield back to the gentleman from Virginia.

Mr. BOUCHER. I thank the gentlewoman for her comments and her support of this amendment. And Mr. Chairman, I yield back.

Mr. COBLE. Mr. Chairman.

Chairman SENSENBRENNER. The gentleman from North Carolina.

Mr. COBLE. Mr. Chairman, I will just respond very briefly.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. COBLE. This will surprise none of us. We all become subjectively involved. My friend from Virginia thinks his amendment is better; I think my amendment is better. Subjectivity. But I pretty well stated my position earlier, and I think ours is the better of the two and urge the defeat of the Boucher amendment and support of my amendment.

Mr. GOODLATTE. Mr. Chairman.

Chairman SENSENBRENNER. The other gentleman from Virginia, Mr. Goodlatte.

Mr. GOODLATTE. Thank you, Mr. Chairman. I wanted to commend both gentlemen for their efforts to address a problem that exists in the bill. I support the amendment to the amendment offered by Congressman Boucher, and I would like to tell you why. The Internet continues to drive innovation and provide efficiency for consumers and businesses. We must continue to create policy that provides incentives for the Internet to thrive so that consumers and businesses can continue to reap the benefits of this revolutionary technology. I support this amendment because it helps to ensure that the Internet will thrive.

The purpose of the underlying bill is to punish those that misappropriate another person's database. This amendment would clarify that providers of interactive computer services would not be liable when a third party uses their services to make available a database in violation of this act. Providers of interactive computer service are some of the basic building blocks of the Internet, and this amendment would ensure that when acting as mere conduits, they would not be liable for violation of the act.

In addition, the protection offered by this amendment applies only when a third party provides the offending content. So if an interactive computer service provider actually provides the offending information and makes it available, it is my understanding that they would be liable.

The amendment will protect some of the basic building blocks of the Internet and help ensure that it grows and thrives. And I want to commend the gentleman from North Carolina. While I think this amendment is more comprehensive in addressing this problem with Internet service providers, nonetheless I have worked with him for years on his effort to produce a database bill. I think the bill is vitally important. In that regard I disagree with my colleague from Virginia, but with respect to this amendment I think it definitely perfects the bill and would urge my colleagues to support it.

Chairman SENSENBRENNER. The gentleman yields back the balance of his time. The gentleman from Texas, Mr. Smith.

Mr. SMITH. Thank you, Mr. Chairman. I move to strike the last word.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. SMITH. Mr. Chairman, Mr. Coble has made a good-faith effort to satisfy the ISP community's concerns with this language.

The amendment will prevent an ISP from being liable for engaging in its normal business activities. I do not believe an ISP should receive a blanket exemption from liability just by virtue of being a service provider. It is unfair for an ISP to be exposed to liability for merely acting as a conduit for information. This language strikes an appropriate balance and allows ISPs to engage in their day-to-day activities without the fear of being exposed to liability. I urge my colleagues to adopt the underlying amendment and oppose any amendments to Mr. Coble's amendment.

I yield back the balance of my time.

Chairman SENSENBRENNER. The question is on—

Mr. CONYERS. Mr. Chairman.

Chairman SENSENBRENNER. The gentleman from Michigan.

Mr. CONYERS. Thank you, sir. Excuse my having to leave the Committee room.

Could I ask both my friends from the South to explain to me what the differences between their approach are, just essentially—

Mr. BOUCHER. Would the gentleman yield?

Mr. CONYERS. Of course. With pleasure.

Mr. BOUCHER. I thank the gentleman for yielding.

Both Mr. Coble and I are seeking to put forth a provision that would exempt ISPs from liability under the bill. The amendment that I have offered that accomplishes this result tracks very closely the approach that we took with the Digital Millennium Copyright Act in 1998. As the gentlewoman from California indicated, that approach has been well received, it has been very effective in application, it has been interpreted in the courts, and generally it is accorded a high degree of success. It is straightforward, it is quite simple in its application, and the gentleman from Virginia Mr. Goodlatte very articulately described the way that it would work in practice.

The problem that I have with the amendment that has been offered by Mr. Coble is that the very act of operating an ISP would involve directing the flow of data through the ISP. And there is language contained within Mr. Coble's amendment that could be interpreted to say that that very act of operating the Internet service provider, even though the operator has no control over the data, even though he doesn't monitor the data, even though the data simply flows through his system, by virtue of the very fact that he is operating the system, his ISP for which he works could be subject to liability under the bill.

That is the principal problem that I have with Mr. Coble's language. I think it is unnecessarily complex quite apart from that, but it is a construction which I think is considerably more complex than what I am offering.

And let me simply add one other thing, and that is that the ISPs support the amendment that I have offered and do not support the one that Mr. Coble has. I thank the gentleman.

Mr. CONYERS. May I now turn to my friend.

Mr. COBLE. I say to my friend from the North—

Mr. CONYERS. To my friend from the South.

Mr. COBLE.—asked a very fair question. And this may be subject to interpretation. But it seems to me that the Boucher amendment

pretty well extends a blanket exemption if you are an ISP. Mine is drawn more narrowly. And I just don't think there is any way that a way good-faith ISP is going to be penalized under my amendment.

Mr. CONYERS. I return my time.

Chairman SENSENBRENNER. The question is on the Boucher amendment to the Coble amendment to the amendment in the nature of a substitute.

Those in favor will say aye.

Opposed, no.

The noes appear to have it.

Mr. BOUCHER. rollcall.

Chairman SENSENBRENNER. rollcalled is ordered. The question is on agreeing to the Boucher amendment to the Coble amendment to the amendment in the nature of a substitute.

Those in favor will, as your names are called, answer aye.

Those opposed, no.

And the clerk will call the roll.

The CLERK. Mr. Hyde.

[No response.]

The CLERK. Mr. Coble.

Mr. COBLE. No.

The CLERK. Mr. Coble, no.

Mr. Smith.

Mr. SMITH. No.

The CLERK. Mr. Smith, no.

Mr. Gallegly.

[No response.]

The CLERK. Mr. Goodlatte.

