

Union Calendar No. 252

108TH CONGRESS
2^D SESSION

H. R. 3261

[Report No. 108–421, Parts I and II]

To prohibit the misappropriation of certain databases.

IN THE HOUSE OF REPRESENTATIVES

OCTOBER 8, 2003

Mr. COBLE (for himself, Mr. SMITH of Texas, Mr. HOBSON, Mr. GREENWOOD, Mr. TAUZIN, and Mr. SENSENBRENNER) introduced the following bill; which was referred to the Committee on the Judiciary

FEBRUARY 11, 2004

Reported from the Committee on the Judiciary with an amendment

[Strike out all after the enacting clause and insert the part printed in *italic*]

FEBRUARY 11, 2004

Referred sequentially to the Committee on Energy and Commerce for a period ending not later than March 12, 2004, for consideration of such provisions of the bill and amendment as fall within the jurisdiction of that committee pursuant to clause 1(f), rule X

MARCH 11, 2004

Additional sponsors: Mr. WEXLER, Mr. TURNER of Ohio, Mr. PORTMAN, and Mr. DELAHUNT

MARCH 11, 2004

Reported adversely from the Committee on Energy and Commerce with an amendment, committed to the Committee of the Whole House on the State of the Union, and ordered to be printed

[Strike out all after the enacting clause and insert the part printed in italic]

[For text of introduced bill, see copy of bill as introduced on October 8, 2003]

A BILL

To prohibit the misappropriation of certain databases.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 *This Act may be cited as the “Database and Collections*
5 *of Information Misappropriation Act”.*

6 **SEC. 2. DEFINITIONS.**

7 *In this Act:*

8 (1) *COLLECTIVE WORK.*—*The term “collective*
9 *work” means a work, such as a periodical issue, an-*
10 *thology, or encyclopedia, in which a number of con-*
11 *tributions, constituting separate and independent*
12 *works in themselves, are assembled into a collective*
13 *whole.*

14 (2) *COMMERCE.*—*The term “commerce” means*
15 *all commerce which may be lawfully regulated by the*
16 *Congress.*

17 (3) *COMPILATION.*—*The term “compilation”*
18 *means a work formed by the collection and assembling*
19 *of preexisting materials or of data that are selected,*
20 *coordinated, or arranged in such a way that the re-*

1 *sulting work as a whole constitutes an original work*
2 *of authorship. The term “compilation” includes collec-*
3 *tive works.*

4 (4) *DATABASE.—*

5 (A) *IN GENERAL.—Subject to subparagraph*
6 *(B), the term “database” means a collection of a*
7 *large number of discrete items of information*
8 *produced for the purpose of bringing such dis-*
9 *crete items of information together in one place*
10 *or through one source so that persons may access*
11 *them.*

12 (B) *EXCLUSIONS.—The term database does*
13 *not include any of the following:*

14 (i) *A work of authorship, other than a*
15 *compilation or a collective work.*

16 (ii) *A collection of information that*
17 *principally performs the function of ad-*
18 *dressing, routing, forwarding, transmitting,*
19 *or storing digital online communications or*
20 *receiving access to connections for digital*
21 *communications, except that the fact that a*
22 *collection of information includes or consists*
23 *of online location designations shall not by*
24 *itself be the basis for applying this clause.*

1 (iii) *A collection of information gath-*
2 *ered, organized, or maintained to perform*
3 *the function of providing schedule and pro-*
4 *gram information for multichannel audio*
5 *or video programming.*

6 (iv) *A collection of information gath-*
7 *ered, organized, or maintained to register*
8 *domain name registrant contact data main-*
9 *tained by a domain name registration au-*
10 *thority, unless such registration authority*
11 *takes appropriate steps to ensure the integ-*
12 *egrity and accuracy of such information and*
13 *provides real-time, unrestricted, and fully*
14 *searchable public access to the information*
15 *contained in such collection of information.*

16 (C) *DISCRETE SECTIONS.*—*The fact that a*
17 *database is a subset of a database shall not pre-*
18 *clude such subset from treatment as a database*
19 *under this Act.*

20 (5) *DOMAIN NAME.*—*The term “domain name”*
21 *means any alphanumeric designation which is reg-*
22 *istered with or assigned by any domain name reg-*
23 *istrar, domain name registry, or other domain name*
24 *registration authority as part of an electronic address*
25 *on the Internet.*

1 (6) *IN CONCERT.*—A person acts “in concert”
2 with another person who makes a database available
3 in commerce if the act of making available in com-
4 merce is planned, arranged, coordinated, adjusted,
5 agreed upon, or settled between the two persons acting
6 together, in pursuance of some design or in accord-
7 ance with some scheme.

