If at *Feist* You Don't Succeed, Try, Try Again: An Evaluation of the Proposed Collections of Information Antipiracy Act

J. Ryan Mitchell
*Jones, Day, Reavis & Pogue, jrmitchell@mcguirewoods.com*

Follow this and additional works at: https://digitalcommons.unl.edu/nlr

Recommended Citation
Available at: https://digitalcommons.unl.edu/nlr/vol78/iss4/10

This Article is brought to you for free and open access by the Law, College of at DigitalCommons@University of Nebraska - Lincoln. It has been accepted for inclusion in Nebraska Law Review by an authorized administrator of DigitalCommons@University of Nebraska - Lincoln.
If at *Feist* You Don't Succeed, Try, Try Again: An Evaluation of the Proposed Collections of Information Antipiracy Act

TABLE OF CONTENTS

I. Introduction ........................................... 901
II. Historical Background ................................ 903
III. The United States Supreme Court Decision of *Feist*
    *Publications, Inc. v. Rural Telephone Service Co.* .... 903
IV. Protection After *Feist* ................................ 905
V. The Need for Database Legislation .................... 908
VI. Proposed Antipiracy Database Legislation .......... 909
   A. Provisions of the Collections of Information
      Antipiracy Act, H.R. 354, Section 1402: Prohibition
      Against Misappropriation ........................... 911
   B. Section 1403: Exceptions to the General Prohibition
      .................................................................. 912
   C. Section 1404: Exclusions for Government Collections
      & Computer Programs .................................. 912
   D. Section 1405: The Act's Relationship to Other Laws
      .................................................................. 913
   E. Sections 1406 & 1407: Civil & Criminal Remedies
      for Violations of the Act .............................. 913
   F. Sections 1408 and 1409: Limitations on Actions and
      Defenses to Claims .................................... 914
VII. Evaluation of the Proposed Collections of Information
     Antipiracy Act, H.R. 354 .............................. 915
VIII. Conclusion ............................................. 923

© Copyright held by the NEBRASKA LAW REVIEW.

* J. Ryan Mitchell, Associate, Jones, Day, Reavis & Pogue; University of Utah,
  B.S., 1996; University of Nebraska College of Law, J.D., 1999; Managing Editor,
  NEBRASKA LAW REVIEW, 1998. The views set forth herein are the personal views
  of the author and do not necessarily reflect those of the law firm with which he is
  associated.
I. INTRODUCTION

In the United States, databases are a multi-billion dollar-a-year industry. Databases are not only commercially valuable to those who produce and maintain them, but are also of great social importance to the public as a whole. They provide Americans with invaluable products such as phone books, directories, almanacs, and encyclopedias. They also provide specialized products like medical and pharmaceutical reference tools, stock quotes, statistical abstracts, chemical compound charts, and countless other sources of information that are extremely important to the scientific, academic, news reporting, and research communities. Determining the legal protection that should be afforded databases has always been a difficult task because it involves balancing "the goal of providing adequate incentives for their continued production, and the goal of ensuring public access to the information they contain." Throughout history, the law has found different ways of balancing these competing goals.

Beginning in the United States in the Eighteenth Century, copyright law began protecting the authorship of databases. The legal protection for databases expanded over the next two centuries and two distinct rationales for granting copyright protection developed. One rationale, which has been labeled the "sweat of the brow" doctrine, determined whether databases should have been granted copyright protection by examining the "effort and investment of the compiler." The second rationale determined whether protection should have been granted by focusing on "the compiler's judgment and creativity in the selection and arrangement of the materials comprising the [database]." For many years, these two distinct rationales coexisted to form a barrier of legal protection that gave database owners broad protection against unauthorized reproduction or misappropriation of both the content and arrangement of their databases. This broad pro-

2. In this paper, the term "database" is used broadly to encompass the definition of "collections of information" as used in the proposed Collections of Information Antipiracy Act. H.R. 354, 106th Cong. (1999). The Act defines the term "collection of information" as "information that has been collected and has been organized for the purpose of bringing discrete items of information together in one place or through one source so that persons may access them." Id. § 1401(1).
4. See id.
5. U.S. COPYRIGHT OFFICE, REPORT ON LEGAL PROTECTION FOR DATABASES 1 (1997).
7. See U.S. COPYRIGHT OFFICE, supra note 5, at 3.
8. Id.
9. Id.
tection, however, began to erode with the adoption of the Copyright Act of 1976.

The Copyright Act of 1976 for the first time expressly drew a connection between the term “compilation” and the term “original work of authorship.” The 1976 Act constricted previous notions of what constituted a protectable database:

a [compilation is] 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.

This language began dividing courts on the question of whether the “sweat of the brow” doctrine could still be applied to give databases copyright protection. The Supreme Court ended the debate among the circuits with its seminal decision in Feist Publications, Inc. v. Rural Telephone Service Co. In Feist, the Court held that the “sweat of the brow” doctrine was not a viable theory on which to grant databases copyright protection. This ruling has had drastic consequences on the protection afforded databases. In many cases following Feist, courts have allowed substantial takings of information contained in databases even where the database was determined to be copyrightable. In the aftermath of Feist and its progeny, database providers, finding their databases inadequately protected against misappropriations, began pressuring Congress to enact legislation that would provide them the protection they had under the “sweat of the brow” doctrine. In response to this pressure, Congress has attempted to craft legislation that would reestablish the “sweat of the brow” doctrine, while maintaining public accessibility to the information contained within the databases.

This article will briefly review the history of copyright protection for databases. It will then discuss the Supreme Court’s decision in Feist Publications, Inc. v. Rural Telephone Service Co., and examine the thin and uncertain protection afforded databases in the aftermath

10. See id. at 6.
14. See id. at 359-60.
15. See Warren Pub’g, Inc. v. Microdos Data Corp., 115 F.3d 1509 (11th Cir. 1997); Bellsouth Adver. & Pub’g Corp. v. Donnelley Info. Publ’g, Inc., 999 F.2d 1436 (11th Cir. 1993); Key Publications, Inc. v. Chinatown Today Publ’g Enters., 945 F.2d 509 (2d Cir. 1991); Kregos v. Associated Press, 937 F.2d 700 (2d Cir. 1991); Victor Lalli Enters., Inc. v. Big Red Apple, Inc., 936 F.2d 671 (2d Cir. 1991).
of Feist. Next, this article will examine Congress' latest attempt to craft legislation that protects databases from unauthorized misappropriations. Finally, this paper will argue that Congress' proposed legislation sweeps too broadly and fails to strike an adequate balance between the competing goals of providing sufficient incentives for the continued production of databases, and ensuring public access to the information they contain.

