

108TH CONGRESS  
1ST SESSION

# H. R. 3261

To prohibit the misappropriation of certain databases.

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## 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

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## 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:

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

1 works in themselves, are assembled into a collective  
2 whole.

3 (2) COMMERCE.—The term “commerce” means  
4 all commerce which may be lawfully regulated by the  
5 Congress.

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

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

15 (A) a telecommunications carrier engaged  
16 in the provision of a telecommunications serv-  
17 ice;

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

20 (C) a person engaged in the business of  
21 providing an Internet information location tool;  
22 and

23 (D) a person similarly engaged in the  
24 transmission, storage, retrieval, hosting, for-  
25 matting, or translation (or any combination

1           thereof) of a communication made by another  
2           person, without selection or alteration of the  
3           content of the communication, except that such  
4           person's deletion of a particular communication  
5           or material made available in commerce by an-  
6           other person in violation of section 3 shall not  
7           constitute such selection or alteration of the  
8           content of the communication.

9           (5) DATABASE.—

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

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

19                   (i) A work of authorship, other than  
20                   a compilation or a collective work.

21                   (ii) A collection of information that  
22                   principally performs the function of ad-  
23                   dressing, routing, forwarding, transmit-  
24                   ting, or storing digital online communica-  
25                   tions or receiving access to connections for

1 digital communications, except that the  
2 fact that a collection of information in-  
3 cludes or consists of online location des-  
4 ignations shall not by itself be the basis for  
5 applying this clause.

6 (iii) A collection of information gath-  
7 ered, organized, or maintained to perform  
8 the function of providing multichannel  
9 audio or video programming.

10 (iv) A collection of information gath-  
11 ered, organized, or maintained to register  
12 domain name registrant contact data  
13 maintained by a domain name registration  
14 authority, unless such registration author-  
15 ity takes appropriate steps to ensure the  
16 integrity and accuracy of such information  
17 and provides real-time, unrestricted, and  
18 fully searchable public access to the infor-  
19 mation contained in such collection of in-  
20 formation.

21 (C) DISCRETE SECTIONS.—The fact that a  
22 database is a subset of a database shall not pre-  
23 clude such subset from treatment as a database  
24 under this Act.

1           (6) DOMAIN NAME.—The term “domain name”  
2 means any alphanumeric designation which is reg-  
3 istered with or assigned by any domain name reg-  
4 istrar, domain name registry, or other domain name  
5 registration authority as part of an electronic ad-  
6 dress on the Internet.

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

14           (8) INFORMATION.—The term “information”  
15 means facts, data, works of authorship, or any other  
16 intangible material capable of being generated or  
17 gathered.

18           (9) INTERNET.—The term “Internet” means  
19 the combination of computer facilities and electro-  
20 magnetic transmission media, and related equipment  
21 and software, comprising the interconnected world-  
22 wide network of computer networks that employ the  
23 Transmission Control Protocol/Internet Protocol or  
24 any successor protocol to transmit information.

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

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

15          (12) LEGAL ENTITY.—The term “legal entity”  
16          means a person, other than an individual, including  
17          a firm, corporation, union, or other organization,  
18          which is organized under the laws of the United  
19          States, a State, the District of Columbia, or any  
20          commonwealth, territory, or possession of the United  
21          States, or the laws of a foreign country.

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

1           (14) MAKING AVAILABLE IN COMMERCE TO  
2 OTHERS.—The term “making available in commerce  
3 to others” means making available in commerce to—

4           (A) a substantial number of members of  
5 the public; or

6           (B) a number of persons that extends be-  
7 yond—

8           (i) a family and its social acquaint-  
9 ances; or

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

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

18           (15) TELECOMMUNICATIONS.—The term “tele-  
19 communications” means the transmission, between  
20 or among points specified by the user, of informa-  
21 tion of the user’s choosing, without change in the  
22 form or content of the information as sent and re-  
23 ceived.

24           (16) TELECOMMUNICATIONS CARRIER.—The  
25 term “telecommunications carrier” means any pro-

1 vider of telecommunications services, except that  
2 such term does not include any person that, in the  
3 ordinary course of its operations, makes telephones  
4 available to the public or to transient users of its  
5 premises, for interstate telephone calls using a pro-  
6 vider of operator services.

7 (17) TELECOMMUNICATIONS SERVICE.—The  
8 term “telecommunications service” means the offer-  
9 ing of telecommunications for a fee directly to the  
10 public, or to such classes of users as to be effectively  
11 available directly to the public, regardless of the fa-  
12 cilities used.

