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Lisa Barr

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DATABASE PROTECTION BILL

All intellectual property law must balance between providing incentives to private creators and maintaining a sufficient public access to created works. This tension is especially taut when the works in question are compilations of data. Increasingly, the database market consists of electronic databases, the technology of which enhances the ability to store and retrieve virtually limitless amounts of information. However, that same technology also enhances the ability of users to copy and sell databases at an economic loss to the original database creator. Quite simply put, the problem is that the creation of databases entails substantial costs of both time and money, yet the copying of databases is easy and costs little.

Database publishers were, for many years, protected under the “sweat of the brow” doctrine of intellectual property protection. However, in 1991 the Supreme Court reached its landmark decision in Feist Publications, Inc. v. Rural Telephone Service Company, Inc., a decision that eliminated the sweat of the brow doctrine after interpreting it as inconsistent with all other forms of intellectual property protection. That decision, which left database publishers covered in a whisper thin veil of copyright protection, has stimulated controversy and prompted legislators to take action.

1. Under the Copyright Act of 1976, a compilation is defined as “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.” 17 U.S.C. § 101 (1988).
2. Each year over one hundred billion dollars change hands for the use of commercial electronic databases ranging from case law to telephone directories. Susan H. Nycum, Database Protection, 490 PLI/PAT 703, 705 (1997).
4. Id.
5. Id.
Congress considered, but eventually rejected, a database protection bill last session, and a new database protection bill is again being contemplated this session, House Resolution 2652. If passed, this bill will add some necessary weight to the slim protection currently afforded databases. The two goals of this proposed legislation are to align database protection laws in the United States with a European Union directive requiring member states to adopt reciprocal \textit{sui generis} database laws, and to create an incentive to compile and publish databases. The bill protects the investments of database publishers from competitors who sponge off their efforts by misappropriating their carefully and expensively gathered information once it had been compiled.

This article will first briefly explore the history of database protection in the United States. Next, it will examine legislative protections offered databases on an international level, as well as a previous effort by Congress to expand database protection. It will then explain the bill currently before Congress, as well as that bill's strengths, weaknesses, and revisions. Finally, it will argue that H.R. 2652, as amended, should be enacted in order to restore the necessary equilibrium between private incentives and public access.

\section*{I. \textbf{BACKGROUND}}

Prior to the enactment of the Copyright Act of 1976, in cases decided under the Copyright Act of 1909 fact compilations were generally protected material. The theory under which they

8. A \textit{sui generis} law is similar but not identical to copyright law, and grants database owners exclusive ownership of the information contained within their database once it is created.


10. \textit{Id}.

11. \textit{See} American Travel & Hotel Directory Co. v. Gehring Publishing Co., 4 F.2d 415, 416 (S.D.N.Y. 1925) (protecting hotel directory); Leon v. Pacific Tel. & Tel. Co., 91 F.2d 484 (9th Cir. 1937) (protecting telephone white pages); Adventures In Good Eating v. Best Places To Eat, 131 F.2d 809, 811 (7th Cir. 1942) (restaurant directory protected).
received protection came to be known as "sweat of the brow" doctrine. In *Schroder v. William Morrow Co.*, a case which relied upon sweat of the brow protection, the plaintiff compiled a gardening directory listing the names and addresses of various seed and plant suppliers, and obtained for it a valid copyright. In an effort to save time, the defendant copied into its gardening directory the names and addresses listed on 27 of plaintiff's 63 pages without expending any independent effort or research. In that case, the Seventh Circuit held that "[a]n original compilation of names and addresses is copyrightable even though the individual names and addresses are in the public domain and not copyrightable." It reasoned that copyright law protected the compilation itself as a product of the plaintiff's industry.

*Yale University Press v. Row Peterson & Co.* came to a similar conclusion on the issue of whether a compilation of data was copyrightable. In that case, the plaintiff published a compilation of photographs. The book, entitled "The Pageant of America," was a pictorial history of the United States and its intended use was as a photographic reference encyclopedia. The defendant published illustrated school text-books which arguably contained at least 44 pictures also found in plaintiff's work. The court held that even though the parties were not in direct competition with each other, a

12. The standard for sweat of the brow protection was put forth in *Jeweler's Circular Publishing Co. v. Keystone Publishing Co.*, 281 F. 83 (2d. Cir. 1922): "The man who goes through the streets of a town and puts down the names of each of the inhabitants, with their occupations and their street number, acquires material of which he is the author. He produces by his labor a meritorious composition, in which he may obtain a copyright, and thus obtain the exclusive right of multiplying copies of his work." *Id.* at 88.