Mr. GOODLATTE. Aye.

The CLERK. Mr. Goodlatte, aye.

Mr. Chabot.

Mr. CHABOT. Aye.

The CLERK. Mr. Chabot, aye.

Mr. Jenkins.

Mr. JENKINS. Aye.

The CLERK. Mr. Jenkins, aye.

Mr. Cannon.

Mr. CANNON. Aye.

The CLERK. Mr. Cannon, aye.

Mr. Bachus.

[No response.]

The CLERK. Mr. Hostettler.

Mr. HOSTETTLER. Aye.

The CLERK. Mr. Hostettler, aye.

Mr. Green.

Mr. GREEN. No.

The CLERK. Mr. Green, no.

Mr. Keller.

Mr. KELLER. No.

The CLERK. Mr. Keller, no.

Ms. Hart.

Ms. HART. Aye.

The CLERK. Ms. Hart, aye.

Ms. HART. No.
 The CLERK. Ms. Hart, no.
 Mr. Flake.
 [No response.]
 The CLERK. Mr. Pence.
 [No response.]
 The CLERK. Mr. Forbes.
 Mr. FORBES. Aye.
 The CLERK. Mr. Forbes, aye.
 Mr. King.
 Mr. KING. No.
 The CLERK. Mr. King, no.
 Mr. Carter.
 [No response.]
 The CLERK. Mr. Feeney.
 Mr. FEENEY. Aye.
 The CLERK. Mr. Feeney, aye.
 Mrs. Blackburn.
 Mrs. BLACKBURN. No.
 The CLERK. Mrs. Blackburn, no.
 Mr. Conyers.
 Mr. CONYERS. No.
 The CLERK. Mr. Conyers, no.
 Mr. Berman.
 [No response.]
 The CLERK. Mr. Boucher.
 Mr. BOUCHER. Aye.
 The CLERK. Mr. Boucher, aye.
 Mr. Nadler.
 [No response.]
 The CLERK. Mr. Scott.
 Mr. SCOTT. Aye.
 The CLERK. Mr. Scott, aye.
 Mr. Watt.
 Mr. WATT. Aye.
 The CLERK. Mr. Watt, aye.
 Ms. Lofgren.
 Ms. LOFGREN. Aye.
 The CLERK. Ms. Lofgren, aye.
 Ms. Jackson Lee.
 Ms. JACKSON LEE. Aye.
 The CLERK. Ms. Jackson Lee, aye.
 Ms. Waters.
 [No response.]
 The CLERK. Mr. Meehan.
 Mr. MEEHAN. Aye.
 The CLERK. Mr. Meehan, aye.
 Mr. Delahunt.
 [No response.]
 The CLERK. Mr. Wexler.
 [No response.]
 The CLERK. Ms. Baldwin.
 Ms. BALDWIN. Aye.
 The CLERK. Ms. Baldwin, aye.

Mr. Weiner.

[No response.]

The CLERK. Mr. Schiff.

Mr. SCHIFF. Pass.

The CLERK. Mr. Schiff, pass.

Ms. Sánchez.

Ms. SÁNCHEZ. Aye.

The CLERK. Ms. Sánchez, aye.

Mr. Chairman.

Chairman SENSENBRENNER. Aye.

The CLERK. Mr. Chairman, aye.

Chairman SENSENBRENNER. Are there Members who wish to cast or change their vote? The gentlewoman from Pennsylvania.

Ms. HART. Thank you. No to aye.

The CLERK. Ms. Hart, aye.

Chairman SENSENBRENNER. Further Members who wish to cast or change their vote? If not, the clerk will report.

The CLERK. Mr. Chairman, there are 17 ayes, 7 noes, and a pass.

Chairman SENSENBRENNER. And the amendment to the amendment to the amendment in the nature of a substitute is agreed to.

The question is now on agreeing to the Coble amendment, as amended by the Boucher amendment.

Those in favor will say aye.

Opposed, no.

The ayes appear to have it. The ayes have it and the amendment, as amended, is agreed to.

Are there further amendments?

Mr. BOUCHER. Mr. Chairman.

Chairman SENSENBRENNER. The gentleman from Virginia.

Mr. BOUCHER. Mr. Chairman, I have an amendment, Boucher 022.

Chairman SENSENBRENNER. The clerk will report the amendment.

The CLERK. Amendment to the amendment in the nature of a substitute.

Mr. BOUCHER. And Mr. Chairman, I ask unanimous consent that the amendment be considered as read.

[The amendment to the amendment in the nature of a substitute follows:]

**AMENDMENT TO THE AMENDMENT IN THE
NATURE OF A SUBSTITUTE TO H.R. 3261
OFFERED BY MR. BOUCHER**

Page 22, strike lines 5 through 17 and insert the following:

1 SEC. 10. EFFECTIVE DATE.

2 This Act shall take effect on the date of the enact-
3 ment of this Act, and shall not apply to a database that
4 is made available in commerce before such date of enact-
5 ment.

Chairman SENSENBRENNER. If the gentleman will withhold for a second. Without objection, so ordered. The gentleman is recognized for 5 minutes.

Mr. BOUCHER. Thank you, Mr. Chairman.

This amendment very simply would make the bill prospective in its application. The bill says, as a part of its text, that the only databases that would qualify for protection under the bill are those that are made available to the public in a time-sensitive manner. And yet the bill, by its terms, is also made retroactive, meaning that it would apply to databases that are presently in existence.

It seems to me that it is impossible for the time sensitivity requirement to have any real meaning if in fact this bill would apply to databases that are in existence at the date that the law becomes effective. And so the amendment simply repeals the retroactivity provision and would make the bill prospective only in its application.

Ms. LOFGREN. Would the gentleman yield?

Mr. BOUCHER. And I would be happy to yield to the gentleman.

Ms. LOFGREN. I think I agree with this amendment. It appears to me that the underlying bill is attempting to conform to *NBA versus Motorola* in the hot news exception to the *Feist* case that disrupted the sweat-of-the-brow theory back in 1991. However, *Motorola* defined hot news—among one of the four tests was “highly time sensitive,” whereas the bill itself merely says “time sensitive.” and I know that your amendment, I think it makes a lot of sense, that how could it be highly time sensitive if it were retroactive?

