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1st Session
HOUSE OF REPRESENTATIVES
REPT. 106–349
Part 1

COLLECTIONS OF INFORMATION ANTIPIRACY ACT

SEPTEMBER 30, 1999.—Ordered to be printed

Mr. COBLE, from the Committee on the Judiciary, submitted the following

R E P O R T

[To accompany H.R. 354]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 354) to amend title 17, United States Code, to provide protection for certain collections of information, having considered the same, reports favorably thereon with an amendment and recommends that the bill as amended do pass.

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The amendment is as follows:

Strike out all after the enacting clause and insert in lieu thereof the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Collections of Information Antipiracy Act".

SEC. 2. COLLECTIONS OF INFORMATION.

Title 17, United States Code, is amended by adding at the end the following new chapter:

"CHAPTER 14—COLLECTIONS OF INFORMATION

"§ 1401. Definitions

"As used in this chapter:

"(1) COLLECTION OF INFORMATION.—The term 'collection of information' means information that has been collected and has been organized for the purpose of bringing discrete items of information together in one place or through one source so that persons may access them. The term does not include an individual work which, taken as a whole, is a work of narrative literary prose, but may include a collection of such works.

"(2) INFORMATION.—The term 'information' means facts, data, works of authorship, or any other intangible material capable of being collected and organized in a systematic way.

"(3) PRIMARY MARKET.—The term 'primary market' means all markets—

"(A) in which a product or service which incorporates a collection of information is offered; and

"(B) in which a person claiming protection with respect to that collection of information under section 1402 derives or reasonably expects to derive revenue, directly or indirectly.

"(4) RELATED MARKET.—The term 'related market' means any market—

"(A)(i) in which products or services which incorporate collections of information similar to a product or service offered by a person claiming protection under section 1402 are offered; and

"(ii) in which persons offering such similar products or services derive or reasonably expect to derive revenue, directly or indirectly; or

"(B) any market in which a person claiming protection with respect to a collection of information under section 1402 has taken demonstrable steps to offer in commerce within a short period of time a product or service incorporating that collection of information with the reasonable expectation to derive revenue, directly or indirectly.

"(5) COMMERCE.—The term 'commerce' means all commerce which may be lawfully regulated by the Congress.

"(6) MAINTAIN.—To 'maintain' a collection of information means to update, verify, or supplement the information the collection contains.

"§ 1402. Prohibition

"(a) MAKING AVAILABLE OR EXTRACTING TO MAKE AVAILABLE.—Any person who makes available to others, or extracts to make available to others, 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 cause material harm to the primary market or a related market of that other person, or a successor in interest of that other person, for a product or service that incorporates that collection of information and is offered or intended to be offered in commerce by that other person, or a successor in interest of that person, shall be liable to that person or successor in interest for the remedies set forth in section 1406.

"(b) OTHER ACTS OF EXTRACTION.—Any person who extracts 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 cause material harm to the primary market of that other person, or a successor in interest of that other person, for a product or service that incorporates that collection of information and is offered or intended to be offered in commerce by that other person, or a successor in interest of that person, shall be liable to that person or successor in interest for the remedies set forth in section 1406.

"§ 1403. Permitted acts

"(a) REASONABLE USES.—Notwithstanding section 1402, the making available or extraction of information for purposes such as illustration, explanation, example, comment, criticism, teaching, research, or analysis is not a violation of this chapter, if it is reasonable under the circumstances. In determining whether such an act is reasonable under the circumstances, all of the following factors shall be considered:

"(1) The extent to which the making available or extraction is commercial or nonprofit.

"(2) Whether the amount of information made available or extracted is appropriate and for the purpose.

"(3) The good faith of the person making available or extracting the information.

"(4) The extent to which and the manner in which the portion made available or extracted is incorporated into an independent work or collection, and the degree of difference between the collection from which the information is made available or extracted and the independent work or collection.

"(5) The effect of the making available or extraction on the primary or related market for a protected collection of information.

"(b) CERTAIN NONPROFIT EDUCATIONAL, SCIENTIFIC, OR RESEARCH USES.— Notwithstanding section 1402, no person shall be restricted from making available or extracting information for nonprofit educational, scientific, or research purposes in a manner that does not materially harm the primary market for the product or service referred to in section 1402.

"(c) INDIVIDUAL ITEMS OF INFORMATION AND OTHER INSUBSTANTIAL PARTS.— Nothing in this chapter shall prevent the making available or extraction of an individual item of information, or other insubstantial part of a collection of information, in itself. An individual item of information, including a work of authorship, shall not itself be considered a substantial part of a collection of information under section 1402. Nothing in this subsection shall permit the repeated or systematic making available or extracting of individual items or insubstantial parts of a collection of information so as to circumvent the prohibition contained in section 1402.

"(d) GATHERING OR USE OF INFORMATION OBTAINED THROUGH OTHER MEANS.— Nothing in this chapter shall restrict any person from independently gathering information or making available information obtained by means other than extracting it from a collection of information gathered, organized, or maintained by another person through the investment of substantial monetary or other resources.

"(e) MAKING AVAILABLE OR EXTRACTION OF INFORMATION FOR VERIFICATION.— Nothing in this chapter shall restrict any person from making available or extracting information from a collection of information within any entity or organization, for the sole purpose of verifying the accuracy of information independently gathered, organized, or maintained by that person. Under no circumstances shall the information so used be made available to others or extracted from the original collection in a manner that harms the primary market or a related market for the collection of information from which it is made available or extracted.

"(f) NEWS REPORTING.—Nothing in this chapter shall restrict any person from making available or extracting information for the sole purpose of news reporting on any subject (including news gathering, dissemination, comment, and feature or general interest reporting) unless the information so made available or extracted is time sensitive and has been gathered by a news reporting entity, and making available or extracting the information is part of a consistent pattern engaged in for the purpose of direct competition.

"(g) TRANSFER OF COPY.—Nothing 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.

"(h) GENEALOGICAL INFORMATION.—

"(1) IN GENERAL.—Notwithstanding section 1402, no person shall be restricted from—

"(A) making available or extracting genealogical information for nonprofit, religious purposes; or

"(B) making available or extracting, for private, noncommercial purposes, genealogical information that has been gathered, organized, or maintained for nonprofit, religious purposes.

"(2) DEFINITION.—For purposes of this subsection, 'genealogical information' includes, but is not limited to, data indicating the date, time, or place of an individual's birth, christening, marriage, death, or burial, the identity of an individual's parents, spouse, children, or siblings, and other information useful in determining the identity of ancestors.

"(i) INVESTIGATIVE, PROTECTIVE, OR INTELLIGENCE ACTIVITIES.—Nothing in this chapter shall prohibit—

"(1) an officer, agent, or employee of the United States, a State, or a political subdivision of a State; or

"(2) a person acting under contract with an officer, agent, or employee described in paragraph (1),

from making available or extracting information as part of lawfully authorized investigative, protective, or intelligence activities.

"§ 1404. Exclusions

"(a) GOVERNMENT COLLECTIONS OF INFORMATION.—

"(1) EXCLUSION.—Protection under this chapter shall not extend to collections of information gathered, organized, or maintained by or for a government entity, whether Federal, State, or local, including by any employee or agent of such government entity, or any person substantially funded by, exclusively licensed by, or working under contract to such government to achieve a government purpose or fulfill a government obligation as established by law or regulation, if such collections of information are gathered, organized, or maintained within the scope of the employment, agency, license, grant, contract, or funding. Nothing in this subsection shall preclude protection under this chapter for information gathered, organized, or maintained by such a person that is not within the scope of such employment, agency, license, grant, contract, or funding, or by a Federal or State educational institution in the course of engaging in education or scholarship.

"(2) EXCEPTION.—The exclusion under paragraph (1) does not apply to any information required to be collected and made available—

"(A) under the Securities Exchange Act of 1934 by a national securities exchange, a registered securities association, or a registered securities information processor, subject to section 1405(g) of this title; or

"(B) under the Commodity Exchange Act by a contract market, subject to section 1405(g) of this title.

"(b) COMPUTER PROGRAMS.—

"(1) PROTECTION NOT EXTENDED.—Subject to paragraph (2), protection under this chapter shall not extend to computer programs, including, but not limited to, any computer program used in the manufacture, production, operation, or maintenance of a collection of information, or any element of a computer program necessary to its operation.

"(2) INCORPORATED COLLECTIONS OF INFORMATION.—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.

"(c) DIGITAL ONLINE COMMUNICATIONS.—Protection under this chapter shall not extend to a product or service incorporating a collection of information gathered, organized, or maintained to address, route, forward, transmit, or store digital online communications, register addresses to be used in digital online communications, or provide or receive access to connections for digital online communications.

"§ 1405. Relationship to other laws

"(a) OTHER RIGHTS NOT AFFECTED.—Subject to subsection (b), nothing in this chapter shall affect rights, limitations, or remedies concerning copyright, or any other rights or obligations relating to information, including laws with respect to patent, trademark, design rights, antitrust, trade secrets, privacy, access to public documents, and the law of contract.

"(b) PREEMPTION OF STATE LAW.—On or after the effective date of this chapter, all rights that are equivalent to the rights specified in section 1402 with respect to the subject matter of this chapter and protected by this chapter shall be governed exclusively by Federal law, and no person is entitled to any equivalent right in such subject matter under the common law or statutes of any State. State laws with respect to trademark, design rights, antitrust, trade secrets, privacy, access to public documents, and the law of contract shall not be deemed to provide equivalent rights for purposes of this subsection.

"(c) RELATIONSHIP TO COPYRIGHT.—Protection under this chapter is independent of, and does not affect or enlarge the scope, duration, ownership, or subsistence of, any copyright protection or limitation, including, but not limited to, fair use, in any work of authorship that is contained in or consists in whole or part of a collection of information. This chapter does not provide any greater protection to a work of authorship contained in a collection of information, other than a work that is itself a collection of information, than is available to that work under any other chapter of this title.

"(d) ANTITRUST.—Nothing in this chapter shall limit in any way the constraints on the manner in which products and services may be provided to the public that are imposed by Federal and State antitrust laws, including those regarding single suppliers of products and services.

"(e) LICENSING.—Nothing in this chapter shall restrict the rights of parties freely to enter into licenses or any other contracts with respect to making available or extracting collections of information.

"(f) COMMUNICATIONS ACT OF 1934.—Nothing in this chapter shall affect the operation of the provisions of the Communications Act of 1934 (47 U.S.C. § 151 et seq.), or shall restrict any person from making available or extracting subscriber list information, as such term is defined in section 222(f)(3) of the Communications Act of 1934 (47 U.S.C. § 222(f)(3)).

"(g) SECURITIES AND COMMODITIES MARKET INFORMATION.—

"(1) AUTHORITY OF SEC AND CFTC.—The Securities and Exchange Commission shall have the authority to modify the application of this chapter as it affects securities issues over which it has jurisdiction, and the Commodity Futures Trading Commission shall have the authority to modify the application of this chapter as it affects commodities issues over which it has jurisdiction.