13. 566 F.2d 3 (7th Cir. 1977).
14. *Id.* at 4.
15. *Id.* at 4-6.
16. *Id.* at 5.
17. *Id.*
18. 40 F.2d 290 (S.D.N.Y. 1930).
19. *Id.* at 291.
20. *Id.* at 292.
21. *Id.*
preliminary injunction against defendant was warranted with respect to the 44 illustrations.\textsuperscript{22} At the heart of the decision was the concept that plaintiff’s work was protectable as a compilation because of the effort it took to compile. The court determined the right to copyright did not depend upon the literary skill or originality of a work, rather industrious collection was sufficient.\textsuperscript{23}

The previous two cases were decided under the Copyright Act of 1909 which expressly included compilations among protected works of authorship.\textsuperscript{24} However, in 1976 a new Copyright Act was passed which eliminated databases from the list of enumerated protected works.\textsuperscript{25} Even after the 1976 Act became effective in 1978, courts still held that certain compilations of facts were protectable under the sweat of the brow theory of copyright law. For example, in \textit{Hutchinson Telephone Co. v. Fronteer Directory Co. of Minnesota, Inc.}\textsuperscript{26} the plaintiff produced and distributed a telephone directory which it claimed the defendant copied in its competing telephone directory.\textsuperscript{27} After examining both the language and legislative history of the 1976 Act, as well as precedent cases the court held telephone directories were protectable as original works of authorship.\textsuperscript{28} The court stated that “[it was] evident that a directory compiled by a telephone company from its internally maintained records may be said to be

\begin{footnotes}
\item[22.] \textit{Id.} at 292-3.
\item[23.] \textit{Row Peterson}, 40 F.2d at 291-2.
\item[24.] Section 5 of the Copyright Act of 1909 specifically mentioned “directories... and other compilations” as copyrightable works. \textit{Feist}, 499 U.S. at 356.
\item[25.] The Copyright Act of 1976 specifically lists eight categories which are to be considered works of authorship: (1) literary works, (2) musical works, including any accompanying words, (3) dramatic works, including any accompanying materials, (4) pantomimes and choreographic works, (5) pictorial, graphic, and sculptural works, (6) motion pictures and other audiovisual works, (7) sound recordings, and (8) architectural works. \textit{17 U.S.C. § 102(a).}
\item[26.] 770 F.2d 128 (8th Cir. 1985).
\item[27.] \textit{Id.} at 129-30.
\item[28.] \textit{Id.} at 132.
\end{footnotes}
independently created. The court emphasized the plaintiff’s efforts in compiling information for the directory.

Then in 1991, the United States Supreme Court handed down its decision in *Feist*. That case focused on the familiar tension between the principal that facts are not copyrightable, although compilations of facts generally are. The question was whether the information contained within the plaintiff’s white pages telephone directories was copyrightable. The Supreme Court, in an opinion by Justice O’Connor, overturned the lower court and held that the Copyright Act protects originality not effort, and therefore the use of information contained in a directory without substantive copying could not be infringement. *Feist* established that under not just statutory but constitutional interpretation as well, a compilation will qualify for copyright only if it displays originality and a degree of creativity in the selection or arrangement of its component data. In the course of her opinion, Justice O’Connor heavily criticized the sweat of the brow doctrine and interpreted it as having impermissibly overextended copyright protection to cover factual material.

*Feist* made clear that although originality is the constitutionally and statutorily mandated standard for a work to receive copyright protection, it was not a stringent standard. Since the decision in *Feist*, therefore, an uncertainty has surfaced with respect to precisely how much copyright protection should be afforded the selection and arrangement of facts in databases. Even when a court decides that a compilation of data is copyrightable, it will often strip that holding of any meaning by finding no infringement. For example, the 11th Circuit examined the issue of whether the defendant infringed the plaintiff’s copyrighted telephone directory yellow pages in *Bellsouth Advertising & Publishing Corp. v.*

