

***NewsBreak: Database Protection Legislation Introduced in Congress***  
**By George H. Pike\***

On October 8, 2003, the ongoing debate over the need for database protection returned to the floors of Congress with the introduction House Bill 3261, the Database and Collections of Information Misappropriation Act. The Act would impose substantial civil penalties to anyone who makes available “in commerce” a “quantitatively substantial” part of an existing database or information collection.

The debate over the need for database protection extends back to the United State Supreme Court’s 1991 decision in *Feist v. Rural Telephone*. In that case, a publisher of telephone “white pages” information appropriated name, address and phone numbers from a rival directory. The rival sued for copyright infringement, but the Court held that the information was factual in nature and that facts are not protected by copyright. The Court also held that simple alphabetical arrangement of the information was not original enough to merit copyright protection. Rural Telephone’s “sweat of the brow” in creating the database did not entitle it to copyright protection.

This decision had an immediate impact on the database industry. I recall an impressive national “white pages” CD-ROM product that I saw demonstrated at the 1992 National Online and priced at about \$4,000. A few years later, similar databases were freely available on the Internet, thus eliminating the market for the CD-ROM. The database industry responded by seeking help from Congress.

Database protection legislation was first introduced in the 104<sup>th</sup> Congress and again in the 105<sup>th</sup> Congress, but never made it out of the House. Efforts to enact database protection legislation were further accelerated by a database protection directive enacted by the European Union. A clause in the directive held that U.S. publishers would not receive protection for their databases in European markets unless U.S. law gave similar protection to European publishers in U.S. markets.

The 106<sup>th</sup> Congress saw two rival database protection bills introduced by Representative Howard Coble of the House Judiciary Committee and Representative Tom Bliley of the House Energy and Commerce Committee. The Coble bill, known as The Collections of Information Antipiracy Act, would have made it a civil or criminal offense to make available a “substantial” part of a collection so as to cause “material harm” to the market for the database. This bill raised several concerns about ambiguity of the terms “substantial part,” “material harm” and “market”. Critics contended that the bill gave publishers almost unfettered power over the information contained in their databases.

The Bliley bill, known as the Consumer and Investor Access to Information Act, was targeted more specifically toward direct copying of database information and using that information in head-to-head competition. Hearings held in the summer of 1999 were unable to resolve the significant differences between the two competing bills and neither of them ended up being enacted.

While no bill was introduced in the 107<sup>th</sup> Congress, work continued on crafting a bill that would represent a compromise between the Bliley and Coble bills. Staffers for the House Judiciary Committee reported that they did not anticipate reintroducing legislation until a bill was crafted that was reasonably likely to be approved by most (but probably not all) of the various interests.

The behind the scenes activity moved in front of the scenes when hearings were held before the House Committee on Energy and Commerce in September 2003. House Bill 3261 was introduced two weeks later. Significantly, the bill was introduced by Representative Coble and is co-sponsored by the chairmen of the previously competing committees.

The legislation is not an exact match of either of the two earlier bills, nor is it a perfect hybrid. The bill focuses on uses “in commerce”, rather than any subsequent use, and requires a “quantitatively substantial” part of the database to also be used in commerce. The bill also requires that the new use must be the functional equivalent of the original database in the same market, and result in disruption of revenue before any injury can be shown.

The legislation also has somewhat broader exemptions permitting the use of hyperlinks, permitting the use of data gathered through other means (originally in the Bliley bill) and providing increased, but not unlimited protection for nonprofit educational, scientific, and research institutions. A specific exemption is also made for databases generated by Federal, State or local governments. However, that exemption does not extend to data that is generated by governments—often not protected by copyright—but compiled by non-governmental publishers, such as a database of Federal court decisions.

Critics of the bill continue to argue that contract, trespass, misappropriation and unfair competition law all provide adequate database protection, as does the federal Computer Fraud and Abuse Act and the Digital Millennium Copyright Act. More to the point, they argue that providing factual information with proprietary protection would violate Constitutional copyright, commerce and free speech provisions. Finally, they argue that continuing uncertainty in the language of the legislation, including the absence of a fair use clause, will chill research, restrict further database development and impede competition in the database marketplace.

Proponents argue that existing law does not adequately protect databases and the important role of databases in the information economy deserves strong, national protection. Specifically, they argue that database protection ensures accurate and reliable information, critical to the needs of consumers and researchers. The specific terms of the new legislation, they contend, provide adequate fair use and other protections for those who would use databases, even extensive uses of the databases.

Obviously, the legislation remains controversial. Supporters of the legislation include many publishers, real estate professionals (for protection of their listing services), and the Software & Information Industry Association. Opponents of the bill include the ALA and other library organizations, the National Academy of Engineering and the U.S. Chamber of Commerce. The U.S. Copyright Office is on record favoring database protection legislation in principal, and this bill is described as “major step” toward the “balanced legislation the (Copyright) Office has long recommended.”

Work is expected to continue on the bill well into next year. If the bill passes in the House, it must still be approved in the Senate.

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