"(2) FEDERAL AGENCIES AND ACTS.—Notwithstanding paragraph (1), nothing in this chapter shall affect—

"(A) the operation of the provisions of the Securities Exchange Act of 1934 (15 U.S.C. § 78a et seq.) or the Commodity Exchange Act (7 U.S.C. § 1 et seq.);

"(B) the jurisdiction or authority of the Securities and Exchange Commission or the Commodity Futures Trading Commission; or

"(C) the functions and operations of self-regulatory organizations and securities information processors under the provisions of the Securities Exchange Act of 1934 and the rules and regulations thereunder, including making market information available pursuant to the provisions of that Act and the rules and regulations thereunder.

"(3) PROHIBITION.—Notwithstanding any provision of subsection (a), (b), (c), (d), (e), (g), (h), or (i) of section 1403, nothing in this chapter shall permit the making available, extraction, resale, or other disposition of real-time market information except as the Securities Exchange Act of 1934, the Commodity Exchange Act, and the rules and regulations thereunder may otherwise provide. Nothing in subsection (f) of section 1403 shall be construed to permit any person to make available or extract real-time market information in a manner that constitutes a market substitute for a real-time market information service (including the real-time systematic updating of or display of a substantial part of market information) provided on a real-time basis.

"(4) DEFINITION.—As used in this subsection, the term 'market information' means information relating to quotations and transactions that is collected, processed, distributed, or published pursuant to the provisions of the Securities Exchange Act of 1934 or by a contract market that is designated by the Commodity Futures Trading Commission pursuant to the Commodity Exchange Act and the rules and regulations thereunder.

"(h) PROTECTION OF PRIVACY.—Nothing in this chapter shall limit, impair, or annul in any manner the protections under Federal or State law or regulation relating to the collection or use of personally identifying information, including medical information.

"§ 1406. Civil remedies

"(a) CIVIL ACTIONS.—Any person who is injured by a violation of section 1402 may bring a civil action for such a violation in an appropriate United States district court without regard to the amount in controversy, except that any action against a State governmental entity may be brought in any court that has jurisdiction over claims against such entity.

"(b) TEMPORARY AND PERMANENT INJUNCTIONS.—Any court having jurisdiction of a civil action under this section shall have the power to grant temporary and permanent injunctions, according to the principles of equity and upon such terms as

the court may deem reasonable, to prevent a violation of section 1402. Any such injunction may be served anywhere in the United States on the person enjoined, and may be enforced by proceedings in contempt or otherwise by any United States district court having jurisdiction over that person.

"(c) IMPOUNDMENT.—At any time while an action under this section is pending, the court may order the impounding, on such terms as it deems reasonable, of all copies of contents of a collection of information made available or extracted in violation of section 1402, and of all masters, tapes, disks, diskettes, or other articles by means of which such copies may be reproduced. The court may, as part of a final judgment or decree finding a violation of section 1402, order the remedial modification or destruction of all copies of contents of a collection of information made available or extracted in violation of section 1402, and of all masters, tapes, disks, diskettes, or other articles by means of which such copies may be reproduced.

"(d) MONETARY RELIEF.—When a violation of section 1402 has been established in any civil action arising under this section, the plaintiff shall be entitled to recover the actual damages sustained by the plaintiff as a result of the violation and any profits of the defendant that are attributable to the violation and are not taken into account in computing the actual damages sustained by the plaintiff. The court shall assess such profits or damages or cause the same to be assessed under its direction. In assessing profits the plaintiff shall be required to prove defendant's gross revenue only and the defendant shall be required to prove all elements of cost or deduction claims. In assessing damages the court may enter judgment, according to the circumstances of the case, for any sum above the amount found as actual damages, not exceeding three times that amount. The court in its discretion may award reasonable costs and attorney's fees to the prevailing party and shall award such costs and fees if it determines that an action was brought under this chapter in bad faith against a nonprofit educational, scientific, or research institution, library, or archives, or an employee or agent of such an entity, acting within the scope of his or her employment.

"(e) REDUCTION OR REMISSION OF MONETARY RELIEF FOR NONPROFIT EDUCATIONAL, SCIENTIFIC, OR RESEARCH INSTITUTIONS AND EMPLOYEES THEREOF.—The court shall reduce or remit entirely monetary relief under subsection (d) in any case in which a defendant believed and had reasonable grounds for believing that his or her conduct was permissible under this chapter, if the defendant was a nonprofit educational, scientific, or research institution, library, or archives, or an employee or agent of such an institution, library, or archives acting within the scope of his or her employment.

"(f) ACTIONS AGAINST UNITED STATES GOVERNMENT.—Subsections (b) and (c) shall not apply to any action brought against the United States Government.

"(g) RELIEF AGAINST STATE ENTITIES.—The relief provided under this section shall be available against a State governmental entity to the extent permitted by applicable law.

"(h) RELIEF AGAINST INTERNET SERVICE PROVIDERS.—(1) The relief provided under this section shall not be available against any Internet service provider unless such provider violates section 1402 willfully.

"(2) For purposes of this subsection, the term 'Internet service provider' means an entity offering the transmission, routing, or providing of connections for digital online communications, between or among points specified by a user, of material of the user's choosing, without modification to the content of the material as sent or received.

"§ 1407. Criminal offenses and penalties

"(a) VIOLATION.—

"(1) IN GENERAL.—Any person who violates section 1402 willfully either—

"(A) for purposes of direct or indirect commercial advantage or financial gain;

"(B) causes loss or damage aggregating $100,000 or more during any 1-year period to the person who gathered, organized, or maintained the information concerned; or

"(C) causes loss or damage aggregating $50,000 or more in any 1-year period to the person who gathered, organized, or maintained the information concerned,

shall be punished as provided in subsection (b).

"(2) INAPPLICABILITY.—This section shall not apply to any employee or agent of a nonprofit educational, scientific, or research institution, library, archives, or law enforcement agency, or to any employee or agent of such an institution, library, archives, or agency acting within the scope of his or her employment.

"(b) PENALTIES.—(1) Any person who commits an offense under subsection (a)(1)(A) shall be fined not more than $250,000, imprisoned not more than 5 years, or both.

"(2) Any person who commits a second or subsequent offense under subsection (a)(1)(A) shall be fined not more than $500,000, imprisoned not more than 10 years, or both.

"(3) Any person who commits an offense under subsection (a)(1)(B) shall be fined not more than $250,000, imprisoned not more than 3 years, or both.

"(4) Any person who commits a second or subsequent offense under subsection (a)(1)(B) shall be fined not more than $500,000, imprisoned not more than 6 years, or both.

"(5) Any person who commits an offense under subsection (a)(1)(C) shall be fined not more than $100,000, imprisoned not more than 1 year, or both.

"(c) VICTIM IMPACT STATEMENT.—(1) During preparation of the presentence report pursuant to Rule 32(c) of the Federal Rules of Criminal Procedure, victims of the offense shall be permitted to submit, and the probation officer shall receive, a victim impact statement that identifies the victim of the offense and the extent and scope of the injury and loss suffered by the victim, including the estimated economic impact of the offense on that victim.

"(2) Persons permitted to submit victim impact statements shall include—

"(A) persons who gathered, organized, or maintained the information affected by conduct involved in the offense; and

"(B) the legal representatives of such persons.

"§ 1408. Defenses to claims

"(a) AFFIRMATIVE DEFENSE WHEN USER CANNOT DETERMINE WHEN COLLECTION FIRST OFFERED IN COMMERCE.—No monetary relief shall be available for a violation of section 1402 if the person who made available or extracted all or a substantial part of the collection of information that is the source of the violation could not reasonably determine whether the date on which the portion of the collection that was made available or extracted was first offered in commerce following the investment of resources that qualified that portion of the collection for protection under this chapter by the person claiming protection under this chapter or that person's predecessor in interest was a date more than 15 years prior to making available or extracting the information.

"(b) NOTICE.—In the case of a collection of information into which all or a substantial part of a government collection of information is incorporated after the effective date of this chapter, no monetary relief shall be available for a violation of section 1402 unless a statement appeared in connection with the version of the collection of information from which the information was made available or extracted, in a manner and location so as to give reasonable notice, identifying the government collection and the government entity from which it was obtained.

"(c) ACCESS TO GOVERNMENT INFORMATION.—

"(1) IN GENERAL.—In the case of a collection of information that incorporates all or a substantial part of a government collection of information, a nonprofit educational, scientific, or research institution, library, or archives, or an employee or agent of such an institution, library, or archives, acting within the scope of his or her employment, shall have a complete defense to an action for a violation of section 1402 for extracting the government information, if all of the following circumstances apply:

"(A) The government information was not publicly available from the government or reasonably available from any other source.

"(B) The information was extracted for the purpose of engaging in nonprofit educational, scientific, or research activities and not for the purpose of offering the information obtained for sale or otherwise in the market.

"(C) Prior to extracting the government information, the person who extracted it—

"(i) made reasonable, good faith efforts to obtain the information from other sources; and

"(ii) made a written request to the person asserting protection under this chapter, which clearly identified the information to be extracted and described the reasonable, good faith efforts made under clause (i).

"(D) The person claiming protection under this chapter did not make the government information available within a reasonable time after receipt of the request, in any form of that person's choosing, including the form in which the government information was first obtained from the government

entity or its employee, agent, or exclusive licensee, at the cost of the information's identification, extraction, and delivery.

"(2) APPLICABILITY.—This subsection applies only to collections of information existing before the effective date of this chapter and only if the person claiming protection under this chapter can reasonably identify and extract the requested information in the form first obtained from the government entity, employee, agent, or exclusive licensee.

"§ 1409. Limitations on actions

"(a) CRIMINAL PROCEEDINGS.—No criminal proceeding shall be maintained under this chapter unless it is commenced within three years after the cause of action arises.

"(b) CIVIL ACTIONS.—No civil action shall be maintained under this chapter unless it is commenced within three years after the cause of action arises or claim accrues.

"(c) ADDITIONAL LIMITATION.—No criminal or civil action shall be maintained under this chapter for making available or extracting all or a substantial part of a collection of information that occurs more than 15 years after the portion of the collection that is made available or extracted was first offered in commerce following the investment of resources that qualified that portion of the collection for protection under this chapter. In no case shall any protection under this chapter resulting from a substantial investment of resources in maintaining a preexisting collection prevent any information from being made available or extracted from a copy of the preexisting collection after the 15 years have expired with respect to the portion of that preexisting collection that is so made available or extracted, and no liability under this chapter shall thereafter attach to the making available or extraction of such information.

"(d) BURDEN OF PROOF ON PLAINTIFF TO SHOW PORTION FIRST OFFERED IN COMMERCE NO MORE THAN 15 YEARS OLD.—No action for a violation of section 1402 may be maintained unless the person claiming protection under this chapter proves that the date on which the portion of the collection that was made available or extracted was first offered by that person or that person's predecessor in interest in commerce following the investment of resources that qualified that portion of the collection for protection under this chapter was no more than 15 years prior to the time when it was made available or extracted by the defendant.