II. HISTORICAL BACKGROUND

Databases have had a long history of legal protection in the United States. In fact, databases "constitute one of the oldest forms of authorship protected under U.S. law, dating back to the eighteenth century." For two centuries prior to the Supreme Court's decision in Feist, courts generally resolved the issue of whether a database would be protected under copyright law by applying one of two distinct theories.17 The first, the "sweat of the brow" doctrine, sought to protect through copyright the author's investment of time, money, and resources that went into gathering of information and producing of the database. The second was a more traditional copyright protection of the selection and arrangement of the facts contained in the database. This selection and arrangement theory only protected the originality and creativity of the databases' arrangement and selection of facts, and not the facts themselves. In Feist, the Supreme Court eliminated the rationale that copyright protection could be extended to protect databases based on the "sweat of the brow" theory.

III. THE UNITED STATES SUPREME COURT DECISION OF FEIST PUBLICATIONS, INC. V. RURAL TELEPHONE SERVICE CO.

The plaintiff, Rural Telephone Company provided telephone services to several communities in Kansas. As part of the services to its

18. See id. at 220; see, e.g., Hutchinson Tel. Co. v. Fronteer Directory Co., 770 F.2d 128 (8th Cir. 1985); Rockford Map Publishers, Inc. v. Directory Serv. Co., 768 F.2d 145 (7th Cir. 1985); Leon v. Pacific Tel. & Tel. Co., 91 F.2d 484 (9th Cir. 1937); Jeweler's Circular Publ'g Co. v. Keystone Publ'g Co., 281 F. 83 (2d Cir. 1922).
19. See Hayden, supra note 17; see, e.g., Fin. Info., Inc. v. Moody's Investors Serv., Inc., 808 F.2d 204 (2d Cir. 1986); Southern Bell Tel. & Tel. Co. v. Associated Tel. Directory Publishers, 756 F.2d 801 (11th Cir. 1985); Eckes v. Card Prices Update, 736 F.2d 859 (2d Cir. 1984); Miller v. Universal City Studios, Inc., 650 F.2d 1365 (6th Cir. 1981).
customers, Rural published a telephone directory that consisted of both a yellow pages and white pages.21 Defendant, Feist Publications, was a publishing company that specialized in producing telephone directories that covered a much wider range of service areas than Rural.22 After Feist sought, and was refused a license to copy the listings in Rural's white pages, it extracted the listings anyway and used them in its directory.23 Rural sued, and the district court granted summary judgment on Rural's copyright infringement claim. The district court held that Rural's telephone directories were copyrightable and that Feist's unauthorized extraction of Rural's listings constituted infringement.24 The Tenth Circuit affirmed the district court's decision, and the Supreme Court granted certiorari.25

The Supreme Court reversed the district court's decision and eliminated the "sweat of the brow" doctrine as a viable theory of copyright protection.26 The Court asserted that both the Constitution and the Copyright Act mandate that originality is the "sine qua non" of copyright protection.27 The Court stated, "[o]riginal, as the term is used in copyright, means only that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity."28 The Court continued, stating that since "facts do not owe their origin to an act of authorship," they are not original, and therefore not copyrightable.29 Thus, the only protection that copyright law affords databases is protection for the selection, coordination, or arrangement of the facts, which have the possibility of being original, and not the facts themselves.30

While recognizing that merely protecting the selection, coordination, and arrangement of facts gave databases only thin protection, the Court held that to rule otherwise would be contrary to the clear intent of the Copyright Act.31 The drafters of the Copyright Act of 1976 clarified the intent of the 1909 Act, which intended that facts remain freely copyable.32 The Court held the "sweat of the brow" doctrine flouted this basic principle by protecting facts from being freely copied and therefore, was not a valid rationale for protecting databases under copyright law.33

21. See id.
22. See id. at 342-43.
23. See id. at 343.
24. See id. at 344.
25. See id.
26. See id.
27. Id. at 345.
28. Id.
29. Id. at 347.
30. See id. at 348.
31. See id. at 349.
32. See id.
33. See id. at 354.
On these facts, the Court not only held the factual information contained in Rural’s white pages could be copied freely, it also held that the directory was uncopyrightable.

The selection, coordination, and arrangement of Rural’s white pages do not satisfy the minimum constitutional standards for copyright protection. As mentioned at the outset, Rural’s white pages are entirely typical .... Rural simply takes the data provided by its subscribers and lists it alphabetically by surname. The end product is a garden-variety white pages directory, devoid of even the slightest trace of creativity.\textsuperscript{34}

The way Rural selected and arranged its listings was obvious and had nothing remotely creative about it. Arranging the listings in a white pages in such a manner “is an age-old practice, firmly rooted in tradition and so commonplace that it has come to be expected as a matter of course.”\textsuperscript{35} Thus, the Court held Feist was not liable for copyright infringement because the items that had been copied were not copyrightable.\textsuperscript{36}

\section*{IV. PROTECTION AFTER \textit{FEIST}}

While the Supreme Court’s decision in \textit{Feist} eliminated the “sweat of the brow” doctrine as a viable method of protecting the factual information contained in a database, it left unanswered two critical questions: First, what constitutes originality or creativity in the selection, coordination, or arrangement of information? Second, if the selection, coordination, or arrangement is sufficiently original to warrant copyright protection, what type of copying does it prevent?\textsuperscript{37} Following \textit{Feist}, lower courts have had the opportunity to answer these questions, and in doing so, have shown how truly thin copyright protection is for databases.

In \textit{Kregos v. Associated Press},\textsuperscript{38} the plaintiff brought suit against the defendant alleging, among other things, copyright infringement for the unauthorized copying of his baseball pitching form, which kept statistics about a pitcher’s performance.\textsuperscript{39} The district court granted the defendant’s motion for summary judgment, ruling that as a matter of law, the pitching form did not display sufficient creativity to satisfy the originality requirement for copyright protection.\textsuperscript{40} On appeal, the Second Circuit reversed the district court’s ruling on copyrightability, stating that as a matter of law, it could not be said that the plaintiff

\begin{flushleft}
34. \textit{Id.} at 362.
35. \textit{Id.} at 363.
36. \textit{See id.} at 363-64.
37. \textit{See Hayden, supra} note 17, at 227.
38. 937 F.2d 700 (2d Cir. 1991).
39. \textit{See id.} at 702.
40. \textit{See id.} at 703.
\end{flushleft}
failed to satisfy the originality requirement in the arrangement and selection of his pitching form.\textsuperscript{41}

The Second Circuit's holding that Kregos' pitching form was likely sufficient in its selection to be original and thus protected by copyright, was followed, however, by a finding that Associated Press likely did not infringe Kregos' copyright.\textsuperscript{42} The court held that Kregos only obtained a copyright by virtue of displaying the requisite creativity in the selection of his statistics, and that if another party displayed the requisite creativity by making a selection "that differed in more than a trivial degree," then there would be no infringement.\textsuperscript{43} Thus, to prevail on the issue of infringement on remand, Kregos would need to prove that the selection used in Associated Press' form was virtually identical to his own.