29. *Id.* at 131.
30. *Id.*
31. *Feist*, 499 U.S. at 344,
32. *Id.* at 360.
33. *Id.* at 362.
34. *Id.* at 353.
35. *Id.* at 362.
Donnelley Information Publishing Inc.\textsuperscript{36} The court held that although the plaintiff employed a specific strategy in selecting its data and organizing the information under original subheadings, the defendant's copying of the selections and arrangements into its own telephone directory was not an infringement.\textsuperscript{37} The court reasoned that neither the selection nor the arrangement of the telephone numbers was original.\textsuperscript{38}

Similarly, the Second Circuit in Key Publications Inc. v. Chinatown Today Publishing Enterprises Inc.\textsuperscript{39} held that the plaintiff's telephone directory was copyrightable because there was a creative selection of facts within the directory.\textsuperscript{40} However, the court proceeded to deny the work protection. The court held that the defendant did not infringe that copyright due to a "significantly different" selection of businesses included in the defendant's directory in addition to the copied listings.\textsuperscript{41}

The cases decided under the Copyright Act of 1976 in the wake of Feist indicate that courts are willing to offer only minimal protection for compilations of data. While some argue that Feist provides sufficient protection, it is important to acknowledge that although Feist may provide copyright protection for the selection and arrangement of databases, it does so only for "idiosyncratic or creative selection or organization of data [which] may be undesirable. . . . The most valuable databases are those that contain comprehensive, current information that is logically organized."\textsuperscript{42} Thus under current law, a database publisher must create a

\begin{itemize}
\item 36. 999 F.2d 1436, 1440 (11th Cir. 1993)(en banc).
\item 37. \textit{Id.} at 1441.
\item 38. \textit{Id.}
\item 39. 945 F.2d 509, 513 (2d Cir. 1991).
\item 40. \textit{Id.}
\item 41. \textit{Id.} at 515-16. \textit{See also} Victor Lalli Enter. Inc. v. Big Red Apple, Inc., 936 F.2d 671 (2d Cir. 1991) (finding no infringement where the charts at issue were purely functional, offered no possibility of variation, and the plaintiff displayed no selectivity or creativity). \textit{But see} CCC Information Services, Inc. v. Maclean Hunter Market Reports, 44 F.3d 61, 67 (2d Cir. 1994) (holding that the selection and arrangement of data in the plaintiff's compendium of car valuations sufficiently original to pass the low threshold called for in \textit{Feist}).
\item 42. Testimony of Dr. Laura D'andrea Tyson, \textit{supra} note 3, at 664842.
\end{itemize}

\url{https://via.library.depaul.edu/jatip/vol8/iss2/6}
database which is not organized in the most logical fashion, and therefore difficult to use in order to receive protection from infringement. Therefore, protection must be found elsewhere. A possible alternative source of protection would be the creation of new legislation. The challenge faced by legislators in drafting such legislation is that of protecting database creators' economic incentives without preventing the public from accessing important information.

II. PREVIOUS AND ALTERNATIVE ATTEMPTS TO RESTORE BALANCE AFTER FEIST

The inconsistent and unsatisfactory protection being granted to factual compilations in the lower courts has in fact resulted in legislative efforts to provide databases with more substantial protection in both the 104th and 105th Congresses. In addition to national efforts to regain the database protection revoked by Feist, there has also been a recent international undertaking to protect databases. The most successful international attempt at protecting databases has been a European Union directive, but an unsuccessful endeavor was also put forth at the World Intellectual Property Organization ("WIPO") conference in 1996.

A. The First Congressional Effort: H.R. 3531


44. Id.
45. The 1996 Act was much more complex and verbose than the bill currently before Congress, H.R. 2652.
legislation would have amended Title 15 of the United States Code, to protect for 25 years any database that was the result of a qualitatively or quantitatively substantial investment of human, financial or other resources in the collection, assembly, verification, organization or presentation of the database contents.\textsuperscript{46} The 1996 Act was aimed at preventing actual or threatened competitive injury by the misappropriation of databases or their contents, rather than targeting non-competitive uses.\textsuperscript{47} Both civil and criminal remedies were made available in the event that the legislation was violated by database copying.\textsuperscript{48} Additionally, the bill disallowed\textsuperscript{49} the circumvention of database protections by importing, manufacturing, or distributing any device that would bypass any protection mechanism on a particular database.\textsuperscript{50}

The 1996 Act was met with ample criticism. Opponents complained that the bill contained inadequate fair use provisions, and criticized the drafters of the bill for not consulting with members of the relevant scientific and educational communities.\textsuperscript{51} Largely because of these criticisms, the bill did not pass into law.