"§ 1410. Study and report

"No later than 3 years after the date of enactment of this Act, the Register of Copyrights and the Assistance Attorney General, Antitrust Division of the Department of Justice, shall conduct a joint study and submit a joint report to Congress on whether the defense provided for in section 1408(c) should be expanded to include collections of information that do not incorporate all or a substantial part of a government collection of information where the extracted information is not publicly available from any other source.".

SEC. 3. CONFORMING AMENDMENTS.

(a) TABLE OF CHAPTERS.—The table of chapters for title 17, United States Code, is amended by adding at the end the following:

"14. Collections of Information ..... 1401".

(b) DISTRICT COURT JURISDICTION.—(1) Section 1338 of title 28, United States Code, is amended—

(A) in the section heading by striking "**trade-marks,**" and inserting "**trademarks, collections of information,**";

(B) in subsection (a) by striking "trade-marks" and inserting "trademarks";

(C) in subsection (b) by striking "trade-mark" and inserting "trademark"; and

(D) by adding at the end the following:

"(d) The district courts shall have original jurisdiction of any civil action arising under chapter 14 of title 17, relating to collections of information. Such jurisdiction shall be exclusive of the courts of the States, except that any action against a State governmental entity may be brought in any court that has jurisdiction over claims against such entity.".

(2) The item relating to section 1338 in the table of sections for chapter 85 of title 28, United States Code, is amended by striking "trade-marks," and inserting "trademarks, collections of information,".

(c) PLACE FOR BRINGING ACTIONS.—(1) Section 1400 of title 28, United States Code, is amended by adding at the end the following:

"(c) Civil actions arising under chapter 14 of title 17, relating to collections of information, may be brought in the district in which the defendant or the defendant's agent resides or may be found.".

(2) The section heading for section 1400 of title 28, United States Code, is amended to read as follows:

"§ 1400. Patents and copyrights, mask works, designs, and collections of information".

(3) The item relating to section 1400 in the table of sections at the beginning of chapter 87 of title 28, United States Code, is amended to read as follows:

"1400. Patents and copyrights, mask works, designs, and collections of information.".

(d) COURT OF FEDERAL CLAIMS JURISDICTION.—Section 1498(e) of title 28, United States Code, is amended by inserting "and to protections afforded collections of information under chapter 14 of title 17" after "chapter 9 of title 17".

SEC. 4. EFFECTIVE DATE.

(a) IN GENERAL.—This title and the amendments made by this title shall take effect on the date of the enactment of this Act, and shall apply to acts of extraction and making available of information that are committed on or after that date.

(b) PRIOR ACTS NOT AFFECTED.—No person shall be liable under chapter 14 of title 17, United States Code, as added by section 2 of this Act, for making available information lawfully extracted from a collection of information prior to the effective date of this Act, by that person or by that person's predecessor in interest.

PURPOSE AND SUMMARY

H.R. 354, the "Collections of Information Antipiracy Act," responds to a need to supplement copyright law to prevent the wholesale copying of another's collection of information in a manner which harms the market for that collection. The bill ensures incentives for investment in the production and dissemination of collections of information, while maintaining continued access to information contained in such collections for public interest purposes such as education, science and research.

The Collections of Information Antipiracy Act prohibits the misappropriation of commercially valuable collections by those who pirate data that has been collected by others through substantial effort and expense, and use it in a way that causes market injury to the producer of the original collection. This protection is modeled in part on the Lanham Act, which already makes various types of unfair competition a civil wrong under Federal law. Importantly, existing protections for collections of information afforded by other bodies of law, most notably copyright and contract rights, are maintained in their present form. The bill is intended to supplement these legal rights, not replace them.

BACKGROUND AND NEED FOR THE LEGISLATION

Electronic collections, and other collections of factual material, are indispensable to the United States in the new information economy. These information products put a wealth of data in a convenient and organized form at the fingertips of business people, professionals, scientists, scholars, and consumers, and enable them to retrieve specific factual information that they need to solve a particular economic, research, or educational problem. Whether the focus is on financial, scientific, legal, medical, bibliographic, news, or other information, databases are essential tools for improving productivity, advancing education and training. They are also the linchpins of a world-leading dynamic commercial information industry in the United States.

Developing, compiling, distributing and maintaining commercially significant collections requires substantial investments of time, personnel, and effort and money. Information companies, small and large, must dedicate massive resources to gathering and verifying factual material, presenting it in a user-friendly way, and keeping it current and useful to customers. American firms have been the global leaders in this field. They have brought to market a wide range of valuable collections that meet the information needs of businesses, professionals, researchers, and consumers worldwide. But several recent legal and technological developments threaten to derail this progress by eroding the incentives for continued investment needed to maintain and build upon the U.S. lead in world markets for electronic information resources.

Historically, protection of collections of information has always been recognized as a branch of copyright law. Databases or compilations have been protected by copyright in some form since 1790, when the first U.S. Copyright Act was enacted. As courts applied copyright law to compilations, two distinct rationales for protection emerged. One, known as "sweat of the brow," viewed the compiler's effort and investment (much as in trademark law) as the basis for copyright protection. In 1976, the Copyright Act was amended to require that compilations contain an element of creativity or originality in addition to effort and investment. Despite this amendment, many courts have continued to apply the "sweat of the brow" doctrine in determining copyright protection.

In *Feist Publications, Inc.,* v. *Rural Telephone Service Co.,* the Supreme Court affirmed that originality and creativity in addition to investment and effort are required for protection under the Copyright Act, and that a related form of protection would have to be created in order to completely protect compilations or portions of compilations in which there is effort and investment but not a threshold level of originality or creativity. H.R. 354 provides such copyright-related protection by amending title 17 to create a new chapter 14. Copyright-related protection of this kind has consistently been achieved through amendments to title 17 of the United States Code so as to be construed in the context of and in tandem with protection under the Copyright Act. This was the case with protection for mask works (chapter 9 of title 17) and protection for original designs (chapter 13 of title 17.)

While *Feist* reaffirmed that most—although not all—commercially significant databases satisfy the "originality" requirement for protection under copyright, the Court emphasized that this protection is "necessarily thin." Several subsequent lower court decisions have underscored that copyright cannot stop a competitor from lifting massive amounts of factual material from a copyrighted database to use as the basis for its own competing product. This casts doubt on the ability of a database proprietor to use contractual provisions to protect itself against unfair competition from "free riders."

In Europe, a 6-year legislative process culminated in the issuance of a European Union Directive on Legal Protection of Databases in 1996. Among other things, the Directive creates a new *sui generis* form of property right for the legal protection of databases to supplement copyright. However, it denies this new

protection to collections of information originating in the United States or other countries unless the other country offers "comparable" protection to collections originating in the European Union. When fully implemented, the European Directive could place U.S. firms at an enormous competitive disadvantage throughout the entire European market.

At the World Intellectual Property Organization, discussions are ongoing as to whether or not there is a growing international consensus supporting development of a new international treaty on *sui generis* property right protection for databases. This bill rejects the notion that an exclusive *sui generis* property right is the only approach to strong database protection, but rather offers comparable protection through the implementation of a new copyright-related Federal misappropriation statute.

In cyberspace, technological developments represent a threat as well as an opportunity for collections of information, just as for other kinds of works. Copying factual material from another's collection, and rearranging it to form a competing information product—just the kind of behavior that copyright protection alone may not effectively prevent—is cheaper and easier than ever, through digital technology that is now in widespread use. Furthermore, piracy and personal theft of collections developed through the resources of another is easy to achieve and will be rampant without proper protections for producers.

When all these factors are added together, it is clear that now is the time to enact new Federal copyright-related legislation to protect developers against piracy and unfair competition, and thus encourage continued investment in the production and distribution of valuable commercial collections of information. Such legislation will improve the market climate for collections of information in the U.S.; ensure protection for U.S. collections abroad on an equitable basis; place the U.S. on the leading edge of an emerging international consensus; and provide a balanced and measured response to the new challenges of digital technology. This bill seeks to advance those goals.

The result of careful legislative deliberation and numerous hearings, the "Collections of Information Antipiracy Act" sets forth intellectual property incentives that the committee believes will ensure the continued growth, vitality and success of the market for important information products, while securing the continued legitimate use of collections of information for scientific, research, educational and archive purposes. The committee further believes that preventing producers from having to rely exclusively on a hodgepodge of individual State laws is essential to advancing this goal.

The "Collections of Information Antipiracy Act" is a balanced proposal. It is aimed at actual or threatened market injury resulting from the misappropriation of substantial parts of collections of information, not at ordinary nonprofit uses of particular information from a collection. The goal is to stimulate the creation of even more collections, and to encourage even more competition among them. The bill avoids conferring any monopoly on facts, and does not create a proprietary right to facts within a collection or take any other steps that might be inconsistent with these goals.

The bill would prevent any person who extracts or uses in commerce all or a substantial part of a collection of information in a way that causes material harm to the markets of the original collector. Those who violate this act would be liable to the producer of the collection for damages in an amount equal to the defendant's profits or damages to the plaintiff, plus costs, and also could be held criminally liable in certain egregious cases.

Provisions similar to this legislation passed the House of Representatives twice last year: once in H.R. 2652, and once as Title V of H.R. 2281, the "Digital Millennium Copyright Act." Further changes have been made in the introduced and reported versions of this legislation to Section 1403 (Permitted Acts) and to Section 1408 (Limitations on Actions), including the addition of a "fair use"-like provision and a clarification that protection under this bill is limited to fifteen years.

HEARINGS

H.R. 354, the "Collections of Information Antipiracy Act" was the topic of a legislative hearing on Thursday, March 18, 1999. Testifying at the hearing was Marybeth Peters, Register of Copyrights, Copyright Office of the United States, Library of Congress; Andrew Pincus, General Counsel, United States Department of Commerce; James G. Neal, Dean, University Libraries, Johns Hopkins University; Terrence M. McDermott, Executive Vice President, The National Association of Realtors; Marilyn G. Winokur, Executive Vice President, Microdex, Incorporated; Dr. Joshua Lederberg, Professor, Sackler Foundation Scholar, The Rockefeller University; Lynn Henderson, President, Doane Agricultural Services Company; Michael Kirk, Executive Director, American Intellectual Property Lawyers Association; Charles E. Phelps, Provost, University of Rochester; and Dan Duncan, Vice President, Government Affairs, Software and Information Industry Association.

COMMITTEE CONSIDERATION

On May 20, 1999, the Subcommittee on Courts and Intellectual Property met in open session and ordered reported the bill H.R. 354 with an amendment in the nature of a substitute, by a voice vote, a quorum being present. On May 26, 1999, the committee met in open session and ordered reported favorably the bill H.R. 354 with an amendment in the nature of a substitute, by a voice vote, a quorum being present.

