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Copyright

Copyright

THE WHITE HOUSE

WASHINGTON

June 17, 1998

MEMORANDUM FOR NEC DEPUTIES

FROM: TOM KALIL TAK

RE: ADMINISTRATION POSITION ON H.R. 2652, "COLLECTIONS OF INFORMATION ANTIPIRACY ACT"

Summary: The Administration currently does not have a consensus position on H.R. 2652, the "Collections of Information Antipiracy Act." The bill passed the House on May 19th by a voice vote. It has been referred to the Senate Judiciary Committee. However, it is possible that the House may attach this bill to legislation that would implement the WIPO (World Intellectual Property Organization) treaties that the Administration agreed to in December 1996. The NEC believes that we need a working group on this issue to see if we can develop an Administration position. If we can't reach consensus - we will bring this issue back to the NEC Deputies. NEC will work closely with the Office of Science and Technology Policy -- given the concerns of many of the science agencies about the database legislation.

If your agency is interested in participating in the working group - please call in your point of contact to Gay Joshlyn at 456-5362 by Friday, June 19th.

What does the legislation do?

Historically, courts have held that copyright protection extended to works lacking originality and/or creativity if a substantial amount of work had been involved in their creation. For example, a telephone directory might have been protected if the author had personally verified every entry. However, in 1991, the Supreme Court rejected this "sweat of the brow" doctrine in *Feist Publications, Inc. v. Rural Telephone Service Co.* Supporters of the legislation argue that this creates a gap in U.S. copyright law, which they propose to fill with a "misappropriations" law. H.R. 2652 does not establish a property right, but a tort-based cause of action against misappropriation.

The bill has the following provisions:

- It would prohibit the extraction or use in commerce of all or a substantial part of a "collection of information" in a manner which causes harm to the actual or potential market of the producer of the collection. A "collection of information" is defined as information (facts, data, works of authorship) that has been organized so that it can be accessed in one place.
- Acts such as independently gathering the information contained in the collection, using individual pieces of information, or using it for news reporting are expressly permitted.

The protections of the act do not extend to government information.

- The act contains both civil remedies (treble damages, temporary and permanent injunctions, impoundment) and criminal penalties (fines, 5-10 years). Criminal penalties do not apply to employees of libraries and educational, scientific and research institutions.

Arguments for the bill

- The *Feist* decision leaves a gap in U.S. copyright law for works that are not original or creative.
- Developing, compiling and updating databases is expensive. If it is easy to copy these databases, and legal protection against copying is inadequate, private sector investment will be deterred. New technologies make it much easier to copy and distribute entire databases.
- The European Union has issued a Directive on the Legal Protection of Databases. This protection will not be extended to U.S.-originated databases unless the U.S. is found to offer "comparable" protection to European databases.
- State misappropriation law only offers protection to some kinds of collections under certain circumstances.

Arguments against the bill

- The bill is not necessary because the commercial database industry is thriving.
- Currently, the conduct of scientific research is characterized by open exchange and the reuse of large quantities of data. As a society, we want researchers to "stand on the shoulders of giants" -- not "reinvent the wheel". This legislation could require researchers to find out who owns data, negotiate for the right to use it, or deter them from using data from third party sources in the first place. It could also create incentives for people or institutions to withhold data.
- It would harm publishers who take information from pre-existing databases and add value to it.
- Associations that represent the broad interests of the information technology industry are opposed to the bill.
- In many instances, the publisher of the database controls the underlying information -- making independent compilation impossible.