In Key Publications, Inc. v. Chinatown Today Publishing Enterprises, Inc.,\textsuperscript{44} the plaintiff sued the defendants for infringing its copyright in a Chinese-American yellow pages directory.\textsuperscript{45} At the conclusion of a bench trial, the district court held that the defendant infringed the plaintiff's copyright in its directory.\textsuperscript{46} On appeal, the Second Circuit held that the arrangement and selection of the Plaintiff's directory was sufficiently creative to warrant copyright protection since the plaintiff had exercised judgment in deciding what information to include and in what order to include it.\textsuperscript{47} The court stated this decision making process necessitated including certain facts to the exclusion of others and arranging them in a manner that could be best utilized by the plaintiff's customers.\textsuperscript{48}

While the court found the plaintiff had a valid copyright, it also held the defendant's use of information contained in the database did not infringe the plaintiff's copyright.\textsuperscript{49} The court stated that both the defendant's selection and arrangement of the information contained in its directory was sufficiently different than the selection and arrangement of the plaintiff's directory.\textsuperscript{50} A defendant can be liable for copyright infringement of a database only if its selection and arrangement are substantially similar, and not just if its factual content is substan-

\textsuperscript{41}. See id. at 704.
\textsuperscript{42}. See id. at 710.
\textsuperscript{43}. Id.
\textsuperscript{44}. 945 F.2d 509 (2d Cir. 1991).
\textsuperscript{45}. See id. at 511.
\textsuperscript{46}. See id. at 511-12.
\textsuperscript{47}. See id. at 513.
\textsuperscript{48}. See id. at 514.
\textsuperscript{49}. See id. at 515-16.
\textsuperscript{50}. See id.
tially similar. Thus, the Second Circuit reversed the district court's finding of copyright infringement.

Since the Supreme Court's decision in *Feist*, the Eleventh Circuit has granted even less protection to databases than the Second Circuit. Like the Second Circuit, the Eleventh Circuit has found that copying substantial portions of a database was not infringement because the selection and arrangement of information was not sufficiently creative to warrant copyright protection.

In *Bellsouth Advertising & Publishing Corp. v. Donnelley Information Publishing, Inc.*, Bellsouth sued Donnelley for infringing its copyright in a yellow pages directory that it had compiled. Both parties conceded that Bellsouth had a compilation copyright in the directory taken as a whole, and that the only elements of a database entitled to copyright protection are the selection, coordination, and arrangement of the information as they appear in the work as a whole. In addition, Donelley admitted that it entered into its computer, for the purpose of creating a competing yellow pages, all of the names, addresses, telephone numbers, and business type of each advertiser in the plaintiff's directory. On these facts, the district court found that Bellsouth's compilation copyright had been infringed by Donnelley.

On appeal, the Eleventh Circuit reversed the district court's decision. The court held the selection, coordination, and arrangement of the plaintiff's directory did not meet the level of originality and creativity required by *Feist*. The court stated the plaintiff's selection of facts was not sufficiently creative because the selection of facts was not an act of authorship, but merely a technique for discovering facts. "The protection of copyright must inhere in a creatively original selection of facts to be reported and not in the creative means used to discover those facts." In addition, the court stated the plaintiff's arrangement of facts was not sufficiently creative to warrant copyright protection because its alphabetical list of business types under generally utilized headings was entirely typical and practically inevitable. Therefore, the court reversed the district court's ruling, stating that even though the amount of material taken from the plaintiff's directory was quantitatively substantial, the defendant did not appropriate any original elements from the plaintiff's directory.

51. See id.
52. See id. at 517.
53. 999 F.2d 1436 (11th Cir. 1993).
54. See id. at 1438.
55. See id. at 1439.
56. See id.
57. See id. at 1444.
58. Id. at 1441.
59. See id. at 1442.
60. See id. at 1445-46.
In *Warren Publishing, Inc. v. Microdos Data Corp.*, plaintiff, the publisher of a cable television systems directory, brought a copyright infringement action against the defendant, the manufacturer of a computer software cable system directory. The plaintiff claimed the defendant infringed its copyright by copying its directory's selection and arrangement. On these facts, the district court found that the defendant was liable for infringement, holding that the plaintiff's selection of which communities to use in its directory was sufficiently creative and original to be copyrightable, and that the defendant's selection of communities was substantially similar to that of the plaintiff.

On appeal, the Eleventh Circuit reversed the district court's decision. The court held that the plaintiff "did not exercise any creativity or judgment in 'selecting' cable systems to include in its Factbook, but rather included the entire relevant universe known to it." The court stated that even if it assumed that the selection was original, and thus copyrightable, the plaintiff's claim for infringement would still fail because its selection was not its own, but that of the cable operators. The cable operators told the plaintiff which cable system was the lead system in each community, and thus formed the basis for the plaintiff's selection. This type of selection is not an act of authorship, but a technique for the discovery of facts, which is not protectable by copyright. "Just as the Copyright Act does not protect 'industrious collection,' it affords no shelter to the resourceful, efficient, or creative collector." Therefore, the court found that there was no copyright infringement because the defendant did not copy any of the plaintiff's copyrightable material.

Since *Feist*, the appellate courts have consistently proved the copyright protection afforded databases is extremely limited. Even in cases where the courts have found a database protectable by copyright, or even where copyrightability has been conceded, the courts have still held wholesale copying of information to be non-infringing. Proving that in the post *Feist* era the scope of copyright protection granted databases is incredibly thin.

V. THE NEED FOR DATABASE LEGISLATION

Databases are an indispensable part of the U.S. economy. "[T]hey are essential tools for improving productivity, advancing education

61. 115 F.3d 1509 (11th Cir. 1997).
62. See id. at 1513.
63. See id. at 1513-14.
64. Id. at 1518.
65. See id. at 1520.
66. Id.
67. See id. at 1520-21.
and training, and creating a more informed citizenry." 68 Since databases have such great social utility, the government needs to ensure that there are sufficient incentives for continued investment in their development and dissemination. 69 Unless adequate protection is afforded databases, investments in their production and maintenance will be sufficiently reduced, which will result not only in a loss of commercial profits, but also in a loss of public benefits that arise from access to the information they contain. 70 In fact, since the Supreme Court's elimination of the "sweat of the brow" doctrine, some database providers have refused to disseminate their databases to the public because of the uncertainty regarding whether their database will be protected under U.S. law.