VOTE OF THE COMMITTEE

During their consideration of H.R. 354, the committee and the subcommittee took no rollcall votes.

COMMITTEE OVERSIGHT FINDINGS

In compliance with clause 3(c)(1) of rule XI of the Rules of the House of Representatives, the committee reports that the findings and recommendations of the committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Rep-

resentatives, are incorporated in the descriptive portions of this report.

COMMITTEE ON GOVERNMENT REFORM FINDINGS

No findings or recommendations of the committee on Government Reform and Oversight were received as referred to in clause 3(c)(4) of rule XIII of the Rules of the House of Representatives.

NEW BUDGET AUTHORITY AND TAX EXPENDITURES

Clause 3(c)(2) of House Rule XIII is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

In compliance with clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, the committee sets forth, with respect to the bill, H.R. 354, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, July 16, 1999.

Hon. HENRY J. HYDE, *Chairman,*
Committee on the Judiciary,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 354, the Collections of Information Antipiracy Act.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contacts are Mark Hadley and Mark Grabowicz (for Federal costs), who can be reached at 226–2860, Shelley Finlayson (for the state and local impact), who can be reached at 225–3220, and John Harris (for the private-sector impact), who can be reached at 226–6910.

Sincerely,

DAN L. CRIPPEN, *Director.*

H.R. 354—Collections of Information Antipiracy Act.

SUMMARY

CBO estimates that enacting H.R. 354 could result in significant mandatory costs to the federal government. Such costs would probably be zero in many years, but we expect that the average annual costs would be about $10 million, beginning in 2002. Because the bill would affect direct spending, pay-as-you-go procedures would apply.

H.R. 354 would attempt to protect substantial investments made in the collecting of information or the establishing of databases with commercial value. Databases that lack a modest amount of original creative expression are not eligible for copyright protection. For example, the Supreme Court held in *Feist Publications* v. *Rural Telephone Service Co.*, 449 U.S. 340 (1991), that the "white

pages" of standard telephone directories lack sufficient creative expression to sustain a copyright. To provide some protection of investments in such databases and other collections of information, H.R. 354 generally would prohibit the misappropriation of a substantial portion of such information in a way that would decrease its potential market value.

Violators of the bill's provisions would be subject to a criminal fine, imprisonment, or civil action. The bill would waive the sovereign immunity of the federal government from liability for decreasing the potential market value of databases. Finally, the bill would require the U.S. Copyright Office and the Department of Justice (DOJ) to conduct a study on whether the Congress should expand certain exemptions for research, educational, or archival uses.

H.R. 354 contains an intergovernmental mandate as defined in the Unfunded Mandates Reform Act (UMRA) because it would preempt state laws regarding the protection of collections of information. However, CBO estimates that complying with this mandate would not have a significant impact on state budgets primarily because states do not generally regulate in this area of law. The bill also would create a new private-sector mandate, as defined in UMRA, by granting copyright-like protection to certain collections of information that are not protected by copyright law. CBO cannot estimate the costs that this mandate would impose on the private sector.

ESTIMATED COST TO THE FEDERAL GOVERNMENT

Spending Subject to Appropriation

Because H.R. 354 would establish a new federal crime, CBO anticipates that the U.S. government would be able to pursue cases that it otherwise would be unable to prosecute. Based on information from DOJ, however, we do not expect the government to pursue many additional cases. Thus, CBO estimates that implementing the bill would not have a significant impact on the cost of federal law enforcement activity. Implementing the bill also could increase costs to the federal courts if more civil suits are filed by private parties, but we do not expect many additional cases.

Based on information from the Copyright Office, CBO estimates that conducting the required study would not significantly increase costs. Finally, waiving sovereign immunity could result in the government paying more to license privately owned databases and could result in additional costs to defend the government in litigation. CBO cannot estimate the amount or timing of these costs, but any such spending would be subject to appropriation of the necessary amounts.

Revenues and Direct Spending

CBO cannot precisely estimate the magnitude or timing of costs that would result from waiving sovereign immunity. The costs could vary greatly from year to year and could be significant—at least in some years. Just one successful suit could result in the payment of tens of millions of dollars. Such payments for successful

claims against the federal government would constitute direct spending.

We expect that there would be no claims payments in many years. In particular, CBO estimates no significant payments for 2000 or 2001 because it would take some time for suits to be initiated and resolved. Although payments are likely to be sporadic, we estimate that they would average about $10 million a year beginning in 2002.

Enacting H.R. 354 could increase governmental receipts (i.e., revenues) from fines, but we estimate that any such increase would be less than $500,000 annually. Criminal fines are deposited as revenues in the Crime Victims Fund and spent in the following year. Thus, any change in direct spending from the fund would match the increase in revenues with a one-year lag.

PAY-AS-YOU-GO CONSIDERATIONS

The Balanced Budget and Emergency Deficit Control Act sets up pay-as-you-go procedures for legislation affecting direct spending and receipts. H.R. 354 would affect both direct spending and receipts, but the effects on revenues would be less than $500,000 a year. We estimate direct spending costs of $10 million a year, beginning in 2002, as shown in the following table. For the purposes of enforcing pay-as-you-go procedures, only the effects in the current year, the budget year, and the succeeding four years are counted.

By Fiscal Year, in Millions of Dollars

	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009
Changes in outlays	0	0	0	10	10	10	10	10	10	10	10
Changes in receipts	0	0	0	0	0	0	0	0	0	0	0

ESTIMATED IMPACT ON STATE, LOCAL, AND TRIBAL GOVERNMENTS

H.R. 354 contains an intergovernmental mandate as defined in UMRA because it would preempt state laws regarding the protection of collections of information. However, CBO estimates that complying with this mandate would not have a significant impact on state budgets primarily because states do not generally regulate in this area of law.

ESTIMATED IMPACT ON THE PRIVATE SECTOR

H.R. 354 would create a new private-sector mandate by granting copyright-like protection to certain collections of information that are not protected by copyright law. Firms that commercially exploit such collections without first obtaining the permission of their owners would be required to pay license fees to the owners or to excise the infringing materials from their products. CBO expects that many such firms would enter into license agreements. Those firms unable to obtain licenses would suffer decreased revenues.

CBO cannot estimate the mandate's costs because we do not have enough information to determine the scope and impact of the new protections. Court rulings identify certain affected collections, but because collection owners are not always aware of unauthor-

ized use and may not wish to bring legal action under current law, court rulings are only a limited indication of the types of collections to which H.R. 354 would extend protection.

ESTIMATE PREPARED BY:

Federal Costs: Mark Hadley and Mark Grabowicz (226–2860)
Impact on State, Local, and Tribal Governments: Shelley Finlayson (225–3220)
Impact on the Private Sector: John Harris (226–6910)

ESTIMATE APPROVED BY:

Robert A. Sunshine
Deputy Assistant Director for Budget Analysis

CONSTITUTIONAL AUTHORITY STATEMENT

Pursuant to clause 3(d)(1) of rule XIII of the Rules of the House of Representatives, the committee finds the authority for this legislation in Article 1, section 8, clause 3 of the Constitution.

SECTION-BY-SECTION ANALYSIS AND DISCUSSION

Section 1. Short Title

The short title of the act will be the "Collections of Information Antipiracy Act"

Section 2. Prohibition Against Misappropriation.

This Section creates a new chapter 14 of the Copyright Act to prevent the misappropriation of another's collection of information where material market harm results. Section 1402 sets out the central prohibition of the Act. It states that any person who makes available to others, or extracts to make available to others, all or a substantial part of a collection of information of another person so as to cause material harm to that other person's primary or related market for a product or service is liable for the remedies established in this act. To be eligible for protection, the collection of information must be gathered, organized, or maintained through the investment of substantial monetary or other resources. In order to qualify, the investment must be substantial, whether it consists of money, time, or effort. The protection would extend to any successor in interest of the person that produced the collection of information.

The use of a substantial part of a collection of information cannot be unlawful under this act unless it is a use made in commerce. Accordingly, the use of information for purely private purposes, without a nexus to commerce such as dissemination to others, would not be prohibited. The intent of the committee is to ensure that those with lawful access to a collection have the ability freely to use its contents for purposes of noncommercial internal study, research or analysis. In contrast, the act of extraction itself could fall within the prohibition of the bill even if it is noncommercial and private, in order to safeguard against the destruction of a market from the members of the intended market simply downloading a collection for their own use without authorization or payment.

Such a circumstance would arise where the person undertaking the act of extraction is within the market for the collection and the extraction causes material harm to that market.

The prohibition of the Act applies only if either the entire collection, or a substantial part of the collection, is taken. The intent is to prohibit piratical takings that misappropriate the value of the collection itself, rather than particular items of information it contains. Since the taking of a substantial part of a collection may seriously harm the collection's market, the prohibition cannot be limited to the taking of the entire collection. Only portions of the collection that are substantial in amount or importance to the value of the collection as a whole would be covered. Qualitative harm may occur through the extraction of a quantitatively small but valuable portion of a collection of information. For example, the Physician's Desk Reference, a work that compiles generally available information about every prescription drug approved by the Food and Drug Administration, contains some several thousand drugs and is available to both consumers and medical professionals. If a second comer extracted information about the thousand most commonly prescribed medications and offered it for sale to the general public—for example under the title "Drugs Every Consumer Should Know"—that extraction and use, although a fraction of the total collection of information, would cause the kind of market harm that the committee intends this legislation to prevent. Similarly, the extraction or use of real-time quotes for all technology stocks from a securities database, while constituting a relatively small portion of actively traded or volatile securities, may be of such "qualitative" importance to the value of the database that it creates the type of commercial harm that the committee intends section 1402 to prevent. On the other hand, the fact that a particular item in the collection is itself of great value does not establish its qualitative substantiality as a part of the collection. Additionally, the prohibition does not apply to or affect the operations or provisions of the Federal Food, Drug and Cosmetic Act (21 U.S.C. § 331 et. seq.).

The distinction between the sheer quantity and the value or quality of data extractions is particularly important in the context of securities and commodities market data. Thousands of securities are publicly traded. The stock exchanges and the NASD are required to collect and disseminate data regarding market activity on a real-time basis, regardless of volume or activity in a particular stock. The sheer number of publicly-traded securities is such that the extraction of quotes on a certain industry sector, or based solely on contemporaneous trading activity would be insubstantial as a percent of the total database, but highly significant and valuable to the producer's market for that data.

Obviously, the greater the portion of the collection taken, the more likely (a) that the taking will be substantial and (b) that material harm will occur. For example, assume that a collector offers a collection of public domain photographs of famous people born in Massachusetts, and invested substantial resources in obtaining these photographs. A defendant could not automatically be excused from the harmful effect of extracting and making available the entire collection of photographs by incorporating them wholesale into a database of famous people born in all fifty States, in effect show-

ing how much the defendant did *not* take. The Act seeks to prevent market harm to the investment in collections of information, and defendants should not be able to escape liability through activity analogous to the use of a stapler.