\textbf{B. International Efforts}


\textsuperscript{48} Section 7 of the bill provided for civil actions, temporary and permanent injunctions, impoundment, monetary relief against one who copied the contents of a database in a manner that conflicted with the owner's normal exploitation of the database. Section 8 of the bill provided criminal fines or imprisonment against anyone who violated the legislation willfully for commercial advantage and caused $10,000 of damage to a database owner in a one-year period.

\textsuperscript{49} Section 12 of the 1996 Act provided additional civil remedies for violation of §10 or §11 of the bill. Section 11 of the bill established means to protect the integrity of a databases management information.

\textsuperscript{50} H.R. 3531, 104th Cong. (1996).

\textsuperscript{51} \textit{Database Protection}, supra note 43, at 20.
On an international level, there has also been attempts to protect databases. In fact, much of the recent flurry to enact a national form of database protection in the United States was encouraged by the European Union Database Directive. Similar to United States legislative proposals, the directive was aimed at rescuing databases from the threat of market-destructive appropriations by competitors who contributed nothing to the collection of data. The directive defined database as any collection of independent works, data or other materials arranged in a systematic or methodical way and individually accessible by electronic or other means. The directive provided for copyright or sui generis protection for databases which would last for 15 years. The directive was scheduled to become law in each of the 15 European Union members by January 1, 1998.

The directive has caused database publishers in the United States to worry, because the directive contains a reciprocity provision which protects databases in foreign countries only if the foreign country provides similar protection in its own national legislation. Because the United States does not currently have comparable protection under its laws, databases originating in the United States

would receive no protection in the European Union. Therefore, there is serious risk that unauthorized copying of United States databases will take place once the directive is enacted into law by the member states. 59

In addition to the directive, other international laws have been proposed. Both European Union representatives and United States negotiators submitted proposals concerning the protection of databases to the WIPO 60 conference in 1996. 61 The United States sought to protect databases that represent a substantial investment in the collection, assembly, verification, organization, or presentation of the database contents. 62 Rights under the WIPO draft treaty were to have been granted in addition to any copyright protection available, and would not have affected other legal rights such as those under unfair competition laws. 63 Also under the proposal, countries would be able to expand or restrict databases protection by way of contract. 64 Like the 1996 Act, the WIPO treaty was met with reproach, and it failed to pass its initial stages of discussion. 65

III. THE CURRENT PROPOSED LEGISLATION: H.R. 2652

Notwithstanding the failure of the 1996 Act and the WIPO treaty, a second database protection bill was introduced in Congress this session. On October 9, 1997, Representative

59. Legislation/Treaties, supra note 45.
60. The WIPO is an arm of the United Nations to which the United States belongs, which concerns itself with the promotion of intellectual property and cooperation of international intellectual property laws. Lionel M. Lavenue, Database Rights and Technical Data Rights: The Expansion of Intellectual Property for the Protection of Databases, 38 SANTA CLARA L. REV. 1, 52 (1997).
61. Database Protection on Hold, supra note 50 at 20.
62. Id.
63. Legislation/Treaties, supra note 46, at 141.
64. Id. The EU directive was silent on the issue of contractual alterations to the rights granted under it.
Howard Coble of North Carolina introduced H.R. 2652, which would add a new Chapter 12 to Title 17. On March 18, 1998, H.R. 2652 was amended in the nature of a substitution offered by Coble. The amended bill, titled *Misappropriation of Collections of Information* [hereinafter “database bill”], cleared the House Subcommittee on Courts and Intellectual Property after being so amended. This bill, like the 1996 Act, seeks to fill the gap in intellectual property protection created by the *Feist* decision.

According to its sponsor the legislation “is a minimalist approach grounded in unfair competition principals as a complement to copyright” rather than a replacement to it.

A. The Database Bill: First Draft

Under the original version of the proposed bill, liability would be imposed on any person “who extracts, or uses in commerce, 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 harm that other person’s actual or potential market for a product or service that incorporates that collection of information and is offered by that person in commerce.” The bill contained both a list of exceptions and exclusions to this prohibition on extracting information from a database.

