

[DISCUSSION DRAFT]

108TH CONGRESS
1ST SESSION

H. R. _____

IN THE HOUSE OF REPRESENTATIVES

Mr. (for himself,) introduced the following bill; which was referred to the
Committee on _____

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 Collec-
5 tions of Information Misappropriation Act".

6 **SEC. 2. DEFINITIONS.**

7 In this Act:



1 (1) COLLECTIVE WORK.—The term “collective
2 work” means a work, such as a periodical issue, an-
3 thology, or encyclopedia, in which a number of con-
4 tributions, constituting separate and independent
5 works in themselves, are assembled into a collective
6 whole.

7 (2) COMMERCE.—The term “commerce” means
8 all commerce which may be lawfully regulated by the
9 Congress.

10 (3) COMPILATION.—The term “compilation”
11 means a work formed by the collection and assem-
12 bling of preexisting materials or of data that are se-
13 lected, coordinated, or arranged in such a way that
14 the resulting work as a whole constitutes an original
15 work of authorship. The term “compilation” includes
16 collective works.

17 (4) COVERED ENTITY.—The term “covered en-
18 tity” means a legal entity that is—

19 (A) a telecommunications carrier engaged
20 in the provision of a telecommunications serv-
21 ice;

22 (B) a person engaged in the business of
23 providing an Internet access service;



1 (C) a person engaged in the business of
2 providing an Internet information location tool;
3 and

4 (D) a person similarly engaged in the
5 transmission, storage, retrieval, hosting, for-
6 matting, or translation (or any combination
7 thereof) of a communication made by another
8 person, without selection or alteration of the
9 content of the communication, except that such
10 person's deletion of a particular communication
11 or material made available in commerce by an-
12 other person in violation of section 3 shall not
13 constitute such selection or alteration of the
14 content of the communication.

15 (5) DATABASE.—

16 (A) IN GENERAL.—Subject to subpara-
17 graph (B), the term “database” means a collec-
18 tion of a large number of discrete items of in-
19 formation produced for the purpose of bringing
20 such discrete items of information together in
21 one place or through one source so that persons
22 may access them.

23 (B) EXCLUSIONS.—The term database
24 does not include any of the following:



1 (i) A work of authorship, other than
2 a compilation or a collective work.

3 (ii) A collection of information that
4 principally performs the function of ad-
5 dressing, routing, forwarding, transmit-
6 ting, or storing digital online communica-
7 tions or receiving access to connections for
8 digital communications, except that the
9 fact that a collection of information in-
10 cludes or consists of online location des-
11 ignations shall not by itself be the basis for
12 applying this clause.

13 (iii) A collection of information gath-
14 ered, organized, or maintained to perform
15 the function of providing multichannel
16 audio or video programming.

17 (iv) A collection of information gath-
18 ered, organized, or maintained to register
19 domain name registrant contact data
20 maintained by a domain name registration
21 authority, unless such registration author-
22 ity takes appropriate steps to ensure the
23 integrity and accuracy of such information
24 and provides real-time, unrestricted, and
25 fully searchable public access to the infor-



1 mation contained in such collection of in-
2 formation.

3 (C) DISCRETE SECTIONS.—The fact that a
4 database is a subset of a database shall not pre-
5 clude such subset from treatment as a database
6 under this Act.

7 (6) DOMAIN NAME.—The term “domain name”
8 means any alphanumeric designation which is reg-
9 istered with or assigned by any domain name reg-
10 istrar, domain name registry, or other domain name
11 registration authority as part of an electronic ad-
12 dress on the Internet.

13 (7) IN CONCERT.—A person acts “in concert”
14 with another person who makes a database available
15 in commerce if the act of making available in com-
16 merce is planned, arranged, coordinated, adjusted,
17 agreed upon, or settled between the two persons act-
18 ing together, in pursuance of some design or in ac-
19 cordance with some scheme.

20 (8) INFORMATION.—The term “information”
21 means facts, data, works of authorship, or any other
22 intangible material capable of being generated or
23 gathered.