Under the misappropriation approach of this bill, liability is premised on harm to the primary or related market for the collection of information. The element of market harm is therefore critical, and should be properly understood. Misappropriation under the chapter occurs only if the making available to others or extraction causes harm to the primary or related market for a collection of information produced by the aggrieved person or its predecessor. Clearly, extracting information from a database and using it in a new database which competes with the first database causes harm to the actual market for the first database. Similarly, if a person extracts so much of an online database that the person would, in the future, be able to avoid paying a subscription fee for access to the data it contains, that person has harmed the market for the database.

As originally introduced § 1402 spoke in terms of "harm" to the market of a collection of information protected under the Act. The committee has decided to modify § 1402 to prohibit "material harm" to such markets. This amendment to § 1402 is in direct response to the Administration's suggestion that the harm standard be stated so as to clearly "shield de minimis activities from any possible liabilities." [1] Thus, as amended, the material harm standard under § 1402 is not intended to include de minimis market injury—injury that it is so isolated, minor, or speculative that the defendant's conduct, even if it were to become widespread among defendant or others—would not be considered by a reasonable person in deciding whether to invest in gathering, organizing or maintaining collections of information. The committee has considered and rejected as overly burdensome to the overriding purpose of this Act the test enunciated by the Second Circuit Court of Appeals in *NBA* v. *Motorola*.[2]

In the committee's view, the requirement of material harm will rule out violations of this chapter for various uses of information from collections for bona fide entertainment purposes that differ significantly from the function of the product or service incorporating that collection. Thus, if such use of information were limited to incorporation in such an entertainment product or service not organized to provide discrete access to such incorporated information, it would be unlikely to harm materially the collection from which it was drawn. For example, if substantial portions of a collection protected under this chapter were extracted for purposes of preparing a docudrama, the docudrama would not ordinarily interfere with sales or licences of the collection.

The prohibition in this section is written so as to avoid preventing consumer, scientific, or educational uses of information which has been acquired through lawful access. It would not, for example, prevent scientists from sharing data sets, or publishing the results of their analysis of data, since such acts do not ordinarily involve

[1] Administration written statement at 9–10.
[2] 105 F.3d 841 (2nd Cir. 1997).

use in commerce that would harm the market for the database. Nor is the Act intended to cover indirect harm to the market for a product. For example, a chemical company which uses the information in a database (for which it paid) to create a new chemical which revolutionizes a segment of the industry, and thereby diminishes demand for the database by decreasing the number of companies in the industry, has not misappropriated information within the meaning of this chapter. The harm to the market was not directly caused by the use of the information, but by the changes to the industry that came about through the effect of the use of the information.

Section 1401 provides several definitions. It defines "collection of information" to mean information that has been collected and organized for the purpose of bringing discrete items of information together in one place or through one source so that users may access them. The definition further clarifies that the term does not include an individual work which, taken as a whole, is a work of narrative literary prose, but may include a collection of such works. The definition is intended to avoid sweeping too broadly, particularly in the digital environment, where all types of material when in digital form could be viewed as collections of information. It makes clear that the statute protects what has been traditionally thought of as a database, involving a collection made by gathering together multiple discrete items with the purpose of forming a body of material that consumers can use as a resource in order to obtain the items themselves. This is in contrast to elements of information combined and ordered in a logical progression or other meaningful way in order to tell a story, communicate a message, represent something, or achieve a result. A work of narrative prose includes a biography, history, novel or account of contemporary events, or similar work of literary prose, regardless of the nature of the medium in which it is embodied. Nothing in this chapter shall prevent the utilization of information from such a work in other works of authorship. Thus, a novel would not be considered a "collection of information" even if it appears in electronic form, and therefore could be described as made up of elements of information that have been put together in some logical way. Similarly, material such as interface specifications would not ordinarily be covered, although a collection of such specifications created in order to provide consumers access to the individual specifications could be covered. The term "in one place or through one source" denotes the availability of the information to consumers in a single material object or through a specific address, location or other source. It does not require that all of the information be present at any particular physical site.

The section also contains a definition of "primary market," which means all markets "in which a product or service which incorporates a collection of information is offered" and "in which a person claiming protection with respect to that collection of information under section 1402 derives or reasonable expects to derive revenue, directly or indirectly." This definition, which is drawn from judicial interpretations of the fair use doctrine under copyright law, is intended to clarify that "primary market" is not to be interpreted in a circular way, to avoid the result that any market that the pro-

ducer of the collection could someday exploit is deemed a potential market sufficient to lead to liability.

The section contains a definition of "related market," which means any market "in which products or services which incorporate collections of information similar to a product or service offered by a person claiming protection under section 1402 are offered" and "in which persons offering such similar products or services derives or reasonably expect to derive revenue, directly or indirectly." The term "related market" may also refer to any market in which a person claiming protection with respect to a collection of information under section 1402 has taken demonstrable steps to offer in commerce within a short period of time a product or service incorporating that collection of information with the reasonable expectation to derive revenue, directly or indirectly.

In the past, the definitions of primary and secondary markets require that a person who is seeking protection under the bill "derives or reasonably expects to derive revenue, directly or indirectly," from that market. The committee does not intend that this test be burdensome, recognizing that substantial investment of monetary or other resources by the owner of a collection will most likely never occur without the expectation of gaining substantial revenues. When Henry Ford first designed his assembly line, many people thought that his expectation of return was not only unreasonable, but absurd. By the same token, many Internet companies have defied current stock valuation methodologies by having multibillion dollar market capitalizations despite operating at a loss for consecutive quarters or years. Thus, a lack of immediate revenue from the offering of a collection of information in commerce, or even within a few years, does not obviate the existence of a primary market. Uncertainty of return, or even evidence of no or little revenue, does not render the expectation of revenues unreasonable. However, in making this assessment, the court should look at the substantiality of the investment of resources as to the particular market from which the particular database proprietor expects to derive revenue.

Moreover, the revenue that is intended to be derived does not have to come directly from the licensing or sale of the collection of information. It may come, for example, from using the collection to attract advertisers or customer attention or interest. Similarly, a nonprofit research organization may place a qualifying collection of information online, and never intend to earn any revenue from it through licensing fees. The organization may, however, use the fact of the collection's existence as a basis for soliciting donations to help deflect the cost of its operating expenses.

"Information" is defined to mean facts, data, works of authorship, or other intangible material capable of being collected and organized in a systematic way. It is important to ensure that databases made through substantial investments in collecting and organizing copyrightable works of authorship, which will be a critical source of entertainment and educational material for consumers on the Internet, may be protected under this chapter. This does not mean that the copyrighted works themselves are protected under this chapter, as made clear by section 1405(c). This provision, as with

the entirety of this Act, is not intended to alter any rights existing as to the materials collected.

Paragraph (5) defines "commerce" as all commerce which may be lawfully regulated by the Congress. A collection of information that is utilized within a particular organization or group of customers, but not made available to the general public, could qualify for protection under this chapter as "offered or intended to be offered for sale or otherwise . . . in commerce." Since many collections will be disseminated through licensing mechanisms, the relevant offer is not limited to one made for sale.

Paragraph (6) defines "maintain" to include updating, ongoing verification or supplementing of the information the collection contains. Given the promise of the Internet and emerging technology for distributing information in ways hitherto unimagined, these terms should be interpreted broadly. Thus, substantial investments made to bring a collection forward into the information age may qualify the resulting product for protection.

The committee intends the phrase "makes available to others" to be interpreted broadly, as the applicability of section 1402 ultimately turns on the existence of material harm to a primary or, in certain cases, related market for a collection. Thus, "making available to others" means making a portion of a collection of information available to any other individual irrespective of any affiliations, or lack thereof, between the individual making the portion available and its recipient, or of the manner in which the portion of the collection is transferred, whether on paper or magnetic media, through transmission or display, or in a form later developed. For example, the term covers both a situation where someone offers for sale, license, or at no cost, substantial portions of a protected collection, and also in those instances in which portions are transferred between individuals within a particular entity, group of customers, or consortium.

Section 1403. Permitted Acts

Section 1403 sets out a list of acts that are permitted despite the language of the prohibition in section 1402. These permitted acts are designed for public policy purposes, to ensure that the statute does not have the unintended effect of providing ownership of information itself, or impeding appropriate and beneficial types of uses.

Section (a) permits an individual act of use or extraction of information, done for the purpose of illustration, explanation, example, comment, criticism, teaching, research or analysis, if the act is reasonable under the circumstances. In order to qualify for this exception, the amount taken must be appropriate and customary for the purpose for which it is taken, ensuring that the exception cannot serve as a pretext for the unnecessary taking of the entire collection.

As introduced, Section 1403 (a) set out a permitted use provision somewhat similar to the fair use test found in § 107 of the Copyright Act. While the addition of a "fair use" like provision was welcomed by the Administration and various user groups, at the subcommittee's March 18 hearing a number of suggested changes to this language was proposed. In response to those suggestions, § 1403 (a) was amended in a number of respects. Most important,

the provision was amended to eliminate certain conditions that, according to the Administration and others, prevented it from being a true balancing test as is the case under the copyright law's fair use test.

As currently drafted, § 1403 (a) provides defendants with an affirmative defense to liability that would otherwise attach under § 1402. Section § 1403 (a) first provides that otherwise unlawful acts of making available or extracting information are excused from liability if they are done for purposes "such as illustration, explanation, example, comment, criticism, teaching, research or analysis" and these acts are "reasonable under the circumstances."

Next, the provision lists five factors, based on the fair use criteria contained in § 107 of the Copyright Act, which a court must consider in deciding whether a particular act of making available or extraction is reasonable and thus shielded from liability. There are five factors that a court must consider when determining whether an act is reasonable under the circumstances:

i. The extent to which the making available or extraction is commercial or nonprofit.

ii. The amount of information made available or extracted is appropriate and for the purpose.

iii. The good faith of the person making available or extracting the information.

iv. The extent to which and the manner in which the portion made available or extracted is incorporated into an independent work or collection, and the degree of difference between the collection from which the use or extraction is made and the independent work or collection.

v. The effect of the making available or extraction on the primary or related market for a protected collection of information.

Overall reasonableness is to be determined by consideration of the totality of the circumstances. Accordingly, none of the five factors is determinative or disqualifying. Rather, all the factors are interrelated, and must be weighed together. This means, for example, that even though a use might be commercial, it would be permitted if evaluation of all the factors indicated that it was nevertheless reasonable.

While the list of purposes in § 1403 (a) is non-exhaustive, the committee intends that courts should be extremely reluctant to apply this provision to non-enumerated purposes. This is so, in part, because the statutory list here is broader than that under § 107 of the Copyright Act. In addition, unlike the copyright law, the Collections of Information Antipiracy Act is a misappropriation statute where market harm is an element of the cause of action that must be proved by the plaintiff. Thus, a successful invocation of the affirmative defense here excuses acts that have caused material market harm. Therefore, it is imperative that courts confine the application of this affirmative defense to the purposes expressly set forth in the statute, or to purposes that are similar to, and closely parallel, those specifically set forth in § 1403 (a) (2).