Some large database producers in the United States and some European producers have reportedly been unwilling to make their databases available on-line in this country, despite the potential for substantial profit from that form of exploitation. One producer has even decided not to make its print database available to libraries because of a fear of piracy by library patrons. 71

The Supreme Court's decision in Feist, coupled with international database legislation 72 and the emergence of new technology that allows for the copying and arranging of massive amounts of information at the push of a button have all hastened the need for database legislation in the United States. As a result of these factors, Congress has tried to develop legislation that will provide both adequate incentives for the continued production of databases and, at the same time, ensure continued public access to the information they contain.

VI. PROPOSED ANTIPIRACY DATABASE LEGISLATION

The first Legislative attempt to protect databases occurred in May 1996, when Representative Carlos J. Moorhead of California introduced House Bill 3531, the Database Investment and Intellectual Property Antipiracy Act of 1996. The purpose of this Bill was to pro-

69. See id. at 3.
70. See U.S. Copyright Office, supra note 5, at 69.
71. Id. at 76.
72. Although beyond the scope of this paper, both the European Union and WIPO advanced legislation to protect databases. The European Union passed sui generis legislation that gave database owners a property right in the databases they produced. This legislation sought to harmonize the scope of copyright protection for databases throughout the European Union. This legislation provides that in order for other countries to receive protection for their databases under this act, their country must grant equivalent rights to databases. In addition, the WIPO has been considering proposals to protect databases. See J.H. Reichman & Pamela Samuelson, Intellectual Property Rights in Data, 50 VAND. L. REV. 51 (1997).
mote the continued investment in the development and dissemination of databases and to prevent database piracy.\textsuperscript{73} The provisions of this Bill, however, were heavily criticized\textsuperscript{74} and the Bill never made it out of the House, but died in committee at the conclusion of the 104th session.\textsuperscript{75} Even though this Bill did not pass during the 104th session, new legislation was introduced during the 105th session.

On October 7, 1997, Representative Howard Coble of North Carolina introduced House Bill 2652, the Collections of Information Antipiracy Act.\textsuperscript{76} Unlike its predecessor, H.R. 2652 did not seek to grant \textit{sui generis} protection to databases, but sought to protect databases against harmful misappropriations.\textsuperscript{77} This Bill was based on the principles of unfair competition, fashioned after the Lanham Act, and sought to supplement, rather than replace existing copyright law.\textsuperscript{78} This Bill was approved as amended by a full vote of the House Judiciary Committee on March 24, 1998.\textsuperscript{79} While this Bill received broad support in the House, it encountered more difficulty in the Senate.\textsuperscript{80} In an effort to alleviate the Senate’s concerns, meetings were held under the direction of the Judiciary Committee to try and seek a resolution that would be favorable to all.\textsuperscript{81} While progress was made during these meetings, an acceptable solution could not be reached prior to the adjournment of the 105th session.\textsuperscript{82}

In 1999, for the third straight session, database legislation was introduced into the House during the 106th Session in the form of House Bill 354.\textsuperscript{83} Again, this legislation was entitled the Collections of Information Antipiracy Act. H.R. 354 is substantially similar to the amended version of its predecessor, H.R. 2652, except that it expands the ability of the scientific, library, and educational communities to use the information contained in databases. Like its predecessors, H.R. 354 attempts to revive the “sweat of the brow” doctrine by filling the gaps in protection that databases have received since the Supreme Court’s decision in \textit{Feist}.  

\textsuperscript{73} See H.R. 3631, 104th Cong. (1996).
\textsuperscript{74} The biggest criticism against the Bill was that it would have a devastating impact on the scientific, library, and educational communities due to the Bill’s broad restrictions on access and fair use.
\textsuperscript{76} H.R. 2652, 105th Cong. (1997).
\textsuperscript{77} Recent Development, House Judiciary Committee Approves Amended Database Protection Bill, 10 No. 5 J. PROPRIETARY RTS. 21 (May 1998).
\textsuperscript{78} See id.
\textsuperscript{79} See id.
\textsuperscript{80} See CONG. REC., supra note 3.
\textsuperscript{81} See id.
\textsuperscript{82} See id.
\textsuperscript{83} H.R. 354, 106th Cong. (1999).
A. Provisions of the Collections of Information Antipiracy Act, H.R. 354, Section 1402: Prohibition Against Misappropriation

The most recent version of the Collections of Information Antipiracy Act, H.R. 354 seeks to protect databases by prohibiting certain uses and extractions of information contained in a database. Section 1402 sets out the central prohibition of the Act, it states:

Any person who makes available to others, or extracts to make available to others, all or a substantial part of a collection of information gathered, organized, or maintained by another person through the investment of substantial monetary or other resources, so as to cause harm to the primary market or a related market of that other person, or a successor in interest of that other person, for a product or service that incorporates that collection of information and is offered or intended to be offered for sale or otherwise in commerce by that other person, or a successor in interest of that person, shall be liable to that person or successor in interest for the remedies set forth in section 1406.84

This section seeks to prohibit uses and extractions of information contained in qualifying databases that cause harm to either the primary or related market of the database owner.

Under section 1402, a misappropriation could result from an unauthorized extraction or use in commerce of any substantial part of a database.85 Whether a substantial part of a database has been misappropriated depends on both a qualitative and quantitative analysis. Thus, a misappropriation could occur where a person takes a relatively small portion of the information contained in a database, if that information is central to the database’s worth. Likewise, a misappropriation could occur if a person copied a major portion of the information contained in a database, regardless the information’s importance.