24 (9) INTERNET.—The term “Internet” means
25 the combination of computer facilities and electro-



1 magnetic transmission media, and related equipment
2 and software, comprising the interconnected world-
3 wide network of computer networks that employ the
4 Transmission Control Protocol/Internet Protocol or
5 any successor protocol to transmit information.

6 (10) INTERNET ACCESS SERVICE.—The term
7 “Internet access service” means a service that en-
8 ables users to access content, information, electronic
9 mail, or other services offered over the Internet, and
10 may also include access to proprietary content, infor-
11 mation, and other services as part of a package of
12 services offered to consumers. Such term does not
13 include telecommunications services.

14 (11) INTERNET INFORMATION LOCATION
15 TOOL.—The term “Internet information location
16 tool” means a service that refers or links users to
17 an online location on the World Wide Web. Such
18 term includes directories, indices, references, point-
19 ers, and hypertext links.

20 (12) LEGAL ENTITY.—The term “legal entity”
21 means a person, other than an individual, including
22 a firm, corporation, union, or other organization,
23 which is organized under the laws of the United
24 States, a State, the District of Columbia, or any



1 commonwealth, territory, or possession of the United
2 States, or the laws of a foreign country.

3 (13) MAINTAIN.—To “maintain” a database
4 means to update, validate, or supplement the infor-
5 mation contained in the database.

6 (14) MAKING AVAILABLE IN COMMERCE TO
7 OTHERS.—The term “making available in commerce
8 to others” means making available in commerce to—

9 (A) a substantial number of members of
10 the public; or

11 (B) a number of persons that extends
12 beyond—

13 (i) a family and its social acquaint-
14 ances; or

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

19 A court may take into account repeated acts di-
20 rected to different persons by the same or con-
21 certed parties in determining the limits imposed
22 by subparagraph (B)(ii) have been exceeded.

23 (15) TELECOMMUNICATIONS.—The term “tele-
24 communications” means the transmission, between
25 or among points specified by the user, of informa-



1 tion of the user's choosing, without change in the
2 form or content of the information as sent and re-
3 ceived.

4 (16) TELECOMMUNICATIONS CARRIER.—The
5 term "telecommunications carrier" means any pro-
6 vider of telecommunications services, except that
7 such term does not include any person that, in the
8 ordinary course of its operations, makes telephones
9 available to the public or to transient users of its
10 premises, for interstate telephone calls using a pro-
11 vider of operator services.

12 (17) TELECOMMUNICATIONS SERVICE.—The
13 term "telecommunications service" means the offer-
14 ing of telecommunications for a fee directly to the
15 public, or to such classes of users as to be effectively
16 available directly to the public, regardless of the fa-
17 cilities used.

18 **SEC. 3. PROHIBITION AGAINST MISAPPROPRIATION OF**
19 **DATABASES.**

20 (a) LIABILITY.—Any person who makes available in
21 commerce to others a quantitatively substantial part of the
22 information in a database generated, gathered, or main-
23 tained by another person, knowing that such making avail-
24 able in commerce is without the authorization of that per-
25 son (including a successor in interest) or that person's li-



1 censee, when acting within the scope of its license, shall
2 be liable for the remedies set forth in section 7 if—

3 (1) the database was generated, gathered, or
4 maintained through a substantial expenditure of fi-
5 nancial resources or time;

6 (2) the unauthorized making available in com-
7 merce occurs in a time sensitive manner and inflicts
8 injury on the database or a product or service offer-
9 ing access to multiple databases; and

10 (3) the ability of other parties to free ride on
11 the efforts of the plaintiff would so reduce the incen-
12 tive to produce the product or service that its exist-
13 ence or quality would be substantially threatened.

14 (b) INJURY.—For purposes of subsection (a), the
15 term “inflicts an injury” means serving as a functional
16 equivalent in the same market as the database in a man-
17 ner that causes the displacement, or the disruption of the
18 sources, of sales, licenses, advertising, or other revenue.