But I guess the question is, wouldn't we also need to deal with the highly-time-sensitive versus time-sensitive issue to have any chance at all of meeting the objections made by the Court under the copyright clause in *Feist*?

Mr. BOUCHER. I think the gentlewoman raises an excellent point, and I would certainly support her amendment, should she choose to offer it, that would change the standard within the bill from merely being time sensitive to actually track the *Motorola* decision and say highly time sensitive. I think she makes an excellent point. Either way, the bill should only be prospective in application, and that is what this amendment would achieve.

Mr. Chairman, I yield back and urge adoption of the amendment.

Chairman SENSENBRENNER. The gentleman from North Carolina, Mr. Coble.

Mr. COBLE. Thank you, Mr. Chairman. My friend from Virginia prevailed on the last point; let me see if I can regroup on this one, Mr. Chairman.

The whole point, Members, of database reform it seems to me is to protect those compilations. They have value to consumers and businesses. Under the protection afforded by the bill, persons will not only have an incentive to create new databases, owners will have an incentive to maintain existing compilations. The amendment, I fear, would deny protection to databases already in existence at the time of enactment.

This just seems to me to be patently unfair. What incentives will compilers of healthcare publications, for example, legal tabulations, and a host of other worthy databases have to update consumers

and businesses with the most accurate information available? What will happen to those consumers and businesses who unwittingly rely upon outdated information when making health, legal, or purchasing decisions? I just believe that the public at large would be better served to include databases that are aligned and well now rather than exclude them if this amendment were to pass. And I yield back.

Mr. GOODLATTE. Would the gentleman yield?

Chairman SENSENBRENNER. Time belongs to the gentleman from North Carolina.

Mr. COBLE. I yield to the gentleman from Virginia.

Mr. GOODLATTE. I thank the gentleman for yielding. And I agree with him, that there are major databases into which a great deal of investment has been made. And the problem that we confront in the digital age is the ease with which they could be duplicated. So somebody could take all of the previously un-updated material and steal all of that, and then just worry about the small amount of updating that is done. That would be I think an inappropriate result.

So I agree with the gentleman from North Carolina and reluctantly oppose the amendment offered by the gentleman from Virginia.

Chairman SENSENBRENNER. Would the gentleman yield to me?

Mr. COBLE. I yield to Mr. Chairman.

Chairman SENSENBRENNER. I agree with the arguments made both by the gentleman from North Carolina and the gentleman from Virginia. What I would say is that if this amendment is adopted, it effectively puts every publicly available database into the public domain. And in many cases, a lot of money and time and effort has been spent in assembling these databases. And to say that if there is no protection as a result of the enactment of this bill, I think that that would be patently unfair. And we would effectively, by an act of Congress, either be taking away the value or diminishing the value of the people's property.

And I yield back to the gentleman from North Carolina.

Mr. COBLE. And I yield back the balance of my time, Mr. Chairman.

Chairman SENSENBRENNER. The gentleman from Michigan, Mr. Conyers.

Mr. CONYERS. Thank you, Mr. Chairman. I again take the floor to raise another North-South dialogue. This time, though, it is between my dear friend from Virginia on our side of the aisle, and I am going to add to my North Carolina friend my Virginia friend. So this is Virginia versus North Carolina and Virginia. Maybe you will do better this time, Mr. Coble.

I am going to begin with the two gentlemen from the South on the Republican side. Could you explain to me, is there—normally being opposed to retroactivity and for being prospective is a good thing. And apparently that is not the case in this instance. Could you define for the Committee why that is the case?

Mr. GOODLATTE. Would the gentleman yield?

Mr. CONYERS. Of course.

Mr. GOODLATTE. If you didn't have a law that prohibited stealing or breaking into somebody's home, it seems to me that if somebody

had already stolen something it would make sense to allow the protection of things that they already own and not just things that—well, let me put it differently. It would make sense to me to allow the protection of things that you owned already and not things that you acquired in the future.

That is what we are talking about here. The database already exists; but if it is enhanced by additional updated information, it seems to me the entire database should be protected and not just the updated material.

Mr. CONYERS. Mr. Coble.

Mr. COBLE. Thank you, Mr. Conyers. Thank you, Mr. Goodlatte.

Mr. Conyers, I think you are correct when you say generally I think most of us probably would oppose retroactivity. But as my friend from the valley in Virginia, Mr. Goodlatte, pointed out, I think this would be one of those exceptions. And I think in this case retroactivity would be indeed damaging and unfair.

Ms. LOFGREN. Would the gentleman yield for an observation?

Mr. COBLE. I would indeed.

Mr. CONYERS. Yes, I would.

Ms. LOFGREN. The problem here—and I was going to move to strike the last word, and if I run out of time I still will. We are having a discussion about what we like and right and wrong and economics, all of which is interesting and useful. But the problem is that we have not yet had the constitutional law discussion that really is at the base of this problem.

In 1991 the Supreme Court threw out the sweat-of-the-brow doctrine and said that you could not copyright facts. You can't have a theft unless you have property. And what the Court has said is you can't have property with the database because there is no creativity that meets the standards of the copyright clause. And this bill does not solve that problem.

That is why the retroactivity issue, and why I don't have an amendment for the hot news exception, because there are so many other problems with the bill that ultimately even if we pass this bill, the Court is going to strike it down, it is not going to be found constitutional, and we will not have solved the problem for people who actually—I, like people and companies on both sides of the disagreement here, I actually sort of like the sweat-of-the-brow doctrine. I thought it served us quite well for a long time, but the Court has thrown that doctrine out. It is not constitutional.

And if you take a look at the standards in this bill, the first, the four-prong standard, the database was generated through a substantial expenditure of financial resources of time. That is the sweat-of-the-brow doctrine that the Court specifically overturned in the Feist case, and that is why just fixing the hot news exception will not fix this bill and why, even though I support the amendment about retroactivity, it still doesn't fix the bill, because there is nothing that rises to the level of what the report said is necessary for protection of those—

Mr. CONYERS. A very good point; you support the Democratic south.