In addition, this section provides that in order to be eligible for protection, the information contained in the database must have been gathered, organized, or maintained through the investment of substantial monetary or other resources.86 Any substantial investment will be protected, whether it is money, time, or effort. This provision seeks to revive the “sweat of the brow” doctrine that had historically been used to prevent copying database information when that information had been created through a substantial investment.87 Section 1402 protects both the creator of a database and his successors in interest.88

85. See id.
86. See id.
88. See id.
B. Section 1403: Exceptions to the General Prohibition

Section 1403 of the Act provides a list of acts that are permitted despite the broad language of section 1402. This section permits the extraction or use of information contained in databases by certain nonprofit, educational, scientific, and research communities that "does not materially harm the primary market for the product or service referred to in section 1402."89 This exception makes clear that these communities will only be liable for a misappropriation if their extraction or use of information causes direct harm to the primary market of the database. Thus, a nonprofit scientific, library, or educational user will not be liable for a use or extraction that only indirectly harms a primary market or harms only a related market.90

Section 1403 also has a reasonable use provision that is similar on its face to the fair use provision in § 107 of the Copyright Act of 1976.91 Section 1403 provides protection for certain individual acts of misappropriations if they are reasonable under the circumstances.92 This section supplements the exceptions contained in section 1403(b) by purportedly providing a possible defense to nonprofit users even when their use or extraction directly harms the actual market for the database.93 Further, this section provides an exception for uses or extractions of individual items of information that are insubstantial in nature, independently gathered, used for verification, or used for news reporting.94 Finally, this section allows the owner of a lawful copy of a database to sell or otherwise dispose of that copy.95 This provision is similar to copyright law's first sale doctrine.96

C. Section 1404: Exclusions for Government Collections & Computer Programs

Section 1404 excludes federal, state, and local government databases from protection under the Act, regardless of whether the database was produced by an employee or agent of the government or whether it was produced under an exclusive government license.97 This section, however, allows protection under the Act to apply to databases that were produced by a government agent or licensee while

89. H.R. 354, 106th Cong. § 1403(b) (1999).
90. See Antipiracy Hearings, supra note 87, at 4-5 (statement of Marybeth Peters, Register of Copyrights).
93. See Antipiracy Hearings, supra note 87, at 5 (statement of Marybeth Peters, Register of Copyrights).
95. See H.R. 354, 106th Cong. § 1403(g) (1999).
not acting within the scope of his employment, and also to federal or state educational institutions that create databases in the course of education or scholarship.\textsuperscript{98}

Section 1404(b) rules out protection for computer programs. This section states that while the relationship between a computer program and a database is often close, computer programs are not protected under this Act; this includes programs that are used in the manufacture, production, operation, or maintenance of a database, or that address, route, forward, transmit, or store, provide, or receive access to connections for digital online communications.\textsuperscript{99} But, this section also makes clear that a database does not lose protection solely by virtue of its inclusion within a computer program.\textsuperscript{100}

D. Section 1405: The Act's Relationship to Other Laws

Section 1405 deals with the Act's relationship to other laws.\textsuperscript{101} This section specifically provides that it is an independent and separate division of copyright law, and does not affect any rights, limitations, or remedies concerning copyright law.\textsuperscript{102} Further, this section confirms that the scope of copyright protection for databases or for works of authorship contained in a database will not change.\textsuperscript{103} This section also does not affect other federal laws, including antitrust, patent, trademark, and contract law; the Communications Act of 1934; or the Securities and Exchange Act of 1934.\textsuperscript{104} Finally, section 1405(b) preempts any state law that provides databases with rights that are equivalent to section 1402 of the Act. State law with respect to trademark, design rights, antitrust, trade secrets, privacy, access to public documents, and contracts are not deemed to provide rights equivalent to section 1402.\textsuperscript{105}

E. Sections 1406 & 1407: Civil & Criminal Remedies for Violations of the Act

The civil remedies that are available to the database producer under the Act are covered in section 1406. This section provides that any person who is injured by a violation of section 1402 can bring suit in an appropriate federal court, unless the action is against a state governmental entity, in which case, the action can be brought in any

\textsuperscript{98} See id.
\textsuperscript{99} See id. § 1401(b)-(c).
\textsuperscript{100} See id.
\textsuperscript{101} See H.R. 354, 106th Cong. § 1405 (1999).
\textsuperscript{102} See id. § 1405(a).
\textsuperscript{103} See id. § 1405(c).
\textsuperscript{104} See id. § 1405.
\textsuperscript{105} See id.
court of proper jurisdiction.\textsuperscript{106} This section provides for both temporary and permanent injunctions, impoundment of all copies of contents of a misappropriated database, and monetary relief.\textsuperscript{107} Subsection (e) protects certain nonprofit communities by instructing a court to reduce or remit any monetary relief entirely in cases where the defendant is an employee or agent of a nonprofit educational, scientific, library, or research institution and the defendant believed and had reasonable grounds for believing that his conduct was permissible under the Act.\textsuperscript{108} Subsection (f) states that an injunction or impoundment shall not apply to any action against the United States government.\textsuperscript{109} Subsection (g) permits the remedies in this section to be enforced against a state governmental entity to the extent permitted by law.\textsuperscript{110} Finally, subsection (h) denies the relief of this section to Internet service providers unless the provider willfully violates section 1402.\textsuperscript{111}

In addition to civil penalties, section 1407 of the Act provides criminal penalties for certain offenses. This section provides for substantial criminal fines and imprisonment if any person willfully violates section 1402, and for direct or indirect commercial advantage or financial gain that causes an aggregate loss or damage to the database provider of more than $100,000 in any one-year period.\textsuperscript{112} This section does not apply to any employee or agent of a nonprofit educational, scientific, or research institution, library, or archives, if the agent or employee was acting within the scope of his employment.\textsuperscript{113}

F. Sections 1408 and 1409: Limitations on Actions and Defenses to Claims

The final substantive provisions of the Act are sections 1408 and 1409, which deal with statute of limitations issues and defenses to claims. The statute of limitations for both civil and criminal matters under this Act is three years from the time the cause of action arises or the claim accrues.\textsuperscript{114} This section also seeks to limit the protection to the information contained in the database to fifteen years from the time the information is first offered for sale or otherwise in commerce. This section states:

No monetary relief shall be available for a violation of section 1402 if the person who made available or extracted all or a substantial part of the collection

\textsuperscript{106} See H.R. 354, 106th Cong. § 1406(a) (1999).
\textsuperscript{107} See id. § 1406(b)-(d).
\textsuperscript{108} See id. § 1406(e).
\textsuperscript{109} See id. § 1406(f).
\textsuperscript{110} See id. § 1406(g).
\textsuperscript{111} See id. § 1406(h).
\textsuperscript{112} See id. § 1407.
\textsuperscript{113} See id. § 1407(a)(2).
\textsuperscript{114} See H.R. 354, 106th Cong. § 1409 (1999).
of information that is the source of the violation could not reasonably deter-
mine whether the date on which the portion of the collection that was made
available or extracted was first offered in commerce following the investment
of resources that qualified that portion of the collection for protection under
this chapter by the person claiming protection under this chapter or that per-
son's predecessor in interest was a date more than fifteen years prior to mak-
ing available or extracting the information.\textsuperscript{115}

This section purports to eliminate the possibility of perpetual protec-
tion of databases by excluding from protection the effort expended in
maintaining a preexisting database. Efforts to maintain a preexisting
database by updating its content will not extend the fifteen year pro-
tection period for that preexisting database, but will only provide pro-
tection to the new updated version.\textsuperscript{116}

VII. EVALUATION OF THE PROPOSED COLLECTIONS OF
INFORMATION ANTIPIRACY ACT, H.R. 354

Databases need protection from market-destructive appropri-
tions. Database providers that make the contents of their databases
accessible to the public risk unauthorized appropriations of their
work, which reduces providers' incentives to continue maintaining
and providing the existing databases and from creating new
databases. This risk is increased due to modern technology, which al-
 lows a person to copy a substantial amount of material with the click
of a button.