8 (7) *INFORMATION.*—The term “information”
9 means facts, data, works of authorship, or any other
10 intangible material capable of being generated or
11 gathered.

12 (8) *INTERNET.*—The term “Internet” means the
13 combination of computer facilities and electro-
14 magnetic transmission media, and related equipment
15 and software, comprising the interconnected world-
16 wide network of computer networks that employ the
17 Transmission Control Protocol/Internet Protocol or
18 any successor protocol to transmit information.

19 (9) *LEGAL ENTITY.*—The term “legal entity”
20 means a person, other than an individual, including
21 a firm, corporation, union, or other organization,
22 which is organized under the laws of the United
23 States, a State, the District of Columbia, or any com-
24 monwealth, territory, or possession of the United
25 States, or the laws of a foreign country.

1 (10) *MAINTAIN*.—To “maintain” a database
2 means to update, validate, or supplement the infor-
3 mation contained in the database.

4 (11) *MAKING AVAILABLE IN COMMERCE TO OTH-*
5 *ERS*.—The term “making available in commerce to
6 others” means making available in commerce to—

7 (A) a substantial number of members of the
8 public; or

9 (B) a number of persons that extends be-
10 yond—

11 (i) a family and its social acquaint-
12 ances; or

13 (ii) those who could reasonably antici-
14 pate to have a database made available in
15 commerce to them without a customary
16 commercial relationship.

17 A court may take into account repeated acts directed
18 to different persons by the same or concerted parties
19 in determining whether the limits imposed by sub-
20 paragraph (B)(ii) have been exceeded.

21 **SEC. 3. PROHIBITION AGAINST MISAPPROPRIATION OF**
22 **DATABASES.**

23 (a) *LIABILITY*.—Any person who makes available in
24 commerce to others a quantitatively substantial part of the
25 information in a database generated, gathered, or main-

1 *tained by another person, knowing that such making avail-*
2 *able in commerce is without the authorization of that other*
3 *person (including a successor in interest) or that other per-*
4 *son's licensee, when acting within the scope of its license,*
5 *shall be liable for the remedies set forth in section 7 if—*

6 (1) *the database was generated, gathered, or*
7 *maintained through a substantial expenditure of fi-*
8 *nancial resources or time;*

9 (2) *the unauthorized making available in com-*
10 *merce occurs in a time sensitive manner and inflicts*
11 *injury on the database or a product or service offering*
12 *access to multiple databases; and*

13 (3) *the ability of other parties to free ride on the*
14 *efforts of the plaintiff would so reduce the incentive*
15 *to produce or make available the database or the*
16 *product or service that its existence or quality would*
17 *be substantially threatened.*

18 (b) *INJURY.*—*For purposes of subsection (a), the term*
19 *“inflicts an injury” means serving as a functional equiva-*
20 *lent in the same market as the database in a manner that*
21 *causes the displacement, or the disruption of the sources,*
22 *of sales, licenses, advertising, or other revenue.*

23 (c) *TIME SENSITIVE.*—*In determining whether an un-*
24 *authorized making available in commerce occurs in a time*
25 *sensitive manner, the court shall consider the temporal*

1 *value of the information in the database, within the context*
2 *of the industry sector involved.*

3 **SEC. 4. PERMITTED ACTS.**

4 (a) *INDEPENDENTLY GENERATED OR GATHERED IN-*
5 *FORMATION.—This Act shall not restrict any person from—*

6 (1) *independently generating or gathering infor-*
7 *mation obtained by means other than extracting it*
8 *from a database generated, gathered, or maintained*
9 *by another person; and*