I recognize Mr. Boucher at this point.

Mr. BOUCHER. Well, thank you very much, Mr. Conyers. Let me just respond to several points. Several of the individuals who have

spoken in opposition to this amendment have said that if the amendment passes, there would be no financial incentive to update and modernize and continue to provide new information for existing databases. And I take issue with that assertion. The creators of databases today are spending billions of dollars every year in order to update their databases. They are receiving tremendous revenues from subscription services and other sales of those databases, of the information therein contained, and they don't have the protection of this bill at the present time. And so if my amendment is adopted and the bill is made prospective only, nothing changes; the legal environment remains exactly the same and the incentive would be no less.

Chairman SENSENBRENNER. The gentleman's time has expired, and, without objection, will be given an additional minute.

Mr. BOUCHER. Yes. Mr. Chairman, I ask for 1 additional minute for the gentleman from Michigan, please. And I trust the gentleman continues to yield.

Mr. CONYERS. Yes, of course.

Mr. BOUCHER. And so the incentive would remain exactly the same as it is today, and we would continue to see billions of dollars invested by database creators in updating and modernizing the information in their databases.

The other point I would simply underscore is that we render absolutely meaningless the time sensitivity requirement in the bill if we do not adopt this amendment, because we would be saying that databases that are already in existence as of the date of the effectiveness of the law would be subject to protection. They can't possibly be time sensitive. And so I think we render the text of the measure itself open to question; I think we render almost a non-entity that provision that requires time sensitivity. And surely that would not be the intent of the authors of the bill.

So it seems to me, Mr. Chairman, that the measure should be made prospective. That is what the amendment does. I hope it would be adopted.

Chairman SENSENBRENNER. The gentleman's time has expired.

The question is on agreeing to the Boucher amendment to the amendment in the nature of a substitute.

Those in favor will say aye.

Opposed, no.

The noes appear to have it. A recorded vote is requested.

Those in favor of the Boucher amendment to the amendment in the nature of a substitute will, as your names are called, answer aye.

Those opposed, no.

And the clerk will call the roll.

The CLERK. Mr. Hyde.

[No response.]

The CLERK. Mr. Coble.

Mr. Coble. No.

The CLERK. Mr. Coble, no.

Mr. Smith.

Mr. SMITH. No.

The CLERK. Mr. Smith, no.

Mr. Gallegly.

[No response.]
 The CLERK. Mr. Goodlatte.
 Mr. GOODLATTE. No.
 The CLERK. Mr. Goodlatte, no.
 Mr. Chabot.
 Mr. CHABOT. No.
 The CLERK. Mr. Chabot no.
 Mr. Jenkins.
 Mr. JENKINS. No.
 The CLERK. Mr. Jenkins, no.
 Mr. Cannon.
 [No response.]
 The CLERK. Mr. Bachus.
 Mr. BACHUS. No.
 The CLERK. Mr. Bachus, no.
 Mr. Hostettler.
 Mr. HOSTETTLER. No.
 The CLERK. Mr. Hostettler, no.
 Mr. Green.
 Mr. GREEN. No.
 The CLERK. Mr. Green, no.
 Mr. Keller.
 Mr. KELLER. No.
 The CLERK. Mr. Keller no.
 Ms. Hart.
 [No response.]
 The CLERK. Mr. Flake.
 [No response.]
 The CLERK. Mr. Pence.
 [No response.]
 The CLERK. Mr. Forbes.
 Mr. FORBES. No.
 The CLERK. Mr. Forbes, no.
 Mr. King.
 Mr. KING. No.
 The CLERK. Mr. King, no.
 Mr. Carter.
 Mr. CARTER. No.
 The CLERK. Mr. Carter, no.
 Mr. Feeney.
 Mr. FEENEY. No.
 The CLERK. Mr. Feeney, no.
 Mrs. Blackburn.
 Mrs. BLACKBURN. No.
 The CLERK. Mrs. Blackburn, no.
 Mr. Conyers.
 Mr. CONYERS. No.
 The CLERK. Mr. Conyers, no.
 Mr. Berman.
 [No response.]
 The CLERK. Mr. Boucher.
 Mr. BOUCHER. Aye.
 The CLERK. Mr. Boucher, aye.
 Mr. Nadler.

[No response.]

The CLERK. Mr. Scott.

Mr. SCOTT. Aye.

The CLERK. Mr. Scott, aye.

Mr. Watt.

Mr. WATT. Aye.

The CLERK. Mr. Watt, aye.

Ms. Lofgren.

Ms. LOFGREN. Aye.

The CLERK. Ms. Lofgren, aye.

Ms. Jackson Lee.

Ms. JACKSON LEE. Aye.

The CLERK. Ms. Jackson Lee, aye.

Ms. Waters.

[No response.]

The CLERK. Mr. Meehan.

Mr. MEEHAN. Aye.

The CLERK. Mr. Meehan, aye.

Mr. Delahunt.

[No response.]

The CLERK. Mr. Wexler.

[No response.]

The CLERK. Ms. Baldwin.

Ms. BALDWIN. Aye.

The CLERK. Ms. Baldwin, aye.

Mr. Weiner.

[No response.]

The CLERK. Mr. Schiff.

Mr. SCHIFF. No.

The CLERK. Mr. Schiff, no.

Ms. Sánchez.

Ms. SÁNCHEZ. Aye.

The CLERK. Ms. Sánchez, aye.

Mr. Chairman.

Chairman SENSENBRENNER. No.

The CLERK. Mr. Chairman, no.

Chairman SENSENBRENNER. Are there Members in the chamber who wish to cast or change their vote? The gentleman from Utah, Mr. Cannon.

Mr. CANNON. No.

The CLERK. Mr. Cannon, no.

Chairman SENSENBRENNER. Are there further Members in the chamber who wish to cast or change their vote? If not, the clerk will report.