While most databases remain copyrightable, the level of protection
they have received since \textit{Feist} has been incredibly thin.\textsuperscript{117} This mi-
nuscule level of protection results from copyright law protecting only
the original and creative selection, arrangement, or coordination of
facts, and not the facts themselves. Copyright's protection policy,
however, precludes from protection many of the most valuable and
useful databases because they are comprehensive and cover an entire
universe of a given field and because they are organized in the most
useful, obvious way.\textsuperscript{118} Because of the comprehensive nature and
manner in which the databases are organized, they fail the originality
and creativity requirements of the Copyright Act, and thus are not
subject to copyright protection.\textsuperscript{119} Therefore, federal copyright law by
itself provides databases with insufficient protection from harmful
competitive misappropriations.

In addition to federal copyright law, trade secret, state contract,
and unfair competition laws also provide protection to databases.

\textsuperscript{115} \textit{Id.} \textsection 1408(c).
\textsuperscript{116} \textit{See Antipiracy Hearings, supra note 87, at 7 (statement of Marybeth Peters, Reg-
ister of Copyrights).}
\textsuperscript{117} \textit{See supra Part III.}
\textsuperscript{118} \textit{See supra note 5, at 75-76.}
\textsuperscript{119} \textit{See id.}
This protection, however, is only stop-gap protection and is ineffective because it provides only a patch-like quilt of protection to databases. This kind of stop-gap protection is unacceptable because both creators and users of databases need predictability and certainty in deciding what they can and cannot legally use or extract. While carefully tailored database legislation is necessary, the current Collections of Information Antipiracy Act is flawed and must be revamped in order to strike a better balance between the needs of database creators and their public users.

The current Collections of Information Antipiracy Act represents the legislature's attempt to restore to database providers the same sense of security that they once had under the "sweat of the brow" doctrine. Congress has tried to craft a Bill that provides adequate incentives for the continued production of databases while ensuring the public continued access to the information they contain. While Congress' attempt to craft such a Bill is commendable, the current version of the Collections of Information Antipiracy Act, H.R. 354 sweeps too broadly. H.R. 354 fails to create a proper balance between assuring sufficient incentives for the continued investment in databases and protecting public access to the information they contain. Instead, the Bill grants too much protection and power to the database provider, vesting the provider with what in essence amounts to monopoly control over much of the information contained in its database.

H.R. 354 fails to strike a proper balance between the competing societal goals in a number of ways. First, the Act's prohibition sweeps too broadly because it provides protection against people other than competitors and malicious vandals. This broad prohibition will likely have significant negative effects on the value-added products and services market. Second, since H.R. 354 measures misappropriation quantitatively or qualitatively, it will prevent many legitimate reuses of information because the subsequent user will have no way of knowing in advance what information is quantitatively or qualitatively substantial. Thus, the Act will chill many legitimate uses and extractions of information contained within a database. Third, the nonprofit and reasonable use exceptions are too narrow. Fourth, the Act does not adequately protect public access to sole-source databases. Fifth, the protection afforded databases under the proposed Bill unnecessarily applies retroactively. Finally, H.R. 354 fails to solve the problem of perpetual protection for electronic databases.

120. See Tessensohn, supra note 1, at 464.
121. See id.
123. See id. at 1.
The proposed Collections of Information Antipiracy Act, H.R. 354, that is currently being considered in Congress grants too much protection to the database provider because it does not limit its prohibition to only competitors and vandals, but provides databases with protection against anyone who causes harm to the database's actual or potential market. This protection is extremely broad and will likely have a significant harmful affect on value-added products and services. The main provision of H.R. 354 prohibits anyone from extracting or using in commerce a substantial part of a qualifying database so as to harm the primary or related market of that database. One of the Act's definitions of related market is "any market in which a person claiming protection with respect to a collection of information under section 1402 has take demonstrable steps to offer in commerce within a short period of time a product or service incorporating that collection of information with the reasonable expectation to derive revenue, directly or indirectly."

The broad protection granted by this section provides database providers with what amounts to a monopoly over the information the database contains, because it is conceivable that any market in which the contents of a database are used could necessarily be considered a potential market. This broad prohibition could prevent a second-comer who, through substantial effort, expenditure, or creativity, develops an entirely new and innovative use for an already existing database. To illustrate this dilemma, consider the following example.

Assume that a graduate student at the University of Michigan is writing his doctoral dissertation on the effects of, and compliance with, Title IX in the Big X Conference. In preparing his dissertation, the Michigan student does extensive research at many of the Big X's member institutions, pouring through numerous and mundane records and reports. When his dissertation is finally complete, he includes in it several charts that summarize his findings. The charts list by member institution both pre-and post-Title IX information regarding: the number of male and female athletes that participate in varsity athletics; the amounts expended by the school for each program; the salary level of both male and female coaches; and the level of student-athlete proportionality attained by each institution. His department posts an abstract of his dissertation on its website and gives copies to anyone who pays the copying charge.

125. See id.
126. Id. § 1401(4)(B)
After the Michigan student completes his dissertation, a professor at the University of Nebraska who specializes in gender studies conducts her own research on the effects of Title IX on the Big XII. She writes a book that compares her research with the findings from the Big X and other major conferences. Her book contains all the facts contained in the charts from the Michigan student's dissertation. The format of her presentation is different than that contained in the dissertation, and she gives proper credit to the source of her information. After completing the book, the professor finds a publisher that sells her book in both general and academic markets.

By creating and publishing the book, the professor extracted and used in commerce a substantial part of another person's collection of information (the Michigan student's charts). Thus, the Nebraska professor has violated the provisions of H.R. 354. Further, the professor's publishing of the book has likely harmed the primary market or related market for the Michigan student's dissertation; he decided not to invest the effort to publish his dissertation, because the professor's book already stated his main discoveries. The professor's book also caused the Michigan student to give up his plan to expand his dissertation into his own Title IX comparative analysis.