10 (2) *making that information available in com-*
11 *merce.*

12 (b) *ACTS OF MAKING AVAILABLE IN COMMERCE BY*
13 *NONPROFIT SCIENTIFIC OR RESEARCH INSTITUTIONS.—*

14 *Subject to section 9, the making available in commerce of*
15 *a substantial part of a database by a nonprofit scientific*
16 *or research institution, including an employee or agent of*
17 *such institution acting within the scope of such employment*
18 *or agency, for nonprofit scientific or research purposes shall*
19 *not be prohibited by section 3 if the court determines that*
20 *the making available in commerce of the information in*
21 *the database is reasonable under the circumstances, taking*
22 *into consideration the customary practices associated with*
23 *such uses of such database by nonprofit scientific or re-*
24 *search institutions and other factors that the court deter-*
25 *mines relevant.*

1 (c) *HYPERLINKING*.—Nothing in this Act shall restrict
2 the act of hyperlinking of one online location to another
3 or the providing of a reference or pointer (including such
4 reference or pointer in a directory or index) to a database.

5 (d) *NEWS REPORTING*.—Nothing in this Act shall re-
6 strict any person from making available in commerce infor-
7 mation for the primary purpose of news reporting, includ-
8 ing news and sports gathering, dissemination, and com-
9 ment, unless the information is time sensitive and has been
10 gathered by a news reporting entity, and making available
11 in commerce the information is part of a consistent pattern
12 engaged in for the purpose of direct competition.

13 **SEC. 5. EXCLUSIONS.**

14 (a) *GOVERNMENT INFORMATION*.—

15 (1) *IN GENERAL*.—Except as provided in para-
16 graph (2), protection under this Act shall not extend
17 to—

18 (A) a database generated, gathered, orga-
19 nized, or maintained by a Federal, State, or
20 local governmental entity, or by an employee or
21 agent of such an entity, acting within the scope
22 of such employment or agency; or

23 (B) a database generated, gathered, or
24 maintained by an entity pursuant to and to the

1 *extent required by a Federal statute or regula-*
2 *tion requiring such a database.*

3 (2) *EXCEPTION.*—*Nothing in this subsection*
4 *shall preclude protection under this Act for a data-*
5 *base gathered, organized, or maintained by an em-*
6 *ployee or agent of an entity described in paragraph*
7 *(1) that is acting outside the scope of such employ-*
8 *ment or agency, or by a Federal, State, or local edu-*
9 *cational institution, or its employees or agents, in the*
10 *course of engaging in education, research, or scholar-*
11 *ship.*

12 (b) *COMPUTER PROGRAMS.*—

13 (1) *PROTECTION NOT EXTENDED.*—*Subject to*
14 *paragraph (2), protection under section 3 shall not*
15 *extend to computer programs, including any com-*
16 *puter program used in the manufacture, production,*
17 *operation, or maintenance of a database, or to any*
18 *element of a computer program necessary to its oper-*
19 *ation.*

20 (2) *INCORPORATED DATABASES.*—*A database*
21 *that is otherwise subject to protection under section 3*
22 *is not disqualified from such protection solely because*
23 *it resides in a computer program, so long as the col-*
24 *lection of information functions as a database within*
25 *the meaning of this Act.*

1 **SEC. 6. RELATION TO OTHER LAWS.**

2 (a) *OTHER RIGHTS NOT AFFECTED.*—

3 (1) *IN GENERAL.*—Subject to subsection (b),
4 nothing in this Act shall affect rights, limitations, or
5 remedies concerning copyright, patent, trademark, de-
6 sign rights, antitrust, trade secrets, privacy, access to
7 public documents, and misuse.

8 (2) *RIGHT OF CONTRACT.*—Notwithstanding sub-
9 section (b), nothing in this Act shall affect rights, lim-
10 itations, or remedies concerning the common law
11 right of contract.

12 (b) *PREEMPTION OF STATE LAW.*—

13 (1) *LAWS REGULATING CONDUCT THAT IS SUB-*
14 *JECT OF THE ACT.*—On and after the effective date of
15 this Act, no State statute, rule, regulation, or common
16 law doctrine that prohibits or otherwise regulates con-
17 duct that is prohibited or regulated under this Act
18 shall be effective.

