



September 8, 2003

The Honorable Jim Sensenbrenner, Jr.
2332 Rayburn House Office Building
Washington, DC 20515-4909

The Honorable W.J. "Billy" Tauzin
2183 Rayburn House Office Building
Washington, DC 20515-1803

Dear Chairman Sensenbrenner and Chairman Tauzin:

Thank you for sharing with us a copy of the August 28, 2003 Discussion Draft, the "Database and Collections of Information Misappropriation Act" ("Discussion Draft" or "Draft"). While we appreciate the considerable time and interest the two committees have given this issue, the draft contains several provisions that would not only be unnecessarily punitive to the Internet community but would exceed other similar federal statutes.

The members of NetCoalition firmly believe that existing law already provides more than adequate protection for producers of databases. In fact, the database community, which includes Internet companies, has repeatedly demonstrated that existing variety of federal and state laws, including federal copyright law, federal anti-hacking prohibitions, and a variety of state contract and tort laws, are more than sufficient to protect their work from those who would engage in unlawful uses of their materials. For example, the Computer Fraud and Abuse Act, 18 U.S.C. §1030, allows a web site operator to obtain injunctive relief and an award of damages against a person who extracts, without authorization, even one fact from its web site provided that the operator spends \$5,000 on damage assessment.

We continue to believe that those who are interested in creating a new, federal property right for facts need to demonstrate where current law has proven to be inadequate to protect their investments. That test has not been met, nor has a record been established that would justify such an unprecedented expansion of the law.

For example, under the Draft, conduits such as ISPs, Internet access providers, and telecommunications providers would be liable for the illegal activity of their users, a precedent that Congress has refused to establish in other areas.

Chairman Sensenbrenner and Chairman Tauzin

400 North Capitol Street, N.W.
Suite 585
Washington, D.C. 20001
Phone: 202-347-8099
Fax: 202-783-6620
www.netcoalition.com

Any person who “makes available in commerce to others” an unlawful part of a database is subject to the bill’s penalties. But, making information available to others is exactly what every ISP does literally every second of every day. Consequently, the limitation on liability in Section 7(i) of the bill would provide no relief. Internet companies may well end up having no other recourse but to monitor or edit the information users are sending across their systems, a degree of intrusion and invasion of no interest to the millions of Americans who use the Internet on a daily basis.

Section 7(h) of the Discussion Draft includes a new subpoena provision that raises serious concerns involving due process, compliance, and privacy, and is much broader than the subpoena process in the Digital Millennium Copyright Act. For example, where the DMCA authorizes copyright owners or their agents to serve subpoenas to identify potential infringers, the Discussion Draft would allow any person—not just the database producer—to seek a subpoena against any entity it believed could provide personal information about a user who may have copied a significant part of a database.

The potential pool of plaintiffs under the Discussion Draft is virtually limitless and could include not only database companies but also individuals, governments, even foreign nations. And here, there would be no court supervision of the subpoena process. It would be a paper process handled by clerks who have no choice but to rely upon the accuracy of the petitioner. And, as is the case with the DMCA, an Internet company would be liable for any injury as the result of complying with an improper subpoena.

Moreover, as has been the case with prior legislative efforts, many of the most critical provisions in the bill are ambiguous and will be the subject of litigation. For example, the bill attempts to restrict liability to the unauthorized “making available” of data in a “time sensitive manner.” Unfortunately, the bill does not define this term. Instead, it specifically directs a court to consider “the temporal value of the information in the database, within the context of the industry sector involved.” In other words, the bill appears to encourage litigation in order to define a key concept in the bill.

In addition, the Draft does not address situations involving sole source databases, which increases monopolists' control over information. It would apply retroactively and could protect facts in perpetuity. And, it includes a unique civil remedies section that would seem to award quadruple damages to a prevailing party. This section, combined with the unique subpoena provision, would result in substantial litigation and legal “fishing expeditions.”

Thank you for your consideration of our views on this matter. We are continuing to work through the bill and hope to have a more complete analysis finished in the near future. We look forward to working with you and your staffs if you decide the legislation Chairman Sensenbrenner and Chairman Tauzin

September 8, 2003
Page 3 of 3

should move forward. While NetCoalition believes that the producers of databases, which include NetCoalition members, should have their investments protected, we cannot support legislation that would create such unnecessary broad new property right in facts and establish such a punitive and draconian method of enforcement.

Sincerely,

Kevin S. McGuiness, Esq.
Executive Director

Cc: Honorable John D. Dingell
Honorable John Conyers, Jr.