The CLERK. Mr. Chairman, there are 8 ayes and 18 nos.

Chairman SENSENBRENNER. And the amendment to the amendment in the nature of a substitute is not agreed to. Are there further amendments?

Mr. BOUCHER. Mr. Chairman.

Chairman SENSENBRENNER. The gentleman from Virginia.

Mr. BOUCHER. Mr. Chairman, I have one additional amendment. It is Boucher 025.

Chairman SENSENBRENNER. The clerk will report the amendment.

The CLERK. Amendment to the amendment in the nature of a substitute.

Mr. BOUCHER. And I ask unanimous consent, Mr. Chairman, that the amendment be considered as read.

Chairman SENSENBRENNER. Without objection, so ordered.

[The amendment to the amendment in the nature of a substitute follows:]

**AMENDMENT TO THE AMENDMENT IN THE
NATURE OF A SUBSTITUTE TO H.R. 3261
OFFERED BY MR. BOUCHER**

Page 4, insert the following after line 13:

- 1 (v) Any legal materials produced by a
2 Federal court, including opinions, judg-
3 ments, and rules of practice, and any legis-
4 lative materials produced by the Congress,
5 including bills and resolutions, committee
6 reports, and floor statements.

Chairman SENSENBRENNER. And the gentleman is recognized for 5 minutes.

Mr. BOUCHER. Thank you very much, Mr. Chairman.

This amendment simply exempts any legal materials produced by a Federal court, including opinions, judgments, and rules of practice, and any legislative materials produced by the Congress, including bills and resolutions, Committee reports, and floor statements from the operation of the bill.

It seems to me that we should not risk through the enactment of this measure these particular documents, of tremendous interest to the public, being locked away from public access, and this amendment would provide that assurance. I hope it will be the Committee's pleasure to adopt it, and I yield back.

Chairman SENSENBRENNER. The gentleman from North Carolina, Mr. Coble.

Mr. COBLE. I thank the Chairman. And Mr. Boucher's amendment excludes legal materials produced by Federal court, that is, opinions, rules, judgments, et cetera, and any legislative material produced by the Congress, bills, Committee reports, floor statements, from the definition of the database. There is a general exclusion for governmental information in the bill that would exempt the use of databases compiled by Federal, State, or local governments or by an entity carrying out work in response to a Government mandate.

The Boucher amendment goes further, and would work contrary to the basic prohibition in the bill. The amendment would deny protection, it seems to me, to persons who invest time, money, and other resources in developing a Government documents database. I believe we should afford protection under the bill to anyone who winnows through a mountain of paper and concisely reduces it to a condensed version that provides necessary information in a consumer-friendly manner to interested persons, businesses, and consumers generally. It should not matter, it seems to me, that the subject matter relates to Government or legal issues as opposed to health care or sports matters or legalistic matters, et cetera.

So with that in mind, Mr. Chairman, I would oppose the Boucher amendment.

Chairman SENSENBRENNER. Does the gentleman yield back?

Mr. COBLE. I yield back.

Chairman SENSENBRENNER. The question is on Boucher amendment number 025 to the amendment in the nature of a substitute.

Those in favor will say aye.

Those opposed, no.

The noes appear to have it. The noes have it the amendment is not agreed to.

Are there further amendments? If not, a reporting quorum—

Mr. WATT. Mr. Chairman.

Chairman SENSENBRENNER. The gentleman from North Carolina.

Mr. WATT. Move to strike the last word.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. WATT. I hope it doesn't take 5 minutes. But I have learned, serving on this Committee with Ms. Lofgren, that when she or Mr. Boucher or Mr. Goodlatte say something about technology, they

generally have a knowledge base that far exceeds mine, and—but I always pay attention. And nobody has yet responded to Ms. Lofgren's concern about the constitutional issue, which kind of goes to the heart of this bill and on which I guess I am a little concerned as we proceed to a final vote up or down on the bill.

Could I ask Mr. Boucher and Mr. Coble their views—and Mr. Goodlatte, if he is still over there—their views on that?

Mr. BOUCHER. Would the gentleman yield?

Mr. WATT. I will yield to Mr. Boucher first.

Mr. BOUCHER. Well, I thank the gentleman from North Carolina for posing the question. And as the gentlewoman from California mentioned earlier, there are severe constitutional questions that surround this entire subject. A point comes when first amendment rights begin to be invaded if facts are locked away in a manner that prohibits people from engaging in free and open speech. And to the extent that pure facts are locked away from public access, as this bill potentially could do, I think there are very serious first amendment questions that could be raised.

Another major problem that I see, which also has constitutional dimension, is that the duration of protection under this bill potentially could exceed the protection that is accorded under the copyright statutes. The Supreme Court had a case in its last term in which it found that the copyright term extension that Congress had approved was constitutional. But in doing so, it made a number of statements about the value of fair use, for example, and the ability of people to use copyrighted material in everyday conversation, and to have access to it in a wide array of other context, for reports, documents, et cetera.

I look at that language and I wonder how the Supreme Court could look at this law, assuming that it becomes law, and decide that locking away the very facts that underlie the free exercise of fair-use rights could be constitutional. And I suspect that on both of the counts that I have just mentioned, the Supreme Court would give serious consideration to whether or not this measure is constitutional. My bet would be that it would be declared unconstitutional, just as the gentlewoman from California said.

And I thank the gentleman for yielding.

Mr. WATT. Reclaiming my time. I yield to Mr. Coble for his response.

Mr. COBLE. I first of all want to associate with my friend from North Carolina's remarks in that I also take a back seat to Mr. Goodlatte, Mr. Boucher, and Ms. Lofgren when it comes to the complex technicalities of this issue. But I don't believe this diminishes free speech in any way. I think the law of false advertising, copyright, trademark, unfair competition, they regulate information or speech to a certain extent, Mr. Watt, in a commercial context without running afoul of the first amendment. And I just don't see the problem there. Again, I say this may be subject to interpretation, but Mr. Boucher and I can agree to disagree agreeably.