Under the proposed legislation as currently drafted, the Nebraska professor would likely be liable for an unauthorized misappropriation. She extracted and used in commerce a substantial part of the Michigan student's dissertation, which has caused harm to the primary and related market for the dissertation. The nonprofit educational exception would not apply to the Nebraska professor because the book is sold through both regular and academic bookstores and the professor receives royalties from the book's sale. Even if the professor could somehow wedge herself within the nonprofit requirement, the exception would probably still not apply because her use directly harms the market for the dissertation.

As a matter of public policy, this type of extraction and use by the Nebraska professor is not the kind of conduct that the government should prohibit. Information in the public domain that has been uncovered and compiled by others should be freely used by those who are not directly in competition with the original compiler. Requiring the Nebraska professor to redo the research the Michigan doctoral student already did is a waste of time and resources. These types of

128. See id.
129. See id.
130. See id.
131. See id.
132. See id.
133. See id.
134. See id.
value-added products should be encouraged, not inhibited. "As a society we want people to stand, in Isaac Newton's words, on the shoulders of giants. We do not want them to reinvent the wheel."135

Since reuses of information in new products like that of the Nebraska professor are common, many reuses of information contained in a database could meet the Act's misappropriation test.136 Such a prohibition could result in publicly useful products and services being kept from the public for years by an inattentive or monopolistic database provider.137 This would result in a windfall for the database provider without producing any offsetting benefit to the public. Any initiative that could weaken the ability of a second comer "to enter and compete effectively in markets for products that add value to existing data" without providing offsetting benefits to the public should be avoided.138 Thus, the main focus of any legislation should be aimed only at preventing the free-riding of competitors and the malicious acts of vandals.

A second reason why the proposed Collections of Information Antipiracy Act, H.R. 354, does not create a proper balance between the interests of database providers and database users is because it will prohibit many legitimate reuses of information because it uses a qualitative or quantitative approach to determine whether a substantial part of a database has been misappropriated.139 Allowing a database producer to prevent reuses of qualitatively substantial parts of a database would effectively prevent the reuse of any information contained within a database.140 Because a subsequent reuser of information has no way of knowing in advance what portions of information a database provider considers qualitatively substantial, the reuser likely will not be able to judge whether a particular extraction or use of information is qualitatively substantial without first going to court.141 In addition, since a determination of what is "qualitatively substantial" is necessarily a question of fact, the issue cannot be decided on a summary judgment motion, but will have to be decided at trial by the finder of fact.142 Therefore, the uncertainty and risk of

135. Id. at 2.
136. See Antipiracy Hearings, supra note 87, at 4 (testimony of the Computer & Communications Industry Association, the Information Technology Association of America, and the Online Banking Association).
137. Id.; see also Reichman & Samuelson, supra note 72.
138. See Reichman & Samuelson, supra note 72, at 125.
140. See Antipiracy Hearings, supra note 87, at 3 (statement of James G. Neal, Dean, University Libraries, Johns Hopkins University).
141. See id.
142. See id. at 3-4 (testimony of the Computer & Communications Industry Association, the Information Technology Association of America, and the Online Banking Association).
long, expensive litigation will likely have a serious chilling effect on many legitimate reuses of information.

Third, the nonprofit and reasonable use exceptions contained in H.R. 354 are too narrow and do not give sufficient protection to the educational, scientific, library, and research communities. Section 1403(b) of the Act provides an exception that permits the use or extraction of information contained in a database for certain nonprofit purposes, so long as the use or extraction does not materially harm the primary market for the database. This exception, however, may be so narrow that it destroys most of the exception’s value. The Act intends the term “market harm” to be construed very broadly. Market harm could include the failure to pay a license fee or even one lost sale of a database. Such a broad standard essentially places the definition of “primary markets” within the control of the database provider, because all a provider must do is identify all possible uses of its database and structure a set of licenses to capture all these different uses. Even if the provider cannot at first discover all the possible uses for its database, once an unanticipated use is discovered, the provider need only create a new license structure that incorporates the new use, thus making the unanticipated use part of the primary market from that point forward.

The nonprofit exception is also too narrow because it does not adequately protect libraries and educational institutions. The Act’s exception does not apply if the database’s primary market is materially harmed, regardless of whether the use is by a nonprofit entity. Libraries and educational institutions are, however, often the only market for a particular database. Thus, by definition, many nonprofit research uses of a database could be held to materially harm the database’s primary market. Therefore, making the exemption of little value to the majority of research and educational uses.

Finally, since the nonprofit provision is an exception to the Act’s general misappropriation rule, the burden of proving that the conduct complained of qualifies for protection under one of these exceptions

144. See Antipiracy Hearings, supra note 87, at 8 (statement by Charles E. Phelps on behalf of the Association of American Universities, the American Council on Education, and the National Association of State Universities & Land-Grant Colleges).
145. See id.
146. See id.
147. See id.
148. See id.
149. See H.R. 354, 106th Cong. § 1403(b) (1999).
151. See id.
152. See id.
will likely fall upon the nonprofit institution. Because nonprofit uses are so important, the burden should fall upon the plaintiff to prove both wrongful use or extraction and that the defendant's conduct does not fall within the nonprofit exception. Since the outcome of many cases turns on what party has the burden of proof, putting the burden on the defendant will likely chill many important nonprofit uses.

In addition to the nonprofit exception, H.R. 354 adopted an additional reasonable use provision that was not contained in earlier versions of the Bill. While the additional reasonable use provision is a significant improvement over previous versions of the Bill, it is constrained by absolute conditions that restrict its usefulness. Section 1403(a) purports to provide an exception to the Act's general prohibition for certain reasonable uses. At first glance, this provision appears to be similar to the fair use provision in § 107 of the Copyright Act. However, the last sentence of section 1403(a) states that certain factors must be considered when determining if a certain act is reasonable. This sentence should be construed as overriding the criteria in section 1403(a) with a standard that differs in form, but not in substance from the basic operating provisions of section 1402. If the provision were construed in this manner, it would override the copyright type of fair use balancing test. Also, unlike copyright's fair use exception, which provides courts with flexibility to consider all the relevant factors for virtually any type of use, H.R. 354 contains absolute conditions that a court must consider when determining whether a use is reasonable. These absolute conditions restrict the flexibility of a court to determine when a reasonable use has occurred.

Fourth, the proposed Act is flawed because it fails to grant the public sufficient access to sole-source databases. While the Act allows individuals to independently gather information regardless of whether it is already being used in a database, such independent collection is often virtually impossible or economically infeasible in markets where there is only one database provider. For example, one cannot go back in time to collect historical information, but must rely on existing

153. See id.

154. See id.

155. See id. at 17 (statement of Andrew J. Pincus, General Counsel, U.S. Dept. of Commerce).

156. See id.

157. See id. at 10 (statement by Charles E. Phelps on behalf of the Association of American Universities, the American Council on Education, and the National Association of State Universities & Land-Grant Colleges).