13 **SEC. 3. PROHIBITION AGAINST MISAPPROPRIATION OF**  
14 **DATABASES.**

15 (a) LIABILITY.—Any person who makes available in  
16 commerce to others a quantitatively substantial part of the  
17 information in a database generated, gathered, or main-  
18 tained by another person, knowing that such making avail-  
19 able in commerce is without the authorization of that per-  
20 son (including a successor in interest) or that person’s li-  
21 censee, when acting within the scope of its license, shall  
22 be liable for the remedies set forth in section 7 if—

23 (1) the database was generated, gathered, or  
24 maintained through a substantial expenditure of fi-  
25 nancial resources or time;

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

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

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

14          (c) TIME SENSITIVE.—In determining whether an un-  
15          authorized making available in commerce occurs in a time  
16          sensitive manner, the court shall consider the temporal  
17          value of the information in the database, within the con-  
18          text of the industry sector involved.

19          **SEC. 4. PERMITTED ACTS.**

20          (a) INDEPENDENTLY GENERATED OR GATHERED IN-  
21          FORMATION.—This Act shall not restrict any person from  
22          independently generating or gathering information ob-  
23          tained by means other than extracting it from a database  
24          generated, gathered, or maintained by another person and  
25          making that information available in commerce.

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

16 (c) HYPERLINKING.—Nothing in this Act shall re-  
17 strict the act of hyperlinking of one online location to an-  
18 other or the providing of a reference or pointer (including  
19 such reference or pointer in a directory or index) to a  
20 database.

21 (d) NEWS REPORTING.—Nothing in this Act shall re-  
22 strict any person from making available in commerce in-  
23 formation for the primary purpose of news reporting, in-  
24 cluding news and sports gathering, dissemination, and  
25 comment, unless the information is time sensitive and has

1 been gathered by a news reporting entity, and making  
2 available in commerce the information is part of a con-  
3 sistent pattern engaged in for the purpose of direct com-  
4 petition.

5 **SEC. 5. EXCLUSIONS.**

6 (a) GOVERNMENT INFORMATION.—

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

10 (A) a database generated, gathered, orga-  
11 nized, or maintained by a Federal, State, or  
12 local governmental entity, or by an employee or  
13 agent of such an entity, acting within the scope  
14 of such employment or agency; or

15 (B) a database generated, gathered, or  
16 maintained by an entity pursuant to and to the  
17 extent required by a Federal statute or regula-  
18 tion requiring such a database.

19 (2) EXCEPTION.—Nothing in this section shall  
20 preclude protection under this Act for a database  
21 gathered, organized, or maintained by an employee  
22 or agent of an entity described in paragraph (1) that  
23 is acting outside the scope of such employment or  
24 agency, or by a Federal, State, or local educational

1 institution, or its employees or agents, in the course  
2 of engaging in education, research, or scholarship.

3 (b) COMPUTER PROGRAMS.—

4 (1) PROTECTION NOT EXTENDED.—Subject to  
5 paragraph (2), protection under section 3 shall not  
6 extend to computer programs, including any com-  
7 puter program used in the manufacture, production,  
8 operation, or maintenance of a database, or to any  
9 element of a computer program necessary to its op-  
10 eration.

11 (2) INCORPORATED DATABASES.—A database  
12 that is otherwise subject to protection under section  
13 3 is not disqualified from such protection solely be-  
14 cause it resides in a computer program, so long as  
15 the collection of information functions as a database  
16 within the meaning of this Act.

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

18 (a) OTHER RIGHTS NOT AFFECTED.—

19 (1) IN GENERAL.—Subject to subsection (b),  
20 nothing in this Act shall affect rights, limitations, or  
21 remedies concerning copyright, patent, trademark,  
22 design rights, antitrust, trade secrets, privacy, ac-  
23 cess to public documents, and misuse.

24 (2) RIGHT OF CONTRACT.—Notwithstanding  
25 subsection (b), nothing in this Act shall affect

1 rights, limitations, or remedies concerning the com-  
2 mon law right of contract.

3 (b) PREEMPTION OF STATE LAW.—

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

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

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

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

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

24 (c) COMMUNICATIONS ACT OF 1934.—Nothing in  
25 this Act shall affect the operation of section 222(e) or any

1 other provision of the Communications Act of 1934 (47  
2 U.S.C. 151 et seq.), or shall restrict any person from mak-  
3 ing available in commerce or extracting subscriber list in-  
4 formation, as such term is defined in section 222(h)(3)  
5 of the Communications Act of 1934 (47 U.S.C.  
6 222(h)(3)).