Mr. WATT. Reclaiming my time, might I also yield to Chairman of the full Committee to get his view on this issue?

Chairman SENSENBRENNER. Well, my preparatory job was being the Chairman of the Science Committee. So while I don't know as

much about technology as Ms. Lofgren, I know a little bit about it and how to encourage it.

Let me say I am not concerned about the first amendment constitutional aspects of this. I think that the gentleman from Virginia may have a point on whether or not this falls within the copyright clause of the Constitution, in that copyrights are designed to protect original inventions. But practically every database requires some type of assembly to get all of the data into one convenient area, and I think that that is copyrightable, and I think that the courts have been friendly toward recognizing that this was a legal copyright.

So you know, while none of us here are judges, I think that the presumption has got to be that this legislation is constitutional under both first amendment and copyright clause grounds.

Mr. WATT. Mr. Chairman, could I ask for 30 additional seconds? Chairman SENSENBRENNER. Without objection.

Mr. WATT. And yield to Mr. Boucher for an additional response that he has.

Mr. BOUCHER. I thank the gentleman for yielding.

Let me simply clarify that I think the relevance of the discussion about the duration of copyright term as applied to this bill is that the material that would be protected under this bill could potentially be protected in perpetuity. There is one provision in the bill that says that if you are simply maintaining a database, that act alone would entitle you to protect. So there would appear to be no limit whatever.

The Supreme Court came to a struggling conclusion with regard to whether or not the copyright term extension was constitutional. I daresay if the Court looks at one of these provisions that would extend protection for a longer time than is permitted under the copyright law, that the Court inevitably would find that that violates the right of people to have access to information under the first amendment and potentially other provisions of the Constitution, and would say that at the outer limit, protection could only be provided within the ambit of the time that the copyright law itself would accord.

I thank the gentleman for yielding.

Chairman SENSENBRENNER. The gentleman's time has expired. Are there further amendments?

If not, the question is on adoption of the amendment in the nature of a substitute which was laid down as the base text as amended.

Those in favor will say aye.

Opposed, no.

The ayes appear to have it. The ayes have it, and the amendment in the nature of a substitute is adopted.

A reporting quorum is present. The question occurs on the motion to report the bill H.R. 3261, as amended.

All those in favor say aye.

Opposed, no.

The ayes appear to have it.

Mr. BOUCHER. Mr. Chairman, a recorded vote, please.

Chairman SENSENBRENNER. A recorded vote is ordered.

Those in favor of the motion to report the bill H.R. 3261, as amended, will, as your names are called, answer aye.

Those opposed, no.

And the clerk will call the roll.

The CLERK. Mr. Hyde.

[No response.]

The CLERK. Mr. Coble.

Mr. COBLE. Aye.

The CLERK. Mr. Coble, aye.

Mr. Smith.

Mr. SMITH. Aye.

The CLERK. Mr. Smith, aye.

Mr. Gallegly.

[No response.]

The CLERK. Mr. Goodlatte.

[No response.]

The CLERK. Mr. Chabot.

Mr. CHABOT. Aye.

The CLERK. Mr. Chabot, aye.

Mr. Jenkins.

Mr. JENKINS. Aye.

The CLERK. Mr. Jenkins, aye.

Mr. Cannon.

Mr. CANNON. Aye.

The CLERK. Mr. Cannon, aye.

Mr. Bachus.

Mr. BACHUS. Aye.

The CLERK. Mr. Bachus, aye.

Mr. Hostettler.

Mr. HOSTETTLER. Aye.

The CLERK. Mr. Hostettler, aye.

Mr. Green.

Mr. GREEN. Aye.

The CLERK. Mr. Green, aye.

Mr. Keller.

Mr. KELLER. Aye.

The CLERK. Mr. Keller, aye.

Ms. Hart.

[No response.]

The CLERK. Mr. Flake.

Mr. Pence.

[No response.]

The CLERK. Mr. Forbes.

Mr. FORBES. Aye.

The CLERK. Mr. Forbes, aye.

Mr. King.

Mr. KING. Aye.

The CLERK. Mr. King, aye.

Mr. Carter.

Mr. CARTER. Aye.

The CLERK. Mr. Carter, aye.

Mr. Feeney.

[No response.]

The CLERK. Mrs. Blackburn.

Mrs. BLACKBURN. Aye.
 The CLERK. Mrs. Blackburn, aye.
 Mr. Conyers.
 Mr. CONYERS. No.
 The CLERK. Mr. Conyers, no.
 Mr. Berman.
 [No response.]
 The CLERK. Mr. Boucher.
 Mr. BOUCHER. No.
 The CLERK. Mr. Boucher, no.
 Mr. Nadler.
 [No response.]
 The CLERK. Mr. Scott.
 Mr. SCOTT. No.
 The CLERK. Mr. Scott, no.
 Mr. Watt.
 Mr. WATT. No.
 The CLERK. Mr. Watt, no.
 Ms. Lofgren.
 [No response.]
 The CLERK. Ms. Jackson Lee.
 Ms. JACKSON LEE. No.
 The CLERK. Ms. Jackson Lee, no.
 Ms. Waters.
 [No response.]
 The CLERK. Mr. Meehan.
 Mr. MEEHAN. No.
 The CLERK. Mr. Meehan, no.
 Mr. Delahunt.
 [No response.]
 The CLERK. Mr. Wexler.
 [No response.]
 The CLERK. Ms. Baldwin.
 Ms. BALDWIN. No.
 The CLERK. Ms. Baldwin, no.
 Mr. Weiner.
 [No response.]
 The CLERK. Mr. Schiff.
 Mr. SCHIFF. Aye.
 The CLERK. Mr. Schiff, aye.
 Ms. Sánchez.
 Ms. SÁNCHEZ. Aye.
 The CLERK. Ms. Sánchez, aye.
 Mr. Chairman.
 Chairman SENSENBRENNER. Aye.
 The CLERK. Mr. Chairman, aye.
 Chairman SENSENBRENNER. Are there Members in the chamber who wish to cast or change their votes? If not, the clerk will report.
 The CLERK. Mr. Chairman, there are 16 ayes and 7 noes.
 Chairman SENSENBRENNER. And the motion to report is agreed to.
 Without objection, the bill will be reported favorably to the House in the form of a single amendment in the nature of a substitute, incorporating the amendments adopted here today.