The fact that the user was acting pursuant to one of the enumerated purposes does not automatically mean that the act was a reasonable one for purposes of § 1403 (a). Courts must still engage in the balancing test set forth in the provision. Additionally, while the statutory factors take into account whether an entity is for-profit or nonprofit, both commercial and noncommercial entities are eligible to qualify for the affirmative defense.

The first factor looks to where the use or extraction falls on the continuum between commercial and nonprofit. The focus should be on the commercial or nonprofit nature of the use or extraction, not solely on the nature of the entity making the use or extraction. Under this first statutory factor, the key distinction between profit-making and nonprofit actions is whether the user gains financially from his or her exploitation of the hard work and investment of the collection's owner. Moreover, the issue is not whether the user is a profit-making or nonprofit entity inasmuch as nonprofit entities can engage in profit-generating activities. The issue is whether the purpose of the particular act of making available or and extraction is commercial or nonprofit. In any event, the fact that a nonprofit institution or user commits the act does not itself mean that the act is excused. Courts must still engage in the full balancing test, and consider, for example, that nonprofit institutions are an important primary or related market for many collections of information.

The second factor focuses on the totality of the circumstances related to the making available or extraction, and allows the court to look at the appropriateness of the amount extracted. The key issue for the court to consider is whether the one who made available or extract from the original collection took advantage of the situation at hand and took more than what was reasonable. The crux of factor two is whether the amount of information made available or extracted exceeds what is appropriate for the user's asserted purpose. Courts are instructed to ask whether the amount of the information made available or extracted is more than is necessary to achieve the user's asserted purpose. For example, if the purpose of the making available or extraction is to review or critique a collection of information regarding all the ethnic restaurants in New York City, more than a quite modest sampling of the contents of the collection would likely cause this factor to weigh against a finding of reasonableness.

In evaluating the third factor, good faith, the court should consider whether the person making the use or extraction is in lawful possession of the copy of the collection from which the use or extraction is made, or has authorized access to the collection.

The fourth factor focuses on the degree of investment or creativity added by the person making the use or extraction, including the way in which the portion used or extracted is incorporated into the independent work or collection. For example, if the portion taken is integrated throughout the independent work or collection, the use is more likely to be considered reasonable than if the portion were simply added as an appendix. It is important to note, however, because no one factor is determinative, the fact that the portion is not incorporated into an independent work or collection would not disqualify the user from invoking the exemption.

Courts should also consider the amount of information extracted or made available. The greater the amount extracted or made available, the more likely it is that the activity is not "reasonable" under § 1403 (a). In addition, the courts must take into account the extent to which the information extracted or made available remains essentially the same as that presented in the protected collection of information. The greater the number of changes made by the user to the extracted information, the more likely that the extraction or making available is reasonable.

The fifth factor is designed to ensure that courts examine whether the person making the use or extraction has affected the primary or related market for a protected collection of information. This factor allows the a court to directly consider the relationship between the amount appropriated and the harm done to the market of the original collection. The greater the harm, the more this factor will weigh against the defendant's affirmative defense.

This section further sets an outside limit for what acts may be considered reasonable. It makes clear that use or extraction is not permitted if the used or extracted portion is offered or intended to be offered for sale or otherwise in commerce and is likely to serve as a market substitute for all or part of the collection from which the use or extraction is made. This provision acts as a safety valve, permitting a court to find acts reasonable despite their failure to qualify for a specific exception.

Subsection (b) seeks to alleviate the concerns expressed by members of the research, scientific, and university communities that any new protection for collections of information would hinder their ability to carry on basic research. The subsection recognizes the value and importance of nonprofit educational, scientific and research purposes, permitting the extraction or use of information for such purposes as long as doing so does not directly harm the actual market for the original product or service. Ordinarily such uses will not cause market harm; it is typically where the user is a member of the intended market for the collection that the bill's prohibition would be called into play. The act also supplements this limitation by providing special relief for nonprofit educational, scientific or research institutions, libraries and archives, from substantial civil and criminal liability under the Act. As described below, such an institution is exempt from criminal liability and entitled to a reduction or remittal of monetary relief for good faith conduct, and may also obtain attorney's fees and costs when sued in bad faith.

This provision also seeks to maintain the status quo in relation to how academic institutions use market quotations. Securities and futures markets and clearing organizations have traditionally made available portions of their collections of information available to academics and researchers and will continue to do so under the belief that such activity is in the pubic interest to do so. For example, a university professor could not open an account with a brokerage firm which grants access to real time quotations and subsequently disseminate those quotations university wide to the extent that he or she replicate a real time service. Such activity would fall outside of the permitted acts under this subsection.

Subsection (b) clarifies that no person shall be restricted from extracting or using information for nonprofit educational, scientific,

or research purposes, so long as such use does not directly harm the actual market for the product or service referred to in section 1402. This provision bars the producer or owner of a collection of information from seeking compensation for damage to related markets, or indirect damage to primary markets, against nonprofit educational, scientific, or research entities.

Subsection (c) defines "individual act" to mean "an act that is not part of a pattern, system, or repeated practice by the same parties, or parties acting in concert with respect to the same collection of information or a series of related collections of information."

Subsection (c) makes clear that the extraction or use of individual items of information is not prohibited. This is crucial in establishing that this legislation does not allow the producer of a collection to "lock up" individual pieces of information contained in the collection. The second sentence ensures that a single item in a collection cannot be considered either quantitatively or qualitatively substantial so as to give rise to liability under section 1402, even if it is in itself a valuable copyrighted work. On the other hand, this subsection would not excuse the extraction or use of many individual items in a repeated or systematic way, in order to evade the prohibition against extraction of a substantial portion.

Subsection (d) further clarifies that the act does not protect the information itself, apart from inclusion within a collection. Others remain free to independently gather and use the same information which is contained in another's collection of information, whether for their own use or to produce a competing collection.

Subsection (e) exempts the use of information for purposes of verifying the accuracy of information independently gathered by the verifier. This concept stems from the early "sweat of the brow" copyright cases, which permitted subsequent compilers to use earlier compilations to verify the fruits of their own independent labor.[3] Potential abuse is avoided by the limitations in the subsection requiring the information to be used only internally, not for distribution to others, and for the sole purpose of verifying accuracy rather than adding to or supplementing the information in the verifier's own collection. The exemption will be particularly important for scientists and other researchers, permitting them to use collections of information produced by others to check the results of their research.

It will also be important for the securities and commodities industries, where it is a common practice to verify the current market as part of placing an order for a security or commodity. For example, investors frequently decide to purchase investments through an online securities trading system that they have followed by means of a delayed data service. Typically, the online trading system will allow the investor to verify electronically the last sale price or prevailing quote for the investment as a last step before the investor places the buy order—called a "market check" or "market verification" service. In today's marketplace, providers of these services distribute millions of real-time quotations each month, aiding individuals by allow them to attain easy and quick access to

[3] 7 See *Illinois Bell Tel. Co.* v. *Haines & Co.*, 683 F.Supp. 1304 (N.D. III. 1988), *aff'd*, 905 F.2d 1081 (7th Cir. 1990), vacated and remanded, 499 U.S. 944 (1991); *Rural Tel. Serv. Co.* v. *Feist Publications, Inc.*, 916 F.2d 718 (10th Cir. 1990).

accurate information on which to decide whether to invest or trade in without unduly burdening them with the costs that would be associated with accessing a continual stream of real-time data. This subsection seeks to maintain the status quo and not to supercede any agreements with market verification services concerning the use of market quotation information. This provision permits the extraction of information for verification purposes unless it harms the market for those collections of information. Nothing in this subsection would permit delayed data subscribers to avoid fees when they verify delayed data by retrieving a real time price, a practice which is widespread within the industry.

This subsection is not intended to allow pirates to extract and use real-time quotations of securities and commodities markets and clearing organizations without the permission of the securities and commodities markets that gather, organize and maintain that information. Such activities are not undertaken for legitimate accuracy verification purposes.

Section 1403(f) is premised on the committee's cognizance of the essential role that the press plays in our constitutional system. This subsection reflects the committee's intent that the act neither inhibit legitimate news gathering activities nor permit the labeling of conduct as "news reporting" as a pretext for usurping a compiler's investment in collecting information.[4]

For purposes of this subsection, "news reporting" should be construed to mean dissemination of news to the public, including sports scores and statistics, without regard to the means through which it is disseminated, whether by print media such as newspapers, periodicals, general interest magazines, by television programs, or online. The definition of "news" is intended to encompass a broad array of content occurring in any location, including, without limitation, dissemination of information related to current events, including sports, entertainment, travel, science and technology. "Time sensitive" information does not include statistics generated from and/or facts occurring within the course of publically-performed live events, shows or athletic contests.

The committee expects that news reporting will seldom fall within the prohibition of section 1402, and therefore this exemption will rarely need to be invoked. News articles typically use particular items of information from a collection rather than the collection as a whole. Even if substantial portions of a collection are used, the use often will not affect the market for the collection and therefore will not implicate section 1402.

Section 1403(f) is applicable only if the extraction or use of all or a substantial part of another's collection of information is "for the sole purpose of news reporting or comment." Courts should be "chary of deciding what is and what is not news,"[5] and should examine, on a case-by-case basis, whether a claim under this provision is justified. In some circumstances, the amount taken from the collection may be relevant to a determination of whether the defendant's sole purpose was in fact news reporting. For example, the republication of an entire collection of information as an insert to

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[4] Cf. *Wainwright Sec.* v. *Wall Street Transcript Corp.*, 558 F.2d 91 (2d Cir. 1977).

[5] *Harper & Row, Publishers, Inc.* v. *Nation Enterprises, Inc.*, 723 F.2d 197, 215 (2d Cir. 1983) (Meskill, J., dissenting), rev'd on other grounds, 471 U.S. 539 (1985).

a newspaper would not usually be excused by the mere fact that the newspaper as a whole is engaged in news reporting, or by the inclusion of an article related to the subject matter of only one distinct portion of the collection. Courts should, however, avoid second-guessing how much information is appropriate to use for a valid news reporting purpose.

Among other purposes, this provision seeks to maintain the status quo in relation to how news operations use market quotations. While securities and futures markets and clearing organizations have traditionally allowed news organizations to use market data in a reasonable manner that legitimately contributes to the news functions, this section would not allow news organizations to replicate real time quote services which harm the market for those collections of information. For example, an entity which establishes itself as a news service and opens an account with a brokerage firm which grants access to real time quotations and subsequently disseminates those quotations to the public to such an extent that it would replicate a real time service would not be protected from the prohibition contained in section 1402 by this subsection.