19 (c) TIME SENSITIVE.—In determining whether an un-
20 authorized making available in commerce occurs in a time
21 sensitive manner, the court shall consider the temporal
22 value of the information in the database, within the con-
23 text of the industry sector involved.

1 **SEC. 4. PERMITTED ACTS.**

2 (a) **INDEPENDENTLY GENERATED OR GATHERED IN-**
3 **FORMATION.**—This Act shall not restrict any person from
4 independently generating or gathering information ob-
5 tained by means other than extracting it from a database
6 generated, gathered, or maintained by another person and
7 making that information available in commerce.

8 (b) **ACTS OF MAKING AVAILABLE IN COMMERCE BY**
9 **NONPROFIT EDUCATIONAL, SCIENTIFIC, OR RESEARCH**
10 **INSTITUTIONS.**—The making available in commerce of a
11 substantial part of a database by a nonprofit educational,
12 scientific, and research institution, including an employee
13 or agent of such institution acting within the scope of such
14 employment or agency, for nonprofit educational, sci-
15 entific, and research purposes shall not be prohibited by
16 section 3 if the court determines that the making available
17 in commerce of the information in the database is reason-
18 able under the circumstances, taking into consideration
19 the customary practices associated with such uses of such
20 database by non-profit educational, scientific, or research
21 institutions and other factors that the court determines
22 relevant.

23 (c) **HYPERLINKING.**—Nothing in this Act shall re-
24 strict the act of hyperlinking of one online location to an-
25 other or the providing of a reference or pointer (including

1 such reference or pointer in a directory or index) to a
2 database.

3 (d) NEWS REPORTING.—Nothing in this Act shall re-
4 strict any person from making available in commerce in-
5 formation for the primary purpose of news reporting, in-
6 cluding news and sports gathering, dissemination, and
7 comment, unless the information is time sensitive and has
8 been gathered by a news reporting entity, and making
9 available in commerce the information is part of a con-
10 sistent pattern engaged in for the purpose of direct com-
11 petition.

12 **SEC. 5. EXCLUSIONS.**

13 (a) GOVERNMENT INFORMATION.—

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

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

22 (B) a database generated, gathered, or
23 maintained by an entity pursuant to and to the
24 extent required by a Federal statute or regula-
25 tion requiring such a database.

1 (2) EXCEPTION.—Nothing in this section shall
 2 preclude protection under this Act for a database
 3 gathered, organized, or maintained by an employee
 4 or agent of an entity described in paragraph (1) that
 5 is acting outside the scope of such employment or
 6 agency, or by a Federal, State, or local educational
 7 institution, or its employees or agents, in the course
 8 of engaging in education, research, or scholarship.

9 (b) COMPUTER PROGRAMS.—

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

17 (2) INCORPORATED DATABASES.—A database
 18 that is otherwise subject to protection under section
 19 3 is not disqualified from such protection solely be-
 20 cause it resides in a computer program, so long as
 21 the collection of information functions as a database
 22 within the meaning of this Act.

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

24 (a) OTHER RIGHTS NOT AFFECTED.—Subject to
 25 subsection (b), nothing in this Act shall affect rights, limi-



1 tations, or remedies concerning copyright, patent, trade-
2 mark, design rights, antitrust, trade secrets, privacy, ac-
3 cess to public documents, misuse, and contract.

4 (b) PREEMPTION OF STATE LAW.—

5 (1) LAWS REGULATING CONDUCT THAT IS SUB-
6 JECT OF THE ACT.—On or after the effective date
7 of this Act, no State statute, rule, regulation, or
8 common law doctrine that prohibits or otherwise reg-
9 ulates conduct that is the subject of this Act shall
10 be effective.