Without objection, the Chairman is authorized to move to go to conference, pursuant to House rules.

Without objection, the staff is directed to make any technical and conforming changes, and all Members will be given 2 days, as provided by House rules, in which to submit additional dissenting supplemental or minority views.

I would ask the indulgence of the Members of the Committee to sit through the reporting of one more bill which I anticipate to be noncontroversial.

DISSENTING VIEWS

Under the U.S. Constitution, facts distributed to the public are deemed to have entered the public domain. Consumers, businesses, and others are free to use those facts and republish them. H.R. 3261, however, would essentially allow database producers to lock up facts, making them available to the American public only for a fee or not at all if such restrictions would give the database owners a competitive advantage. Competition in the information market would be restricted, leading to higher prices and less innovation. Moreover, enactment of the legislation could undermine the ability of American citizens to express their First Amendment and other constitutionally based rights.

We believe the bill suffers from fundamental legal defects, which under the Supreme Court's opinion in the *Feist* case rise to Constitutional dimension. Notwithstanding the Court's clear rejection of the "sweat of the brow" doctrine in *Feist* over a decade ago, the bill seeks to codify the doctrine. It relies on the Commerce Clause to achieve precisely what the Supreme Court found the Intellectual Property Clause prohibited: a copyright in facts. Moreover, notwithstanding the Second Circuit's articulation of a clear standard for the "hot news" doctrine in the *NBA v. Motorola* case, H.R. 3261 adopts a lesser standard as a basis for liability. Finally, notwithstanding the Supreme Court's recent articulation of concerns about perpetual copyright protection and the creation of "a species of mutant copyright law," this bill essentially gives database owners the ability to lock up facts forever.

Beyond these legal infirmities, the bill suffers from a weak economic rationale as well. The stated intent of H.R. 3261 is to provide database publishers with the incentive to invest in the collection of information. But the proponents of H.R. 3261 have failed to demonstrate that publishers need any additional incentive; the database industry in the United States is thriving, with publishers investing billions of dollars each year in the creation of new databases. Profit margins in the industry are higher than in most other industries, and the existing database companies continue to purchase other database companies, reflecting their confidence in the future of their industry.

Additionally, proponents of H.R. 3261 have failed to show a gap in the legal protection of databases that needs to be filled. While published facts enter the public domain, database publishers have a wide variety of legal mechanisms that protect a range of business models:

- The publisher can employ copyright law to protect the selection and arrangement of facts in a database. If a person copies most of a database, he probably has infringed the copyright in the database because he has copied the selection and arrangement of the facts.

- The publisher can distribute the database under a license that prohibits the copying and redistribution of information.
- The publisher can make the database available only on-line, where it can receive protection under the Federal Computer Fraud and Abuse Act or state trespass to chattels, which have been successfully employed to protect databases.
- The publisher can use a technological protection measure to secure the database, and a person who circumvents the protection violates the Digital Millennium Copyright Act.
- The publisher of “hot news” can rely on state common law misappropriation.

Stripped to its essence, H.R. 3261 is not about preventing “piracy.” It is about increasing publishers’ revenue streams by allowing them to control information in an unprecedented way.

H.R. 3261 contains provisions that appear at first blush to mitigate its harm, but their benefits disappear on closer examination. The bill applies only to information that is redistributed in “a time sensitive manner,” but this phrase is defined so indefinitely that it could include all information that has any commercial value. Reinforcing the breadth of the bill’s scope is that it would apply to databases already in existence, including specifically encyclopedias and journal issues.

H.R. 3261 contains many uncertain terms that will lead to litigation. Unfortunately, the potential to receive treble damages will provide publishers with an economic incentive to adopt aggressive interpretations of the bill’s ambiguities. For example, liability is triggered when a person redistributes a “quantitatively substantial part of a database.” With the possibility of recovering treble damages, publishers will argue that as little as 5% of a database is a “quantitatively substantial part.” The 1996 EU Database Directive, which inspired the proponents to seek database legislation in the U.S., has led to ruinous litigation across Europe, particularly with respect to specialized Internet search engines that provide consumers with access to news and product information. The litigation has centered on the Directive’s ambiguous terms, some of which appear in H.R. 3261.

Examples of the bill’s potential harm can be given from every sector of the economy. An Internet company might want to provide consumers with the ability to compare prices at different websites. A biochemist might want to publish a comparison of his results with that of a scientist at another biotech firm. A market analyst might want to publish a report listing the performance of a wide variety of financial instruments. All of these activities could be unlawful under H.R. 3261.

Information is the lifeblood of the Information Economy. Congress should not create a new regime that restricts access to information in the absence of any demonstrated market failure requiring Government regulation. Moreover, of any Committee in the House, this is the last Committee that should be favorably reporting legislation with such potentially fatal constitutional flaws. We trust the bill will not ultimately become law and give monopolists the ability to lock up facts to the detriment of the American public.

RICK BOUCHER.

ROBERT C. SCOTT.
MELVIN L. WATT.
MARTIN T. MEEHAN.

DISSENTING VIEWS

The stated goal of this legislation—to protect database owners from misappropriation of their work product—is appealing. The old “sweat of the brow” standard in existence before *Feist Publication v. Rural Telephone Services Company*, 499 U.S. 340 (1991), seemed to serve society reasonably well by providing incentives for the creation of databases. But the *Feist* case was clear and decisive, and the legislation before us does not avoid the Constitutional defects outlined in that case.

We do not believe that Congress should try to provide database owners with protection that is not within our power to grant. More precisely, we are convinced that the Intellectual Property Clause (article I, section 8, clause 8) of the U.S. Constitution does not countenance the type of protection granted by this bill.