19 (2) *CLARIFICATION OF INAPPLICABILITY TO*
20 *CASES NOT INVOLVING COMMERCIAL COMPETITION.*—
21 Paragraph (1) shall not apply to preempt actions
22 under State law against a person for taking actions
23 that—

24 (A)(i) *disrupt the sources of data supply to*
25 *a database; or*

1 (ii) substantially impair the perceived accu-
2 racy, currency, or completeness of data in a
3 database by inaccurate, untimely, or incomplete
4 replication and distribution of such data; and

5 (B) do not involve the person making avail-
6 able in commerce the data from such database in
7 competition with such database.

8 (c) *COMMUNICATIONS ACT OF 1934*.—Nothing in this
9 Act shall affect the operation of section 222(e) or any other
10 provision of the Communications Act of 1934 (47 U.S.C.
11 151 *et seq.*), or shall restrict any person from making avail-
12 able in commerce or extracting subscriber list information,
13 as such term is defined in section 222(h)(3) of the Commu-
14 nications Act of 1934 (47 U.S.C. 222(h)(3)).

15 (d) *SECURITIES*.—Nothing in this Act shall—

16 (1) affect the operation of the Securities Act of
17 1933 (15 U.S.C. 78a *et seq.*), the Securities Exchange
18 Act of 1934 (15 U.S.C. 78a *et seq.*), the Public Utility
19 Holding Company Act of 1935 (15 U.S.C. 79a *et*
20 *seq.*), the Trust Indenture Act of 1939 (15 U.S.C.
21 77aaa *et seq.*), the Investment Company Act of 1940
22 (15 U.S.C. 80a–1 *et seq.*), the Investment Advisers Act
23 of 1940 (15 U.S.C. 80b *et seq.*), or the Securities In-
24 vestor Protection Act of 1970 (15 U.S.C. 78aaa *et*
25 *seq.*), or the rules or regulations thereunder;

1 (2) *affect the authority of the Securities and Ex-*
2 *change Commission; or*

3 (3) *apply to information with respect to*
4 *quotations for, or indications, orders, or transactions*
5 *in, securities.*

6 (e) *MISUSE.—Judicial doctrines of misuse shall apply*
7 *under this Act.*

8 **SEC. 7. CIVIL REMEDIES.**

9 (a) *CIVIL ACTIONS.—*

10 (1) *COMMENCEMENT OF ACTIONS.—Any person*
11 *who is injured by a violation of section 3 may bring*
12 *a civil action for such a violation in an appropriate*
13 *United States district court. Any action against a*
14 *State governmental entity may be brought in any*
15 *court that has jurisdiction over claims against such*
16 *entity.*

17 (2) *NOTICE OF COMMENCEMENT OF ACTIONS AND*
18 *APPEALS.—Any person who brings an action for such*
19 *a violation, or who files an appeal from any final de-*
20 *cision on such an action, shall transmit notice of such*
21 *action or appeal to the Federal Trade Commission,*
22 *the United States Patent and Trademark Office, and*
23 *the Register of Copyrights, in accordance with sub-*
24 *section (i)(1).*

1 (b) *TEMPORARY AND PERMANENT INJUNCTIONS.*—Any
2 court having jurisdiction of a civil action under this section
3 shall have the power to grant temporary and permanent
4 injunctions, according to the principles of equity and upon
5 such terms as the court may deem reasonable, to prevent
6 or restrain a violation or attempted violation of section 3.
7 Any such injunction may be served anywhere in the United
8 States on the person enjoined, and may be enforced by pro-
9 ceedings in contempt or otherwise by any United States dis-
10 trict court having jurisdiction over that person.