The final clause of this subsection, excepting from its application a consistent pattern of competitive takings of time-sensitive information, is intended to preserve the holding in *International News Service* v. *Associated Press*,[6] and is therefore tailored to the specific facts in that case. It should not be interpreted to have any other meaning, including any implication as to the permissibility of conduct not falling within its narrow scope.

Subsection (g) establishes the principle permitting resale or other sharing of a physical copy of a collection of information once that copy has been lawfully obtained. It does so by using language similar to that of the "first sale" doctrine in the Copyright Act, stating that the owner of a particular lawful copy of all or part of a collection of information may sell or otherwise dispose of that copy.

Subsection (h) establishes that no person shall be restricted from "making available or extracting genealogical information for nonprofit, religious purposes," or from "making available or extracting, for private, noncommercial purposes, genealogical information that has been gathered, organized, or maintained for nonprofit, religious purposes." "Genealogical information" refers to data indicating the date, time, or place of an individual's birth, christening, marriage, death, or burial, the identity of an individual's parents, spouse, children, or siblings, and other information useful in determining the identity of ancestors.

Subsection (i) clarifies that the provisions of this bill should not interfere with properly conducted investigations by law enforcement. It establishes that nothing in this chapter shall prohibit an officer, agent, or employee of the United States, a State, or political subdivision of a State, or a person acting under contract for such officer, agent or employee, from making available or extracting information as part of lawfully authorized investigative, protective or intelligence activities.

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[6] 248 U.S. 215 (1918).

Section 1404. Exclusions

Subsection (a) provides that the act's protection does not extend to collections of information gathered, organized or maintained by or for governmental entities, or any person substantially funded by a governmental entity, their employees, agents, or exclusive licensees or working under contract to such government entity to achieve a government purpose or fulfill a government obligation established by law or regulation. It is designed to ensure that information collected by the government at taxpayer expense will be made available for public knowledge and basic research. The provision responds to concerns that the bill would thwart access to government information currently available to the public, especially to the scientific, research and educational communities. The exclusion is broader than the similar provision in section 105 of the Copyright Act; it applies to State and local governments as well as the Federal Government, and covers collections prepared for the government by independent contractors and exclusive licensees as well as employees.

This subsection does not apply, however, to collections of information gathered, organized or maintained by agents or licensees of the government created outside the scope of their agency, license, grant or contract, or by Federal or State educational institutions in the course of engaging in education or scholarship. When a party retained by the government to perform one particular task also invests in producing databases that add value to the information it has produced or collected for the government, it should not be precluded from protection. Similarly, educational institutions that happen to be government owned should not be disadvantaged relative to private institutions when producing databases unrelated to the provision of regulatory government functions.

Section 1404 (a) excludes from protection under the Act government collections of information, as the government needs no financial incentive to create databases. In its testimony before the subcommittee, the Department of Commerce stated several concerns regarding the breadth of the provisions in this section of the bill as introduced. The legislation was amended by both the subcommittee and the committee, to exempt from protection not only collections of information gathered, organized or maintained by governments or by their employees, agents, or exclusive licensees, but also data collection and dissemination activities funded substantially with government monies, and those performed under contract with government entities.

The committee wishes to emphasize, however, with respect to data collection and dissemination activities funded substantially with government monies or performed under contract, careful attention should be paid to assuring that the purpose of the funding or contract was to achieve a government purpose or fulfill a government obligation. The exclusion in Section 1404 (a) should not serve as a means of depriving non-government suppliers of information products and services vital to the operations of government of the incentive to create, maintain and organize such collections of information. Rather, the purpose of Section 1404 (a) is to provide increased opportunities and incentives for the public—including value-added publishers—to seek greater access to the collections of

information that government entities within the Untied States and its Territories gather, organize or maintain either directly or through clear and specific non-exclusive arrangements with contractors or recipients of government funds.

For example, the American Medical Association's ("AMA") "Physician's Current Procedural Terminology" ("CPT") is a compilation of over 7000 numeric codes with associated descriptions for the reporting of the wide diversity of procedures performed by physicians and other health care providers. The CPT medical code was first published in 1966 to meet the needs of physicians and industry to accurately report medical procedures, and the AMA continues to spend millions of dollars in the organization and maintenance of the CPT medical code. The AMA sells CPT books to the public including physicians, insurance companies and others, and licenses numerous types of users including hospitals and commercial software vendors to use CPT in various electronic media including use over the Internet. In 1983, the AMA granted the Health Care Financing Administration a royalty free license to use CPT in its Medicare, Medicaid and related programs. The AMA also licenses many other types of government users including state worker's compensation agencies, the National Library of Medicine, the Department of Defense and the Veteran's Administration. CPT data is gathered, organized and maintained for purposes other than those for which government agencies contract with AMA to fulfill a government obligation, including international use through license. In addition, when government agencies publish the CPT medical code, they make it clear that extraction and redistribution of the information is subject to the terms and conditions established by AMA with its contracts with those agencies. Clearly, government itself would incur enormous costs to gather, organize and maintain the same type of database, and a general public good is served by the arrangement between AMA and government for general availability, with reasonable limitations, of the CPT medical code. It is precisely this type of arrangement which the committee intends to encourage in the future and does not believe that simply because agencies use nongovernment collections of information to fulfill a governmental purpose or obligation should remove the protections for such collections that would otherwise be afforded under Section 1402.

Similarly, many nongovernment owners of collections of information license use of their products and services to government agencies for limited internal use. Such was the case with the Justice Retrieval and Inquiry System ("JURIS") provided under contract to the Department of Justice by West Publishing Company from 1983 until 1997. Although the collection of information was provided under contract to "achieve a government purpose," the agreement between the Department and West stipulated that access to and distribution of the collection of information was limited. Although certain potential competitors of West sought to have JURIS made publicly available under provisions of the Freedom of Information Act, 5 U.S.C. § 552, the courts have ruled that the terms of the contract between the government and the owner of the collection of information allowed the agency to properly deny a request to make JURIS generally available, because JURIS did not qualify as agen-

cy records and therefore was exempt from disclosure under provisions of 5 U.S.C. §552(a)(4)(B). See *Tax Analysts* v. *United States Dept. of Justice*, 913 F. Supp. 599 (D.C. Cir. 1997), *aff'd*, 107 F.3d 923 (D.D.C. 1996).

Thus, despite the fact that the AMA's CPT is subject to a contract with government agencies to "fulfill a government obligation as established by law or regulation," the exclusion in Section 1404(a) is not meant to reach these types of arrangements. In determining what the governmental purpose behind a contract governing collections of information, courts should rely heavily on the agreement between the government and the nongovernment party. Statutes tend to give broad authority to enforce laws to agencies, but it is in the contract where the motivation for such agreements is most readily revealed.

It should be noted that language added by the committee at mark-up insures patient rights in confidential medical information (Sec. 1405(h)). With this added protection, H.R. 354 would neither prohibit patients from accessing their own medical records, nor does the bill change current law on privacy of medical information and would not authorize any entity to gather and disseminate confidential medical information or records. The language added by the committee was done so specifically for this purpose. Furthermore, this committee does not intend for this legislation to effect any state laws and pending federal legislation that serve to protect confidential medical information and records of patients.

The Act can only lay the groundwork for increasing access to government collections of information. Government entities must undertake the considerable tasks of assuring that publicly funded data and facts are made available without restriction, and ensuring that government information is stored and archived. The evolution of digital technologies, including advances in software capabilities and the reach of the Internet, should ease government costs and labor of gathering, providing and maintaining collections of information. The same should hold true for the functions of storage and archiving, whether the cost efficiencies associated with technology ease the burden of government itself or those of libraries, universities and research institutions to continue acting as repositories for government collections of information.

Finally, this section recognizes that non-government providers of government information may invest substantial monetary or other resources in gathering, organizing collections of information to which they have added value or which may be incidental to any such activity funded by the government. Any product or service in which such investment occurs outside a contractual or agency relationship with the government remains protected under this Act, even if it contains a government collection of information, in whole or in part, subject to the complete defense herein. In this manner, non-government entities will be encouraged to make government collections of information more widely available and in a greater number of formats than government itself may be able to achieve with the use of limited taxpayer funds. Likewise, any Federal of State educational institution can protect its collections of information when it is engaging in education or scholarship, thereby pro-

viding further incentive to these organizations to create, maintain and organize useful collections of information.

The exclusion does not apply to information required to be collected and disseminated by securities, futures exchanges and clearing organizations operating under the Securities and Exchange Act of 1934 or the Commodity Exchange Act. Under the authority of both Acts, the dissemination of market data and price quotes in collections of information supplied by securities and commodities markets is regulated by the SEC and the CFTC, respectively. Because of the fact that the Securities Exchange Act of 1934 requires securities exchanges, securities associations, securities information processors and clearing organizations to register with the SEC, and the fact that the Commodity Exchange Act requires commodities markets to register with the CFTC, might cause the financial markets to be deemed agents or exclusive licensees of the SEC and CFTC, this language clarifies that the unique relationship between government regulatory authorities and the securities and commodities markets does not bar protection under this chapter for the collections of information those markets produce.

Subsection (b) rules out protection under this chapter for computer programs. Computer programs are already closely linked with collections of information, and in the future will be even more so. The search engine for a large collection of information stored on CD–ROM is a type of computer program. Similarly, computer programs referred to as "intelligent agents" can gather information from the World Wide Web and create a collection of information. Section 1404(b)(1) is intended to make clear that notwithstanding the often close relationship between a program and a collection of information, computer programs are not protected under this chapter, including programs that are used in the manufacture, production, operation, or maintenance of a collection of information, or any elements of the program that are necessary for the program's operation.

At the same time, Section 1404(b)(2) makes clear that a collection of information does not lose protection by virtue of its inclusion within a computer program. For example, a set of engineering constants contained in a program which performs mathematical calculations using those constants remains a protected collection of information, assuming it meets the criteria of the Act. Section 1404(b)(2) recognizes that the information in a data-file is distinct from the instructions that perform operations on that information.

Subsection (c) ensures that this legislation will not affect the functioning of the Internet by inhibiting the use of functional building blocks of network information. It explicitly excludes from protection products or services incorporating a collection of information used to conduct digital object online communications, such as Internet specifications, or the registration or use of domain names or addresses. This subsection does not exclude from protection provided by the prohibition under Section 1402 of the Act copyright management information (as defined in section 1202 of Title 17), including digital object identifiers, or exclude from this protection Metadata (i.e., collections of information that describe digital content for the purpose of digitally directing users of that content to such content). Further, this subsection does not exclude collections

of information that facilitate the use of technological measures (as defined in section 1201 of title 17) by copyright owners to protect their copyrighted works in online communications.

Section 1405. Relationship to Other Laws

Section 1405 deals with the relationship of the Act to existing legal rights or obligations relating to information. Subsection (a) clarifies that nothing in this act will affect the rights, limitations or remedies available to a party under current law, other than State rights preempted under subsection (b). For example, nothing in this act would negate the ability of a party to receive copyright protection for a collection of information should that collection qualify for protection as a "compilation" under the Copyright Act. Similarly, other laws that may provide affirmative rights of access to information would remain unaffected. This subsection establishes the general principle of non-interference; subsequent subsections provide specific examples of areas of law particularly relevant to the coverage of this chapter.