In *Feist*, the Supreme Court unanimously held that the Intellectual Property Clause protects only expressive elements in compilations and that effort without creativity could not convert facts into protected expressions. The Court thus expressly rejected the “sweat of the brow” theory, ruling that a compilation could only be copyrighted if the facts are selected, coordinated or arranged in such a way as to render the work an original work of authorship. Even then, the protection only applies to the author’s original contributions and not the facts or information conveyed.

This legislation is intended to resurrect the “sweat of the brow” theory rejected by the Supreme Court in *Feist*. In an attempt to conceal its true intent, the drafters have styled the bill as a Federal “misappropriation” statute, as though we were not creating a new property right, but establishing a new tort. However, the bill seeks to establish a new property right for databases, complete with civil remedies for unauthorized uses and exceptions for non-profit scientific research and news reporting. Such characteristics belie the “misappropriation” label, and look suspiciously analogous to those of copyright (infringement, fair use, etc.).

Proponents argue that even if this proposal runs afoul of the Intellectual Property Clause, it is still constitutional because it is within Congress’ power under the Commerce Clause (article I, section 8, clause 3). However, the Supreme Court’s interpretation of the relationship between the Commerce Clause and another enumerated power (the Bankruptcy Clause) in *Railway Labor Executives’ Association v. Gibbons*, 455 U.S. 457 (1982), seems to rule out this argument.

In *Railway Labor*, the Court struck down a statute providing protection to the employees of a railroad in bankruptcy. The Court found that the proposed statute violated the “uniformity” requirement of the Bankruptcy Clause, which Congress could not circumvent by purporting to legislate under the Commerce Clause. *Railway Labor*, 455 U.S. at 469. The *Railway Labor* opinion makes

clear that Congress cannot avoid the particular requirements of one enumerated power by relying on the generality of the Commerce Clause. Likewise, H.R. 3261 cannot avoid the originality requirement of the Intellectual Property Clause by relying on the general powers of the Commerce Clause.

The United States Justice Department came to the same conclusion after analyzing an earlier database bill in 1998:

If the Intellectual Property Clause precluded Congress from providing protection against the copying of non-original portions of factual compilations, even pursuant to a power other than conferred by that Clause, then Congress would not be able to use the Commerce Clause to avoid the implicit strictures of the Intellectual Property Clause that the Court in *Feist* could be said to have recognized, just as Congress may not use the Commerce Clause to avoid the Bankruptcy Clause's express requirement that bankruptcy laws be uniform. . . .

Memorandum from William Michael Treanor, Deputy Assistant Attorney General, United States Department of Justice, to William P. Marshall, Associate White House Counsel (July 28, 1998).

The fact that Congress regulates trademarks under the Commerce Clause does not save H.R. 3261. Over 120 years ago, the Supreme Court ruled that the Intellectual Property Clause did not apply to trademarks because they were neither writings nor discoveries. *Trade-Mark Cases*, 100 U.S. 82 (1879). In contrast, databases are writings that clearly fall within the scope of the Intellectual Property Clause. Indeed, copyright law already extends to compilations. *See, e.g.*, 17 U.S.C. § 103. Thus, unlike trademarks, database legislation is subject to the limitations of the Intellectual Property Clause. *See Bonito Boats v. Thundercraft Boats*, 489 U.S. 141, 146 (1989) (“[a]s we have noted in the past, the [Intellectual Property] Clause contains both a grant of power and certain limitations upon the exercise of that power”).

We are also concerned that this legislation may run afoul of the First Amendment. Factual information and ideas are the building blocks of all forms of expression, and the Supreme Court has recognized that the First Amendment leaves little room for restrictions on the dissemination of ideas and factual information. In fact, the Court's ruling in *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985), seems to indicate that our rights of expression under the First Amendment preclude Congress from limiting access to information in the manner contemplated by this legislation:

Our “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open,” *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964), leaves no room for a statutory monopoly over information and ideas. “The arena of public debate would be quiet, indeed, if a politician could copyright his speeches or a philosopher his treatises and thus obtain a monopoly on the ideas they contained.” *Lee v. Runge*, 404 U.S. 887, 893 (1971) (Douglas, J., dissenting). A broad dissemination of principles, ideas, and factual information is crucial to the robust public debate and informed citizenry that are “the essence of self-govern-

ment.” *Garrison v. Louisiana*, 379 U.S. 64, 74–75 (1964). And every citizen must be permitted freely to marshal ideas and facts in the advocacy of particular political choices.

Harper & Row, 471 U.S. at 582 (emphasis added).

The Court distinguished copyright protection from the rights protected by the First Amendment by making clear that copyright protection is limited to the author’s expression of facts or ideas, not the facts or ideas themselves. In *Harper & Row*, the Court recited with approval the Second Circuit’s explanation that copyright’s “idea-expression” dichotomy “strike[s] a definitional balance between the First Amendment and the Copyright Act by permitting free communication of facts while still protecting an author’s expression.” *Harper & Row*, 471 U.S. at 556 (quoting 723 F.2d 195, 203 (2d Cir. 1983)). Because of this distinction, “every . . . fact in a copyrighted work becomes instantly available for public exploitation at the moment of publication.” *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003).

As we stated initially, we are extremely sympathetic to the efforts of our Colleagues to protect the misappropriation of the work and efforts of database publishers. We should be concerned about the need to provide incentives to produce and maintain valuable collections of information. However, our efforts are worthless if we do not enact legislation that comports with the Constitution. We are convinced that the current bill will not meet the Constitutional questions raised by the courts that stimulated this legislation. In the end, enacting still another unconstitutional law serves no one’s interests. Those who rely on the law will do so to their detriment. Efforts to find measures that might meet Constitutional muster will linger or wither. Business decisions may be made based on unsound law. We would also point out that database publishers already have a wide variety of legal theories available to protect their business models, as pointed out in the views submitted by our colleague Rep. Rick Boucher.

While proponents of this bill have only the best intentions, the bill will only create additional market uncertainty, is unconstitutional and should be rejected.

MELVIN L. WATT.
ZOE LOFGREN.
MARTIN T. MEEHAN.