11 (c) *MONETARY RELIEF.*—

12 (1) *ACTUAL DAMAGES AND ATTRIBUTABLE PROF-*
13 *ITS.*—When a violation of section 3 has been estab-
14 lished in any civil action arising under this section,
15 the plaintiff shall be entitled to recover the actual
16 damages sustained by the plaintiff as a result of the
17 violation and any profits of the defendant that are at-
18 tributable to the violation and are not taken into ac-
19 count in computing the actual damages sustained by
20 the plaintiff. The court shall assess such profits or
21 damages or cause the same to be assessed under its di-
22 rection. In assessing profits the plaintiff shall be re-
23 quired to prove defendant's gross revenue only and the
24 defendant shall be required to prove all elements of
25 cost or deduction claims.

1 (2) *ADDITIONAL DAMAGES.*—*In addition to ac-*
2 *tual damages, the court may enter judgment for an*
3 *additional amount not exceeding 2 times such actual*
4 *damages after considering the following factors:*

5 (A) *Whether the plaintiff notified the de-*
6 *fendant of the alleged violation and the defend-*
7 *ant continued to violate section 3.*

8 (B) *The willfulness of the defendant's con-*
9 *duct.*

10 (C) *Whether the defendant has a history of*
11 *database misappropriation.*

12 (D) *The defendant's ability to pay.*

13 (E) *Whether the alleged violation had a se-*
14 *rious negative financial impact on the plaintiff.*

15 (F) *Any good faith effort by the defendant*
16 *to rectify the misappropriation.*

17 (G) *Whether the assessment of additional*
18 *damages is necessary in order to deter future*
19 *violations.*

20 (d) *IMPOUNDMENT.*—*At any time while an action*
21 *under this section is pending, including an action seeking*
22 *to enjoin a violation, the court may order the impounding,*
23 *on such terms as it deems reasonable, of all copies of con-*
24 *tents of a database made available in commerce or at-*
25 *tempted to be made available in commerce potentially in*

1 violation of section 3, and of all masters, tapes, disks, disk-
2 ettes, or other articles by means of which such copies may
3 be reproduced. The court may, as part of a final judgment
4 or decree finding a violation or attempted violation of sec-
5 tion 3, order the remedial modification or destruction of
6 all copies of contents of a database made available in com-
7 merce or attempted to be made available in commerce in
8 violation of section 3, and of all masters, tapes, disks, disk-
9 ettes, or other articles by means of which such copies may
10 be reproduced.

11 (e) *COSTS AND ATTORNEY'S FEES.*—The court in its
12 discretion may award reasonable costs and attorney's fees
13 to the prevailing party. The court shall award costs and
14 fees if it determines that an action was brought or a defense
15 was raised under this Act in bad faith.

16 (f) *ACTIONS AGAINST UNITED STATES GOVERN-*
17 *MENT.*—Subsections (b) and (d) shall not apply to any ac-
18 tion against the United States Government.

19 (g) *RELIEF AGAINST STATE ENTITIES.*—The relief
20 provided under this section shall be available against a
21 State governmental entity to the extent permitted by appli-
22 cable law.

23 (h) *LIMITATION ON LIABILITY OF CERTAIN ENTI-*
24 *TIES.*—

1 (1) *LIMITATION ON LIABILITY.*—No provider of
2 an interactive computer service shall be liable under
3 section 3 for making available information that is
4 provided by another information content provider.

5 (2) *DEFINITIONS.*—In this subsection, the terms
6 “interactive computer service” and “information con-
7 tent provider” have the meanings given those terms in
8 section 230(f) of the Communications Act of 1934 (47
9 U.S.C. 230(f)).

10 (3) *CONSTRUCTION.*—For purposes of section 230
11 of the Communications Act of 1934 and any other
12 provision of law, the provisions of this Act shall not
13 be construed to be a law pertaining to intellectual
14 property.

15 (i) *OVERSIGHT OF CIVIL REMEDIES BY FTC AND*
16 *PTO.*—

17 (1) *NOTICE.*—The Federal Trade Commission,
18 the Director of the United States Patent and Trade-
19 mark Office, and the Register of Copyrights shall, by
20 regulation, prescribe the form and procedures by
21 which persons shall transmit the notices required by
22 subsection (a)(2).