There were five exceptions. First, “[n]othing in this chapter shall prevent the extraction or use of an individual item of information, or other substantial part of a collections of information...”

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68. *Id.*
69. *Id.*
71. *Id.*
information, in itself." 72 Second, "[n]othing in this chapter shall restrict any person from independently gathering information or using information obtained by means other than extracting it from a [database]." 73 Next, the legislation permitted using database information for verifying the accuracy of independently gathered information. 74 Fourth, the extraction of information for not-for-profit educational, scientific, or research purposes was permissible so long as it caused no harm to the actual or potential market for the database from which it came. 75 Finally, "[n]othing in this chapter shall restrict any person from extracting or using information for the sole purpose of news reporting." 76

In addition to these exceptions, the proposed legislation also listed two exclusions. Government employees or agents were not entitled to protection for databases created within the scope of their employment, and computer programs were given no protection under the bill. 77

In the event that a violation of the legislation's provisions were to occur, the bill provided for both civil and criminal remedies. Civil remedies included injunctive relief, impoundment, and monetary relief in the form of damages and attorney's fees. 78 Criminal penalties included fines ranging from $250,000 to $500,000, and imprisonment for five to ten years. 79 There was no time limitation expressly provided for the protection granted under this legislation.

B. Criticism

72. Id.
73. Id.
74. Id.
75. Id.
76. Database Protection Bill supra note 70, at 611.
77. Id.
78. Id.
79. Id.
During both the first and second hearing on the bill in subcommittee, the bill was the subject of critical remarks. Much of the early criticism surrounding the bill centered on the general concern that the language was too broad, and the terms ill-defined. Critics cautioned that any legislation seeking to protect an investment in information necessarily had to be carefully and narrowly drawn to avoid abuse, because everything is potentially a collection of information in today's society. The bill was also considered unnecessary by some because of adequate and existing database protections under standard contract law, technological passwords that limit access to databases, and the protection for the selection and arrangement of facts in databases provided for in Feist.

During the February 12, 1998 hearing, Dr. Debra Stewart, provost and dean of the North Carolina State Graduate School voiced a concern in the academic field that the database bill would create an insurmountable barrier to information and research. Stewart condemned the bill for including an exception for educational, scientific and research which was too narrow to be effective. She argued that database publishers would have the power to charge exorbitant prices for access to their works, causing library budgets to elevate dramatically in response to the increase in acquisition costs. Additionally, she argued that researchers of all kinds would suffer because the legislation contained no time

82. Mayberry, supra note 6.
83. Id.
86. Id.
limit, and thus certain information would remain permanently outside the public domain and available only for a price. 87

Even those who testified in favor of the bill at the hearing offered suggestions for improvement. For example, Richard M. Corlin, who spoke on behalf of the American Medical Association, proposed three changes. 88 First, Corlin proposed the inclusion of a definition for the term “substantial use.” Corlin also proposed the legislators clarify whether a protected database could be used as a surrogate for third-party databases that are being verified. 89 Third, Corlin urged the legislators to modify the bill so as to address the concerns of scientific, educational and research communities. 90

Professor at Columbia University, Jane C. Ginsburg, also supported the bill, but with suggested modifications. 91 Ginsburg recommended that: (1) the bill exclude from protection government information contained in sole-source collections; (2) a time limit be imposed; (3) the non-profit educational and research exemption be altered; and (4) the language of the bill make clear that it is the database producers’ burden to identify their investment in their work. 92

C. Response to Criticism: Database Bill Gets a Make-Over

In response to these criticisms and suggestions, Coble amended the bill to address fair use and access issues raised during hearings. 93 Notably, the substitute bill, 94 added a 15-year time limit

87. Id.
89. Id.
90. Id.
92. Id.
on protection, provided more definitions than its predecessor and added language precluding the imposition of criminal penalties against non-profit violators.\textsuperscript{95}

The amended bill defines the terms used in the legislation. Whereas the previous database bill defined only information and commerce, the amended bill adds to that short list the definitions for the terms “collection of information,” and “potential market.”\textsuperscript{96}

Collection of information, for purposes of the bill means “information that has been collected and organized for the purpose of bringing discrete items of information together in one place so that users may access them.”\textsuperscript{97} A potential market is defined as “any market that a person claiming protection under section 1202 has current and demonstrable plans to exploit or that is commonly exploited by persons offering similar products or services incorporating collections of information.”\textsuperscript{98}

