

September 4, 2003

The Honorable James Sensenbrenner, Jr.
Chair, House Committee on the Judiciary
2332 Rayburn House Office Building
Washington, DC 20515-4909

The Honorable W.J. " Billy" Tauzin
Chair, House Committee on Energy and Commerce
2183 Rayburn House Office Building
Washington, DC 20515-1803

Dear Chairman Sensenbrenner and Chairman Tauzin:

Re: discussion draft database protection bill

We are writing to you on behalf of four major library associations, the American Association of Law Libraries, the American Library Association, the Association of Research Libraries, and the Special Libraries Association. Taken altogether, we represent over 80,000 librarians, libraries and millions of library users throughout the country.

As you know, we have worked very closely with you and your staffs for many years to craft a database protection bill that would be acceptable to a wide range of competing interests. As part of this process, we have recently had the opportunity to review the latest discussion draft of the bill, "Database and Collections of Information Misappropriation Act." We very much appreciate the efforts that have been made to address some of our concerns. However, this new draft contains many new provisions and raises many additional concerns. We are writing today to bring to your attention a few of the most serious ones from our perspective. Although this draft is a result of several years of discussion and negotiation between staff of your Committees and was intended to bring all stakeholders closer to agreement, it appears that we are still very far apart.

First, we wish to reiterate at the outset that we have yet to see any serious evidence of the need for legislation that provides additional protections to databases. Congress has been discussing database legislation since 1996, and in all that time, there has been little if any evidence that the database industry has faced uncertainty in the courts or has been

harmed in the marketplace. There is no evidence that selected database producers have suffered any serious harm as a result of the kind of activity addressed in the current draft proposal. Indeed, the industry appears to be thriving. In addition to that general -- but significant -- concern, we have a number of more specific issues to bring to your attention:

- The exemption for non-profit educational organizations. The provision that purports to exempt non-profit educational, scientific, or research institutions seems wholly inadequate to meet the needs of those institutions. Among other things, the determination of what such institutions are allowed to do is made post-facto and only when they have already been forced into a court under an allegation of misappropriation and a threat of quadruple damages. In addition, the standard to be applied is so vague that it offers no guidance at all - only what is customary and reasonable under the circumstances, again to be determined after the fact in the courtroom. There seems to be little doubt that this lack of legislative guidance on what research and educational institutions can and cannot do will have a chilling effect on the very research it claims to protect.
- The subpoena provision. We believe that the subpoena provision in the draft database bill is an invitation to a flood of frivolous lawsuits by database owners on a fishing expedition for possible infringers. The provision provides for no judicial oversight and no finding of harm before the subpoena is issued - only that the court papers be completed properly and submitted to the clerk. A person requesting a subpoena under this bill does not even have to provide a statement that the person has a good faith belief that the use of the material is not authorized, such as is required by the Digital Millennium Copyright Act. And only the copyright owner or his agent can request a DMCA subpoena, while any person supposedly harmed by a violation could request a database subpoena.
- Legal and government information. The draft bill contains no exemption for legal information and the exemption concerning government information requires greater clarity. For example, the bill contains no provision to ensure that legal and government information will remain in the public domain. It is true that the government cannot protect its information, but someone else can assert that protection. If a federal research grantee that generates a database is not considered an “agent” of the granting agency, the grantee could exercise proprietary control over the government-funded database. Similarly, a publisher that incorporates legal or government information into its database could prevent others from making available that information – even if it is not available from any other source. We urge the Committees to keep public domain information public and to ensure that legal and/or government information not be granted protection under this discussion draft bill unless that information is also permanently available from a public domain accessible website.
- Time sensitivity. The provision in the draft legislation relating to time sensitivity is confusing and vague, providing the courts with little guidance. The provision needs to state explicitly that the value of the information in the database must be highly time-

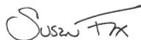
sensitive and that the unauthorized making available of information occurred before sufficient time has elapsed for the value to diminish significantly. Without that, almost every making available could be said to occur in a time sensitive manner.

- **Relation to the Copyright Act.** For the first time, the draft bill now explicitly encompasses periodical issues, which are themselves covered under the Copyright Act. This raises fundamental questions about the relationship between this bill and the copyright law. It appears that if this draft were to become law, the very same action (such as an interlibrary loan) would be lawful under the Copyright Act but a potential violation of the draft database legislation. This new approach will cast a shadow over all of the exemptions currently in the Copyright Act, thus necessitating a re-litigation of those provisions and a court-provided clarification of which law governs when.

Finally, as described in the enclosed article and editorial from the *Washington Post* and the *New York Times*, the scientific and research communities are moving in a very new and exciting direction to spur the advancement of knowledge. The new approach, "open access," encourages and supports the greater sharing of data and information across and between disciplines to promote the advancement of science and innovation. Many in the scientific community are embracing this new dissemination model for several reasons: restrictive licensing terms and conditions, the high cost of journals, and the opportunity to better realize the benefits of the information technologies utilized in support of research. Thus the approach taken in the draft database bill is strikingly at odds with how the research and education communities are increasingly engaging in scientific and research discovery.

The draft database bill raises many new and continuing concerns which is not surprising given how difficult and complex these issues are. We strongly urge that this draft proposal be given a careful and thorough review prior to moving it forward. We look forward to meeting with you and your staff at an early opportunity to discuss these concerns further.

Sincerely,



Susan Fox
Executive Director
American Association of Law Libraries



Keith Fiels
Executive Director
American Library Association



Duane E. Webster
Executive Director
Association of Research Libraries



Janice R. Lachance
Executive Director
Special Libraries Association

Enclosure

The **American Association of Law Libraries** (AALL) is a nonprofit educational organization with 5,000 members dedicated to providing leadership and advocacy in the field of legal information and information policy. Contact: Robert Oakley (202-662-9160)

The **American Library Association** (ALA) is a nonprofit educational organization of over 64,000 librarians, library trustees, and other friends of libraries dedicated to improving library services and promoting the public interest in a free and open information society.
Contact: Miriam Nisbet (202-628-8410)

The **Association of Research Libraries** (ARL) is a nonprofit organization of 124 research libraries in North America. ARL programs and services promote equitable access to and effective use of recorded knowledge in support of teaching, research, scholarship, and community service.
Contact: Prue Adler (202-296-2296)

The **Special Libraries Association** (SLA) is an international professional association serving more than 14,000 members of the information profession, including special librarians, information managers, brokers, and consultants.
Contact: Doug Newcomb (202-939-3676)