11 (2) CLARIFICATION OF INAPPLICABILITY TO
12 CASES NOT INVOLVING COMMERCIAL COMPETI-
13 TION.—Paragraph (1) shall not apply to preempt ac-
14 tions under State law against a person for taking ac-
15 tions that—

16 (A)(i) disrupt the sources of data supply to
17 a database; or

18 (ii) substantially impair the perceived accu-
19 racy, currency, or completeness of data in a
20 database by inaccurate, untimely, or incomplete
21 replication and distribution of such data; and

22 (B) do not involve the person making
23 available in commerce the data from such data-
24 base in competition with such database.



1 (c) COMMUNICATIONS ACT OF 1934.—Nothing in
2 this Act shall affect the operation of section 222(e) or any
3 other provision of the Communications Act of 1934 (47
4 U.S.C. 151 et seq.), or shall restrict any person from mak-
5 ing available in commerce or extracting subscriber list in-
6 formation, as such term is defined in section 222(h)(3)
7 of the Communications Act of 1934 (47 U.S.C. 222(h)(3))

8 (d) SECURITIES.—Nothing in this title shall—

9 (1) affect the operation of the Securities Act of
10 1933 (15 U.S.C. 78a et seq.), the Securities Ex-
11 change Act of 1934 (15 U.S.C. 78a et seq.), the
12 Public Utility Holding Company Act of 1935 (15
13 U.S.C. 79a et seq.), the Trust Indenture Act of
14 1939 (15 U.S.C. 77aaa et seq.), the Investment
15 Company Act of 1940 (15 U.S.C. 80a-1 et seq.), the
16 Investment Advisers Act of 1940 (15 U.S.C. 80b et
17 seq.), or the Securities Investor Protection Act of
18 1970 (15 U.S.C. 78aaa et seq.), or the rules or reg-
19 ulations thereunder;

20 (2) affect the authority of the Securities and
21 Exchange Commission; or

22 (3) apply to information with respect to
23 quotations for, or indications, orders, or transactions
24 in, securities.

1 (e) MISUSE.— Judicial doctrines of misuse shall
2 apply under this Act.

3 **SEC. 7. CIVIL REMEDIES.**

4 (a) CIVIL ACTIONS.—

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

12 (2) NOTICE OF COMMENCEMENT OF ACTIONS
13 AND APPEALS.—Any person who brings an action
14 for such a violation, or who files an appeal from any
15 final decision on such an action, shall transmit no-
16 tice of such action or appeal with the Federal Trade
17 Commission and the Patent and Trademark Office
18 in accordance with subsection (j)(1).

19 (b) TEMPORARY AND PERMANENT INJUNCTIONS.—
20 Any court having jurisdiction of a civil action under this
21 section shall have the power to grant temporary and per-
22 manent injunctions, according to the principles of equity
23 and upon such terms as the court may deem reasonable,
24 to prevent or restrain a violation or attempted violation
25 of section 3. Any such injunction may be served anywhere



1 in the United States on the person enjoined, and may be
2 enforced by proceedings in contempt or otherwise by any
3 United States district court having jurisdiction over that
4 person.

5 (c) MONETARY RELIEF.—

6 (1) ACTUAL DAMAGES.—When a violation of
7 section 3 has been established in any civil action
8 arising under this section, the plaintiff shall be enti-
9 tled to recover the actual damages sustained by the
10 plaintiff as a result of the violation and any profits
11 of the defendant that are attributable to the viola-
12 tion and are not taken into account in computing
13 the actual damages sustained by the plaintiff. The
14 court shall assess such profits or damages or cause
15 the same to be assessed under its direction. In as-
16 ssuming profits the plaintiff shall be required to prove
17 defendant's gross revenue only and the defendant
18 shall be required to prove all elements of cost or de-
19 duction claims.

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



1 (A) whether the plaintiff notified the de-
2 fendant of the alleged violation and the defend-
3 ant continued to violate section 3;

4 (B) the willfulness of the defendant's con-
5 duct;

6 (C) whether the defendant has a history of
7 database misappropriation;

8 (D) the defendant's ability to pay;

9 (E) whether the alleged violation had a se-
10 rious negative financial impact on the plaintiff;

11 (F) any good faith effort by the defendant
12 to rectify the misappropriation; and

13 (G) whether the assessment of additional
14 damages is necessary in order to deter future
15 violations.