In addition, the new bill imposes liability on “any person who extracts, or uses in commerce, all or a substantial part, measured either qualitatively or quantitatively, of a collection of information gathered, organized or maintained by another person through the investment of substantial monetary or other resources, so as to harm the actual or potential market of that other person or assignee 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 by that other person in commerce, shall be liable to that person for the remedies set forth in section 1206.”\textsuperscript{99}

The newly amended section 1203 modifies what was section 1202 in the first database bill. Subsection (a) adds that “[a]n individual item of information, including a work of authorship, shall not itself be considered a substantial part of a collection of

\textsuperscript{94} For an explanation of the original H.R. 2652, see infra sec. III(A).

\textsuperscript{95} Judiciary Approves, supra note 91

\textsuperscript{96} Database Protection Bill (H.R. 2652) Approved by House Subcommittee, 55 PAT. TRADEMARK & COPYRIGHT J. 428, (March 19, 1998) [hereinafter Subcommittee Approves].

\textsuperscript{97} Id.

\textsuperscript{98} Id.

\textsuperscript{99} Id. (emphasis added).
information under section 1202.” Subsection (b) now states that “nothing in this chapter shall restrict any person from independently gathering information or using information obtained by means other than extracting or using it from a collection of information gathered, organized, or maintained by another person through the investment of substantial monetary or other resources.” Subsections (c) and (d) remain substantially the same.

Subsection (e) considerably expands the exception for news reporting. It provides that “[n]othing in this chapter shall restrict any person from extracting or using information for the sole purpose of news reporting, including news gathering, dissemination, and comment, in the amount reasonably necessary for such purpose, unless the information so extracted or used has been gathered by a news reporting entity in competition with that person for distribution to the public, and has not yet been distributed to the public.” The amended bill also adds a first sale provision; subsection (f) provides that “[n]othing in this chapter shall restrict the owner of a particular lawfully made copy of all or part of a collection of information from selling or otherwise disposing of the possession of that copy.”

The exclusions in the amended section 1204 clarify that the exclusion of protection for government databases permits the protection of information not gathered within the scope of the agency. Additionally, the exclusion for computer programs is clarified to indicate that though computer programs are still not protected under the database bill, a collection of information “that is otherwise subject to protection under this chapter is not disqualified from such protection solely because it is incorporated into a computer program.”

100. Id.
101. Id.
102. Subcommittee Approves, supra note 96.
103. Id.
104. Id.
105. Judiciary Approves, supra note 93.
106. Subcommittee Approves, supra note 96.
Section 1205, in addition to the relations to other laws provided for in the original database bill, clarifies in subsection (d) that the database rights created under the bill do not limit constraints imposed by antitrust laws. Subsection (d) of section 1205 explains that protection under the bill is independent of, and does not effect copyright protections.

Other changes in the new database bill provide for recovery of attorney's fees by non-profit groups sued in bad faith under the bill. An additional benefit to non-profit groups, is the provision that bars monetary recovery from a non-profit agency that has reasonable grounds for believing its conduct to be lawful, and finally the provision that precludes the imposition of criminal penalties against them.

On March 18, 1998, the House Subcommittee on Courts and Intellectual Property approved the database bill as amended by Coble. On March 24, 1998, the bill traveled to the House Judiciary Committee where technical changes to the Subcommittee's bill were made, and the Committee then approved the bill. According to Coble's co-sponsor, Rep. Barney Frank (D-Mass), the technical changes made in Committee were aimed at "tightening the language so as to better carry out the intent" of the legislation. Changes made in Committee included the addition of a provision providing that when an existing collection of information is updated the bill's 15-year term of protection extends only to the newly added material and not the existing collection.

Clearly these changes address concerns voiced by opponents of the bill as originally drafted. As it now reads the database bill

107. See infra sec. III(A).
108. Judiciary Approves, supra note 93.
109. Id.
110. Id.
111. Id.
112. Id.
113. Id.
114. Judiciary Approves, supra note 93.
115. Id.

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provides enough database protection to encourage the creation of new databases without hindering access to them.

