

ACE American Council on Education
AAU Association of American Universities
NASULGC National Association of State Universities and Land-Grant Colleges

September 9, 2003

The Honorable F. James Sensenbrenner, Jr.
Chair, House Committee on the Judiciary
2449 Rayburn House Office Building
Washington, DC 20515

The Honorable W.J. "Billy" Tauzin
Chair, House Committee on Energy and Commerce
2183 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Sensenbrenner and Chairman Tauzin:

I write on behalf of the Association of American Universities, the American Council on Education, and the National Association of State Universities and Land-Grant Colleges, concerning the database protection legislation discussion draft "Database and Collections of Information Misappropriations Act," which was made available August 29 for consideration by interested parties. Our associations have been involved in the database deliberations from the beginning because of their potentially sweeping implications for the vitality and growth of college and university research and education programs, which invigorate our domestic economy, sharpen our international competitiveness, strengthen our national security, and enrich the health and quality of life of our citizens.

The higher education community has important interests on both sides of the database protection debate. Information, including data of all kinds and databases containing that information, is an essential input into higher education research and education programs. At the same time, databases and organized collections of information constitute one of the most important outputs of those programs. Colleges and universities therefore recognize the need for a balanced approach. We support policies that retain incentives to create databases and that protect the integrity of those databases. But higher education has an overriding interest in preserving unfettered access to data and information, which are, after all, the basic building blocks of the knowledge produced through research and education. Thus, colleges and universities believe that any database protection legislation should provide narrowly focused protection that supports data integrity and responds to demonstrable threats to the incentive to create databases without impeding access to the data and information upon which research and education programs depend.

We appreciate the evident hard work and good-faith effort to achieve an appropriate balance that are reflected in the discussion draft. We understand the difficulty of reconciling the often sharply differing views of the wide range of groups critically affected by database protection legislation.

From our perspective, we believe that the draft moves in the right direction in a number of important respects when compared to previous legislative proposals. Notably, we recognize and appreciate the elimination of the concept of “qualitative” substantiality, which we believed was inappropriate in a bill intended to protect the substantial effort involved in creating large databases. We also appreciate (i) the clear recognition that the protection of the bill is directed to “large” databases that require substantial effort to develop, (ii) the effort to tie the requisite injury to direct competition in the same market as the existing database, and (iii) the insertion of a knowledge standard as a condition of liability, which should help protect innocent downstream users of data.

However, we are concerned that a number of the problematic provisions and uncertainties of earlier proposals remain in the current draft. For example, the draft does not make clear that making available a “quantitatively substantial part” of a database “generated...through a substantial expenditure...” is not a violation unless the part made available was itself the result of a “substantial expenditure...” by the database claimant. In addition, there appears to be no requirement that the defendant’s conduct cause the substantial injury that undermines the incentive to create the database. While one provision includes a related concept, that provision appears to require only proof of the notion that free-riding in the abstract, not necessarily connected to the behavior of the defendant, would diminish incentive, a proposition that, as specified in the bill, would virtually always be true. Thus, the bill would still appear to permit suit for single lost sale or, equally troubling, a single lost source of data. Further, while we understand the threat posed by the unauthorized making all or substantially all of a database available to the relevant public, the concept of “making available to others” appears overly broad, and could pose a threat to traditional, collaborative work within or among universities. We also are puzzled by the apparent lack of any required nexus between the person who contributes the substantial effort or investment that qualifies for protection and the rights and remedies that are granted to any “injured” person.

We are concerned that the bill does not make sufficiently clear that customary academic uses of data and information are protected from liability so that scholars and researchers who engage in those uses will not need lawyers looking over their shoulders lest they find themselves in court facing potential large liability. Protecting academic uses of data has been a fundamental concern of the higher education community since the database discussions began. We believe there should be a strong safety net to prevent the chilling of customary and well-accepted educational and research activities. The lack of such protection could slow the advancement of knowledge and could thus be extremely harmful to the national interest. We have urged, and continue to urge, that the burden of proof of demonstrating that customary nonprofit academic and scientific uses are unreasonable should be a heavy one and should fall on the plaintiff.

In addition, the current draft contains a number of new provisions whose intent and impact are ambiguous and which could have serious unintended consequences for colleges and universities and for research and education. We note in particular (i) the new subpoena provision, which appears to be substantially broader than the already controversial provision in the DMCA, (ii) the service provider immunity provision, which could be read not to provide essential protection that we believe was intended, and (iii) the effect of the inclusion of “maintenance” in the prohibition and how it relates to the duration of protection and the extent of effort required for protection.

Given the importance of data and databases to colleges and universities and the potential long-term economic, educational, and research impacts of the legislation, we urge you to allow sufficient time to address and resolve these concerns before your committees move this bill forward.

We recognize that the database debate has been a long and difficult one, and we understand your desire to advance the process. We are prepared to work with you in any way we can to resolve our concerns and help produce database legislation that provides appropriately focused protection while preserving critical access to data and information.

Cordially,

A handwritten signature in black ink that reads "Nils Hasselmo". The signature is written in a cursive style with a prominent initial "N".

Nils Hasselmo
President
Association of American Universities

cc: Members of House Judiciary Committee
Members of House Energy and Commerce Committee