16 (d) IMPOUNDMENT.—At any time while an action
17 under this section is pending, including an action seeking
18 to enjoin a violation, the court may order the impounding,
19 on such terms as it deems reasonable, of all copies of con-
20 tents of a database made available in commerce or at-
21 tempted to be made available in commerce potentially in
22 violation of section 3, and of all masters, tapes, disks,
23 diskettes, or other articles by means of which such copies
24 may be reproduced. The court may, as part of a final judg-
25 ment or decree finding a violation or attempted violation



1 of section 3, order the remedial modification or destruc-
2 tion of all copies of contents of a database made available
3 in commerce or attempted to be made available in com-
4 merce in violation of section 3, and of all masters, tapes,
5 disks, diskettes, or other articles by means of which such
6 copies may be reproduced.

7 (e) COSTS AND ATTORNEY'S FEES.—The court in its
8 discretion may award reasonable costs and attorney's fees
9 to the prevailing party. The court shall award costs and
10 fees if it determines that an action was brought or a de-
11 fense was raised under this chapter in bad faith.

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

15 (g) RELIEF AGAINST STATE ENTITIES.—The relief
16 provided under this section shall be available against a
17 State governmental entity to the extent permitted by ap-
18 plicable law.

19 (h) SUBPOENA TO IDENTIFY VIOLATOR.—

20 (1) REQUEST.—A person who is injured by a
21 violation of section 3 or a person authorized to act
22 on that person's behalf may request the clerk of any
23 United States district court to issue a subpoena to
24 a covered entity for identification of a person alleged



1 to have violated section 3 in accordance with this
2 subsection.

3 (2) CONTENTS OF REQUEST.—The request may
4 be made by filing with the clerk—

5 (A) a proposed subpoena; and

6 (B) a sworn declaration to the effect that
7 the purpose for which the subpoena is sought is
8 to obtain the identity of a person alleged to
9 have violated section 3 and that such informa-
10 tion will only be used for the purpose of pre-
11 venting a violation under section 3.

12 (3) CONTENTS OF SUBPOENA.—The subpoena
13 shall authorize and order the covered entity receiving
14 the written notice and the subpoena to expeditiously
15 disclose to the person who is injured by a violation
16 of section 3 or the person authorized to act on that
17 person's behalf information sufficient to identify the
18 person alleged to have violated section 3 to the ex-
19 tent such information is available to the covered en-
20 tity.

21 (4) BASIS FOR GRANTING SUBPOENA.—If the
22 proposed subpoena is in proper form and the accom-
23 panying declaration is properly executed, the clerk
24 shall expeditiously issue and sign the proposed sub-



1 poena and return it to the requester for delivery to
2 the covered entity.

3 (5) ACTIONS OF COVERED ENTITY RECEIVING
4 SUBPOENA.—Upon receipt of the issued subpoena,
5 the covered entity shall expeditiously disclose to the
6 person who is injured by a violation of section 3 or
7 the person authorized to act on that person’s behalf
8 the information required by the subpoena, notwith-
9 standing any other provision of law.

10 (6) RULES APPLICABLE TO SUBPOENA.—Unless
11 otherwise provided by this subsection or by applica-
12 ble rules of the court, the procedure for issuance and
13 delivery of the subpoena, and the remedies for non-
14 compliance with the subpoena, shall be governed to
15 the greatest extent practicable by those provisions of
16 the Federal Rules of Civil Procedure governing the
17 issuance, service, and enforcement of a subpoena
18 duces tecum.