D. Potential Questions if the Database Bill Passes into Law

Despite the reworking of the database bill, if it were to be passed by Congress, several questions would inevitably arise, not the least of which is how such a statute would be interpreted by the courts. It is, of course, possible that the courts would find the legislation to be an unconstitutional end-run around the decision in *Feist*. If invocation of the Copyright Clause was insufficient to protect facts, it is questionable whether the invocation of the Commerce Clause can overcome constitutional objections. The possibility exists that a court would hold that the express authority of the Copyright Clause precludes Congress from enacting copyright legislation based on alternative constitutional authority, although such a holding is not likely. However, if originality is required for any federal statute that protects against copying, then the database bill may be vulnerable to a constitutional attack, even under Commerce Clause authority, since the bill’s standard is investment and not originality.

Other questions focus on whether the legislation would be redundant in that database publishers currently have alternative means of protection through state misappropriation or unfair competition law, contract law and technological self-help measures. However, a mere glance at those methods reveals that they fall short, and the database bill would be a more consistent and substantial means of protection. The biggest flaw in using state misappropriation or unfair competition law is the lack of national uniformity. Beyond this problem of conflicting state

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120. *Id.*
laws, misappropriation and unfair competition protection is virtually non-existent in many foreign countries.\textsuperscript{121} This sort of local protection is simply inadequate for databases which, in light of today's technology, are internationally accessible and appealing. Furthermore, misappropriation is available only if the information pirated is time-sensitive and the person who takes the information is in direct competition with a product or service offered by the database owner.\textsuperscript{122}

Opponents of the database argue that bill is needless due to the safeguards of contract law. However, contract law, like misappropriation and unfair competition is state-based and thus lacks any sort of national accord.\textsuperscript{123} Contract law also lacks sufficiency in that a contract is enforceable only against a party to the contract. Thus, once information is accessed out of a database and used by someone not bound by the contract, any contractual control is unhelpful.\textsuperscript{124} A final alternative that opponents to the database bill cite as sufficient is technological protection such as encryption.\textsuperscript{125} The obvious limitation of this method of protection is that it can only protect electronic works, leaving printed works wholly unprotected.\textsuperscript{126} Although these three alternatives may be helpful for limited purposes, they clearly can not and have not filled the gap in intellectual property protection left by \textit{Feist}.

In spite of the parade of terribles that the database bill has sparked in its opponents, it is a well-written bill that would adequately and uniformly protect databases. The bill improves upon Congress' previous efforts by responding to criticisms aimed at the failed 1996 Act, as well as criticisms directed at the first version of the bill. For example, the legislation now contains an express time limit after which the information in a database will enter the public domain. Additionally, it has been prepared with an

\begin{itemize}
  \item \textsuperscript{121} Id.
  \item \textsuperscript{122} See\textit{ National Basketball Association v. Motorola, Inc.}, 105 F.3d 841, 845 (2d Cir. 1997).
  \item \textsuperscript{123} Aber, \textit{supra} note 119.
  \item \textsuperscript{124} Id.
  \item \textsuperscript{125} Id.
  \item \textsuperscript{126} Id.
\end{itemize}
effort to consider viewpoints from interested parties, and includes provisions that allow adequate access to databases for research, education, science and news reporting.\textsuperscript{127} It is more desirable than the 1996 Act because it is grounded in principals of misappropriation law rather than copyright law. This emphasis on misappropriation responds more precisely to the nature of the problem of copying information from databases.\textsuperscript{128} Furthermore, "given the Supreme Court's frequent reiteration in \textit{Feist} that originality is constitutionally mandated for copyright protection, limiting database creators protection to misappropriation claims should avoid constitutional conflict."\textsuperscript{129}

\textbf{V. CONCLUSION}

Ultimately, there must be a balance between the need to preserve the incentive to create databases and the need for information to be readily available to the public. The result would be extremely unfavorable if either side were to be afforded too much weight in striking that balance. This improper balance is evidenced by what has occurred as a result of the \textit{Feist} decision, which tipped the scales too heavily in favor of public access. It is therefore necessary, especially in light of international concerns and technological advancements, to restore the pre-\textit{Feist} balance by giving back sweat of the brow protection to databases publishers. The database bill can give that protection back and should be passed.

\textit{Lisa Barr}

\textsuperscript{127} \textit{Database Protection on Hold, supra} note 43, at 20.
\textsuperscript{128} Ginsburg, \textit{supra} note 91.
\textsuperscript{129} \textit{Id.