23 (2) *OVERSIGHT.*—The Federal Trade Commis-
24 sion, the Director of the United States Patent and
25 Trademark Office, and the Register of Copyrights

1 *shall review the actions conducted under this section*
2 *for the purposes of identifying instances in which ju-*
3 *dicial interpretation of this Act adversely or otherwise*
4 *materially affects the administration of laws and*
5 *policies within their respective jurisdictions.*

6 (3) *AMICUS CURIAE BRIEFS.*—*The Federal Trade*
7 *Commission, the Director of the United States Patent*
8 *and Trademark Office, and the Register of Copyrights*
9 *may, in appropriate instances, file briefs as friends*
10 *of the court in appeals from final decisions of actions*
11 *under this section.*

12 (4) *REPORTS.*—*The Federal Trade Commission,*
13 *the Director of the United States Patent and Trade-*
14 *mark Office, and the Register of Copyrights shall,*
15 *within 18 months after the date of the enactment of*
16 *this Act, each transmit a report to the Committee on*
17 *the Judiciary and the Committee on Energy and*
18 *Commerce of the House of Representatives and the*
19 *Committee on the Judiciary and the Committee on*
20 *Commerce, Science, and Transportation of the Senate*
21 *on their operations under this subsection. Such re-*
22 *ports shall include—*

23 (A) *a summary of any briefs filed under*
24 *paragraph (3);*

1 (3) *any student enrolled in such educational in-*
2 *stitution acting in furtherance of the supervised ac-*
3 *tivities or programs of the institution—*

4 *by reason of activities undertaken for nonprofit education,*
5 *scientific, or research purposes.*

6 (b) *ACCREDITATION.—For purposes of this section, ac-*
7 *creditation shall be as determined by a regional or national*
8 *accrediting agency recognized by the Council on Higher Ac-*
9 *creditation or the United States Department of Education.*

10 (c) *NONPROFIT RESEARCH LABORATORY.—For pur-*
11 *poses of this section, a nonprofit research laboratory is a*
12 *nonprofit research organization that is primarily engaged*
13 *in basic or applied scientific research, or both, and that*
14 *is a qualified organization as defined in section 41(b)(6)(B)*
15 *of the Internal Revenue Code of 1986 for purposes of the*
16 *research credit determined under section 41 of such Code.*

17 (d) *EXCEPTION.—Subsection (a) does not apply to an*
18 *institution, laboratory, employee of such institution or lab-*
19 *oratory, or student of such institution to the extent that*
20 *the institution, laboratory, employee, or student makes*
21 *available substantially all of a database in direct commer-*
22 *cial competition with a person who made the substantial*
23 *expenditure described in section 3(a)(1).*

1 **SEC. 10. EFFECTIVE DATE.**

2 (a) *IN GENERAL.*—*This Act shall take effect on the*
3 *date of the enactment of this Act, and shall apply to acts*
4 *of making available in commerce on or after that date with*
5 *respect to databases existing before, on, or after that date.*

6 (b) *PRIOR ACTS NOT AFFECTED.*—*No person shall be*
7 *liable under section 3 for making available in commerce*
8 *on or after the date of the enactment of this Act a quan-*
9 *titatively substantial part of the information in a database*
10 *in violation of that section, when the information was law-*
11 *fully extracted from the database before the date of the en-*
12 *actment of this Act, by that person or by that person’s pred-*
13 *ecessor in interest.*

14 **SEC. 11. NONSEVERABILITY.**

15 (a) *IN GENERAL.*—*If the Supreme Court of the United*
16 *States holds that the provisions of section 3, relating to pro-*
17 *hibition against misappropriation of databases, are invalid*
18 *under Article I of, or the First Amendment to, the Constitu-*
19 *tion of the United States, then this Act is repealed, effective*
20 *as of the date of the Supreme Court decision.*

21 (b) *TERMINATION.*—*Subsection (a) shall cease to be ef-*
22 *fective at the end of the 10-year period beginning on the*
23 *date of the enactment of this Act.*

Union Calendar No. 252

108TH CONGRESS
2^D SESSION

H. R. 3261

[Report No. 108-421, Parts I and II]

A BILL

To prohibit the misappropriation of certain
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FEBRUARY 11, 2004

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amendment

Referred sequentially to the Committee on Energy and
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