19 (i) LIMITATION ON LIABILITY OF CERTAIN ENTI-
20 TIES.—A covered entity shall not be liable for a violation
21 under section 3 unless—

22 (1) the person who made the database available
23 in commerce in violation of section 3 is an officer,
24 employee, or agent of the covered entity acting with-
25 in the scope of the actor’s duties or agency;



1 (2) an officer, employee, or agent of the covered
 2 entity, acting within the scope of the actor's duties
 3 or agency, actively directs or induces the act of mak-
 4 ing available in commerce in violation of section 3 by
 5 another person, or acts in concert with the person
 6 who made the database available in commerce in vio-
 7 lation of section 3; or

8 (3) the covered entity receives a financial gain
 9 or benefit that—

10 (A) is directly attributable to the making
 11 available in commerce of the database, or the
 12 content thereof, in violation of section 3; and

13 (B) is in excess of the ordinary compensa-
 14 tion for the rendering of the services described
 15 in subparagraph (A), (B), (C) or (D) of section
 16 2(2) that are provided by the covered entity.

17 (j) OVERSIGHT OF CIVIL REMEDIES BY FTC AND
 18 PTO.—

19 (1) NOTICE.—The Federal Trade Commission
 20 and the Patent and Trademark Office shall, by regu-
 21 lation, prescribe the form and procedures by which
 22 persons shall transmit the notices required by sub-
 23 section (a)(2).

24 (2) OVERSIGHT.—The Federal Trade Commis-
 25 sion and the Patent and Trademark Office shall re-



1 view the actions conducted under this section for the
2 purposes of identifying instances in which judicial
3 interpretation of this Act adversely or otherwise ma-
4 terially affects the administration of laws and poli-
5 cies within their respective jurisdictions.

6 (3) AMICUS CUREA BRIEFS.—The Federal
7 Trade Commission and the Patent and Trademark
8 Office may, in appropriate instances, file briefs as
9 friends of the court in appeals from final decisions
10 of actions under this section. The Patent and Trade-
11 mark Office shall consult with the Register of Copy-
12 rights before filing such a brief.

13 (4) REPORTS.—The Federal Trade Commission
14 and the Patent and Trademark Office shall, within
15 18 months after the date of enactment of this Act,
16 each transmit a report to the Committee on the Ju-
17 diciary and the Committee on Energy and Com-
18 merce of the House of Representatives and the Com-
19 mittee on the Judiciary and Committee on Com-
20 merce, Science, and Transportation of the Senate on
21 its operations under this subsection. Such reports
22 shall include—

23 (A) a summary of any briefs filed;



1 (B) an explanation of the impact, if any, of
2 the judicial decisions reviewed on existing laws
3 and policies within its jurisdiction; and

4 (C) any recommendations for legislative or
5 other changes that the agency considers appro-
6 priate.

7 **SEC. 8. LIMITATION ON ACTIONS.**

8 No civil action shall be maintained under this Act un-
9 less it is commenced within 2 years after the cause of ac-
10 tion arises or claim accrues.

11 **SEC. 9. EFFECTIVE DATE.**

12 (a) IN GENERAL.—This Act shall take effect on the
13 date of the enactment of this Act, and shall apply to acts
14 of making available in commerce on or after that date with
15 respect to databases existing before, on, or after that date.

16 (b) PRIOR ACTS NOT AFFECTED.—No person shall
17 be liable under section 3 for making available in commerce
18 after the date of the enactment of this Act of a quan-
19 titatively substantial part of the information in a database
20 in violation of that section, when the information was law-
21 fully extracted from the database before the date of the
22 enactment of this Act, by that person or by that person's
23 predecessor in interest.



1 **SEC. 10. NONSEVERABILITY.**

2 (a) **IN GENERAL.**—If the Supreme Court of the
3 United States holds that the provisions of section 3, relat-
4 ing to prohibition of misappropriation of databases, are
5 invalid under Article I of, or the First Amendment to, the
6 Constitution of the United States, then this Act is re-
7 pealed, effective as of the date of the Supreme Court deci-
8 sion.

9 (b) **TERMINATION.**—Subsection (a) shall cease to be
10 effective at the end of the 10-year period beginning on
11 the date of the enactment of this Act.