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

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

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

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

24 (e) MISUSE.—Judicial doctrines of misuse shall apply  
25 under this Act.

1 **SEC. 7. CIVIL REMEDIES.**

2 (a) CIVIL ACTIONS.—

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

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

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

1 United States district court having jurisdiction over that  
2 person.

3 (c) MONETARY RELIEF.—

4 (1) ACTUAL DAMAGES AND ATTRIBUTABLE  
5 PROFITS.—When a violation of section 3 has been  
6 established in any civil action arising under this sec-  
7 tion, the plaintiff shall be entitled to recover the ac-  
8 tual damages sustained by the plaintiff as a result  
9 of the violation and any profits of the defendant that  
10 are attributable to the violation and are not taken  
11 into account in computing the actual damages sus-  
12 tained by the plaintiff. The court shall assess such  
13 profits or damages or cause the same to be assessed  
14 under its direction. In assessing profits the plaintiff  
15 shall be required to prove defendant's gross revenue  
16 only and the defendant shall be required to prove all  
17 elements of cost or deduction claims.

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

22 (A) Whether the plaintiff notified the de-  
23 fendant of the alleged violation and the defend-  
24 ant continued to violate section 3.

1 (B) The willfulness of the defendant's con-  
2 duct.

3 (C) Whether the defendant has a history of  
4 database misappropriation.

5 (D) The defendant's ability to pay.

6 (E) Whether the alleged violation had a se-  
7 rious negative financial impact on the plaintiff.

8 (F) Any good faith effort by the defendant  
9 to rectify the misappropriation.

10 (G) Whether the assessment of additional  
11 damages is necessary in order to deter future  
12 violations.

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

1 merce in violation of section 3, and of all masters, tapes,  
2 disks, diskettes, or other articles by means of which such  
3 copies may be reproduced.

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

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

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

16 (h) LIMITATION ON LIABILITY OF CERTAIN ENTI-  
17 TIES.—A covered entity shall not be liable for a violation  
18 under section 3 unless—

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

23 (2) an officer, employee, or agent of the covered  
24 entity, acting within the scope of the actor's duties  
25 or agency, actively directs or induces the act of mak-

1 ing available in commerce in violation of section 3 by  
2 another person, or acts in concert with the person  
3 who made the database available in commerce in vio-  
4 lation of section 3; or

5 (3) the covered entity receives a financial gain  
6 or benefit that—

7 (A) is directly attributable to the making  
8 available in commerce of the database, or the  
9 content thereof, in violation of section 3; and

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

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

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

21 (2) OVERSIGHT.—The Federal Trade Commis-  
22 sion and the Patent and Trademark Office shall re-  
23 view the actions conducted under this section for the  
24 purposes of identifying instances in which judicial  
25 interpretation of this Act adversely or otherwise ma-

1           terially affects the administration of laws and poli-  
2           cies within their respective jurisdictions.

3           (3) AMICUS CUREA BRIEFS.—The Federal  
4           Trade Commission, the Patent and Trademark Of-  
5           fice, and the Register of Copyrights may, in appro-  
6           priate instances, file briefs as friends of the court in  
7           appeals from final decisions of actions under this  
8           section.

9           (4) REPORTS.—The Federal Trade Commission  
10          and the Patent and Trademark Office shall, within  
11          18 months after the date of enactment of this Act,  
12          each transmit a report to the Committee on the Ju-  
13          diciary and the Committee on Energy and Com-  
14          merce of the House of Representatives and the Com-  
15          mittee on the Judiciary and Committee on Com-  
16          merce, Science, and Transportation of the Senate on  
17          its operations under this subsection. Such reports  
18          shall include—

19                   (A) a summary of any briefs filed;

20                   (B) an explanation of the impact, if any, of  
21                   the judicial decisions reviewed on existing laws  
22                   and policies within its jurisdiction; and

23                   (C) any recommendations for legislative or  
24                   other changes that the agency considers appro-  
25                   priate.

1 **SEC. 8. LIMITATION ON ACTIONS.**

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

5 **SEC. 9. EFFECTIVE DATE.**

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

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

18 **SEC. 10. NONSEVERABILITY.**

19 (a) IN GENERAL.—If the Supreme Court of the  
20 United States holds that the provisions of section 3, relat-  
21 ing to prohibition of misappropriation of databases, are  
22 invalid under Article I of, or the First Amendment to, the  
23 Constitution of the United States, then this Act is re-  
24 pealed, effective as of the date of the Supreme Court deci-  
25 sion.

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

○