158. See id.

159. See id. at 6 (statement of James G. Neal, Dean, University Libraries, Johns Hopkins University).
databases to collect the necessary information.\textsuperscript{160} Nothing in H.R. 354 requires that a provider grant access to its database, thus leaving open the possibility that a provider could prevent certain groups or individuals from having access to information that is not available elsewhere.\textsuperscript{161}

The only provision the Act provides with respect to sole source databases is to leave intact federal antitrust laws.\textsuperscript{162} This provision, however, does not adequately solve the sole source problem because proving that a database provider has monopoly power in a relevant market is extremely difficult, expensive, and time consuming.\textsuperscript{163} By failing to address the sole source issue, H.R. 354 could create a monopoly in certain kinds of information, thus providing database providers with a windfall at the expense of public access.\textsuperscript{164}

Fifth, the Collections of Information Antipiracy Act, H.R. 354 fails to create a proper balance between creating incentives for providers to develop and maintain databases and protecting public access to the information contained in the databases because H.R. 354 applies retroactively. Since the Act applies retroactively, any database created within the last fifteen years is protected.\textsuperscript{165} Databases that have already been created, do not require any further incentives to ensure their creation.\textsuperscript{166} Therefore, providing retroactive protection to databases that already exist provides database providers with an unwarranted windfall without providing any offsetting benefit to the public.\textsuperscript{167}

Finally, H.R. 354 fails to strike a proper balance between database providers and the public because it does not adequately remedy the problem of perpetual protection for electronic databases. Section 1409(c) states that maintaining an existing database is not a sufficient enough investment to extend the term of protection for a database.\textsuperscript{168} This section was added to cure a serious problem that had been identified with earlier versions of the Bill, i.e., perpetual protection for

\textsuperscript{160} See id. at 4 (testimony of the Computer & Communications Industry Association, the Information Technology Association of America, and the Online Banking Association).

\textsuperscript{161} See id.

\textsuperscript{162} H.R. 354, 106th Cong. § 1405(d) (1999).

\textsuperscript{163} See Antipiracy Hearings, supra note 87, at 5 (testimony of the Computer & Communications Industry Association, the Information Technology Association of America, and the Online Banking Association).

\textsuperscript{164} See id. at 6 (statement of James G. Neal, Dean, University Libraries, Johns Hopkins University).

\textsuperscript{165} See id. at 5 (testimony of the Computer & Communications Industry Association, the Information Technology Association of America, and the Online Banking Association).

\textsuperscript{166} See id.

\textsuperscript{167} See id.

\textsuperscript{168} See H.R. 354, 106th Cong. § 1409(c) (1999).
merely expending effort to maintain an existing database. This new provision attempts to permit older versions of databases to fall into the public domain even if newer versions of the database remain protected.169

This new provision, however, fails to address the concern of what happens when the older unprotected version of a database is, as a practical matter, unavailable to the public. This concern is especially relevant in regard to electronic databases.170 Once a provider of an electronic database creates a new, updated version of the original database, the original database is often no longer available to the public.171 Therefore, a second-comer that wishes to use or extract a portion of an updated database will have no way of knowing which portions of a database are more than fifteen years old, and thus no longer subject to protection.172 Without access to the preexisting database, users will not be able to distinguish protected and unprotected data, and therefore, will be chilled in their use of unprotected data.173 It does little good for the Bill to end protection for an old database that is no longer publicly available, since the uncertainty of what is and is not protected will create a chilling effect on database users, that will in turn, grant many electronic database providers with de facto perpetual protection for their databases.174

VIII. CONCLUSION

Databases are a very important part of American society. They provide such widely used tools as telephone books, encyclopedias, almanacs, specialized reference materials, and countless other sources of information for businesses, researchers, scientists, educators, and consumers.175 Because databases have such great social utility, they must be granted sufficient protection to ensure their continued creation and development. With the abolition of copyright's "sweat of the brow" doctrine, traditional legal methods of protection are insufficient to provide many database developers with sufficient incentives to maintain and develop new databases. Thus, creating database legis-

169. See Antipiracy Hearings, supra note 87, at 4 (statement of James G. Neal, Dean, University Libraries, Johns Hopkins University).
170. See id. at 13 (statement of Andrew J. Pincus, General Counsel, U.S. Dept. of Commerce).
171. See id. at 4 (statement of James G. Neal, Dean, University Libraries, Johns Hopkins University).
172. See id at 5 (testimony of the Computer & Communications Industry Association, the Information Technology Association of America, and the Online Banking Association).
173. See id. at 14 (statement of Andrew J. Pincus, General Counsel, U.S. Dept. of Commerce).
174. See id.
lation to enhance the scope of intellectual property protection for database providers is necessary.

Any legislation that is enacted to protect databases, however, must be carefully tailored to balance the competing societal goal of providing adequate incentives for the continued production of databases, and the goal of ensuring public access to the information the contain. As drafted, the Collections of Information Antipiracy Act, H.R. 354 fails to strike a proper balance between these competing societal goals. H.R. 354 provides too much protection to the information contained in a database, and grants too much power to their providers. Thus, database providers will receive unwarranted windfalls at the expense of public access.

An alternative approach that should be seriously considered by Congress, is one based upon true misappropriation principles such as those set forth in *NBA v. Motorola, Inc.*\(^\text{176}\) This case stated that in order to have a finding of misappropriation, the plaintiff must prove: 1) the plaintiff generates or collects information at some cost or expense; 2) the value of the information is time sensitive; 3) the defendant's use of the information constitutes free-riding on the plaintiff's costly efforts to generate or collect it; 4) the defendant's use of the information is in direct competition with a product or service offered by the plaintiff; and 5) the ability of other parties to free ride on the efforts of the plaintiff would so reduce the incentive to produce the product or service that its existence or quality would be substantially threatened.\(^\text{177}\)

Since this approach is only targeted at competitors, it will not have significant adverse effects on education or scientific research, and will keep intact their current ability to access and use information contained in databases.\(^\text{178}\) This approach will also provide greater public access to information by preventing the establishment of many anti-competitive, economically damaging property rights in data.\(^\text{179}\) Finally, this approach will allow second comers to create new value-added databases that are indispensable to intellectual and societal progress.\(^\text{180}\) Therefore, Congress should not enact the Collections of Information Antipiracy Act as currently drafted, but should revamp it so that it truly strikes an adequate balance between database creators and users.

\(^{176}\) 105 F.3d 841 (2d Cir. 1997).

\(^{177}\) Id.


\(^{179}\) See id.

\(^{180}\) See id.