Subsection (b) provides for preemption of State law to the extent it provides equivalent rights in the same subject matter. This subsection makes clear that Federal law controls in this specific area, with State common law or statutes dealing with misappropriation of collections of information, as defined in section 1401, preempted by this Act. On the other hand, State law providing different rights in collections of information are not preempted. A collection subject to the additional limitation of § 1409 (c) is not protected by this Act and protection of such a collection under State law is therefore not preempted. The Act specifies that State laws regarding trademark, design rights, antitrust, trade secrets, privacy, access to public documents and the law of contract shall not be deemed to provide equivalent rights and are not preempted by the Act.

Subsection (c) addresses the relationship between the protection provided by this Act and by copyright law. The first sentence clarifies that protection under this chapter is independent of, but complementary to, any copyright protection that may subsist in a work of authorship that is contained in or consists in whole or in part of a collection of information. In evaluating a claim under this chapter, it is not relevant whether copyright protection exists in the collection of information or any component thereof. Rather, a court's task is to determine whether the defendant has misappropriated all or a substantial portion of the plaintiff's collection of information in violation of this chapter—irrespective of whether or not part or all of the contents of such collection of information consists of copyrighted material. When a defendant's use or extraction is also alleged to constitute copyright infringement, the court should determine that issue exclusively under the Copyright Act.

The second sentence of subsection (c) amplifies this principle. Because a collection of information protected under this chapter can consist, in whole or part, of one or more copyrighted works, this sentence affirms that an original work of authorship that is one of the items contained in a collection of information does not receive greater protection under this Act than it does under the copyright law. A work that is itself a collection of information, however, may receive greater protection against misappropriation under this

chapter than it would receive against infringement as a compilation protected by copyright. Because the nature of the protection is distinct, a court evaluating a claim under this chapter need not distinguish between copyrightable and uncopyrightable components of collections of information. If the dissemination or extraction of all or a substantial part of a collection of information violates this chapter, it is irrelevant whether copyright subsists in any part of that collection.

Subsection (d) deals with the relationship of this Act to antitrust law. It states that this chapter will not limit application of antitrust laws, including those laws regarding single suppliers of products and services. The subsection is intended to address the so-called "sole source" issue, involving situations where the information within a collection is not available elsewhere for others to obtain, giving the producer of the collection a de facto monopoly over the facts contained therein. The committee believes that an appropriate response to potential abuse, to the extent it is not dealt with by existing regulatory authorities overseeing certain industries, can be found in the antitrust laws, which are specifically designed to deal with such monopoly concerns. The essential facilities doctrine in particular may be particularly relevant to this issue.

Subsection (e) reaffirms the basic principle of freedom of contract. It makes clear that nothing in this Act prevents the producer of the collection of information from entering into any licensing agreements or contracts concerning the use of the collection. In today's marketplace, licensing and other contractual mechanisms are widely relied upon in disseminating collections of information. The committee intends to preserve the ability to structure and enforce contractual arrangements tailored to the particular circumstances of a transaction.

Subsection (f) provides that nothing in this chapter shall affect the operation of provisions of the Communications Act of 1934, as amended. Consequently, nothing in this bill shall affect the operations of sections 251, 252, 271 or 272 of the Communications Act of 1934, as amended, and this bill shall not have any effect on any existing right contained in the Communications Act to extract or use information from a collection of information for the purpose of obtaining access to a network element, as such term is defined in section 153(29) of the Communications Act of 1934, as amended, (47 U.S.C. § 153(29)), or otherwise to provide a telecommunications service as provided for under the Communications Act of 1934, as amended. Nor shall anything in this chapter affect the operation of section 222(e) of the Communications Act of 1934, as amended, (47 U.S.C. § 222(e)), or shall restrict any person from extracting or using subscriber list information, as such term is defined in section 222(f)(3) of the Communications Act of 1934 (47 U.S.C. § 222(f)(3)). This provision addresses the concerns of companies which presently use such information to publish independent directories separate from those published by the telephone service provider.

Subsection (g) specifically addresses the concerns of some on the issue of securities and commodities market information. This provision affirmatively gives the Securities and Exchange Commission and the Commodity Futures Trading Commission the authority to alter the application of this chapter if it adversely affects those

issues, including making market information available and the rules and regulations concerning the information dissemination. It is the goal of the committee not to have the provisions of this chapter interfere with the smooth assembly and dissemination of market information. Paragraph (3) goes on to make clear that nothing in this chapter shall be construed to permit any person to make available or extract realtime market information in a manner that constitutes a market substitute for a real-time market information service, provided on a real-time basis, unless otherwise specifically authorized to. The committee is aware of the intricate and complicated relationships regarding the dissemination of market information and does not wish to upset the balance or status of those relationships.

The public has a particular need for convenient and reliable information about the financial industry. Reliable information in the financial industry can only result from the same commitment of resources to collect and select relevant data. The most convenient way of arranging such information is in the form of a financial index which, perhaps more so than other arrangements of collection of information, can be easily copied or downloaded and sold at a lower price than the database producers of indexes charge. The same incentive must be afforded, therefore, to database producers to produce financial indexes that are accurate and convenient reflections of the market as other database producers receive under this bill. Those database producers who produce indexes as a result of substantial investment are protected, which provides incentive for them to produce the collections of information most beneficial to economists, financial analysis, news services, librarians, and the public in general.

Subsection (h) makes clear that nothing in this chapter shall limit, impair, or annul in any manner the protections under Federal and State law or regulation relating to the collection or use or use of personally identifying information, including medical information. The committee would also reemphasize its interpretation under Section 1405 indicating other laws that may provide affirmative rights of access to information would remain unaffected.

Section 1406. Civil Remedies

This section sets out the civil penalties which may be imposed for a violation of the act. Subsection (a) establishes exclusive subject matter jurisdiction in United States district courts. Subsection (b) gives courts the power to grant permanent and temporary injunctions to prevent violations of section 1402. An injunction may be served on a party anywhere in the United States and may be enforced by any district court having jurisdiction over the party.

Subsection (c) allows the appropriate court to impound copies of contents of a collection of information extracted or used in violation of this act. The court may also, as part of a final judgement or decree, order the remedial modification or destruction of all contents of a collection of databases extracted or used in violation of this act. Both the injunction and order of destruction may extend to all masters, tapes, disks, diskettes, or other articles by means of which copies may be produced.

Subsection (d) authorizes monetary damages for a violation of this act. The plaintiff is entitled to recover any damages it sustained as well as the defendant's profits not taken into account in computing damages. The plaintiff is required to prove the defendant's gross revenue only, while the defendant has the burden of proving all elements of cost or deduction claimed. The court may assess treble damages up to three times the amount of actual damages. The court may also award reasonable costs and attorney's fees to the prevailing party, and shall award such costs and fees if the action was brought in bad faith against a nonprofit educational, scientific or research institution, library or archives.

Subsection (e) requires a court to reduce or remit entirely monetary relief in any case where a defendant believed and had reasonable grounds for believing that his or her conduct was permissible under this Act, if the defendant was acting within the scope of his or her employment by a nonprofit educational, scientific, or research institution, library or archives.

The injunction and impoundment provisions of this act do not apply to any action against the United States Government. The relief provided under this section is available against a State entity only to the extent permitted by law.

Subsection (h) states that an Internet service provider would not be subject to liability under this chapter unless the provider violates section 1402 willfully. The provision addresses the concerns raised by some providers who may innocently have their systems used by an individual who misappropriates another's collection of information.

Section 1407. Criminal Penalties

Under paragraph (1), any person who willfully violates this Act for direct or indirect commercial advantage or financial gain, or causes loss or damages aggregating $100,000 or more in any 1-year period, is punishable by a fine of not more than $250,000 or imprisonment for not more than 5 years, or both. Additionally, under paragraph (2), any person who willfully violates this Act for direct or indirect commercial advantage or financial gain or causes loss or damages aggregating $50,000 or more in any 1-year calendar period is criminally liable, and is punishable by a fine of not more than $500,000 or imprisonment for not more than 10 years, or both. A second or subsequent offense under paragraph (1) is punishable by a fine of not more than $500,000 or imprisonment for not more than 6 years, or both. Additionally, any person who commits an offense under subsection (a)(1)(C) shall be fined not more than $100,000 and imprisoned not more than 1 year, or both. Section 1407 does not apply to an employee or agent of a nonprofit educational, scientific, or research institution, library or archives, acting within the scope of his or her employment. Like the similar limitations on civil remedies, this exception is intended to avoid the chilling effect these substantial penalties might have on legitimate public interest uses of collections of information.

Paragraph (c) permits victims to submit an impact statement that identifies the victims of the offense and the scope of the injury and the loss suffered by the victim. Those persons permitted to submit a victim impact statement are persons who gathered, orga-

nized, or maintained the information affected by the conduct involved in the offense and their legal representatives.

Section 1408. Defenses to claims.

Section 1408 establishes a number of defenses which may be raised in response to claims of violations of the protections in section 1402. Paragraph (a) provides for an affirmative defense where the person who made available or extracted all or a substantial part of the disputed collection of information could not reasonably determine when that collection was first offered in commerce. This provision seeks to encourage the producer of a collection of information to clearly identify when a given portion of a collection is first placed in commerce. The goal is to assist the user in knowing precisely whether a given portion of a collection is within the fifteen year term of protection from the time it was first placed in commerce.

Subsection (b) states that in the case of a collection of information into which all or substantial part of a government collection of information is incorporated, no monetary relief is available unless the collection contains some reasonable notice identifying the government collection and the government entity from which it was obtained. Subsection (b) provides a partial defense to an action for a violation of section 1402 in that no monetary relief shall be available to an owner of a protected collection of information if: (1) that collection incorporates government information after the effective date of the Act and the owner fails to provide reasonable notice; and (2) the owner identifies both the government collection of information and the government entity from which such information was obtained. The notice must be reasonable but not exhaustive. In most cases, indicating the government entity—e.g., "National Oceanic and Atmospheric Administration"—which produced the collection, or other such information which would generally guide the user to its source will suffice. The committee intends this provision to act as an additional incentive to government to make information widely available by assuring that all can know where government collections of information may be obtained from the original government source, once they appear anywhere in the market.

Paragraph (c) seeks to address the problem of government information which available from only one source. The provisions states that nonprofit educational, scientific, or research institutions, library, or archives, or an employee or agent of each, shall have a complete defense to violation of this chapter is the following apply:

(A) The government information was not publically available from the government or reasonably available from any other source.

(B) The information was extracted for the purpose of engaging in nonprofit educational, scientific, or research activities and not for the purpose of offering the information obtained for sale or otherwise in the market.

(C) Prior to extracting the government information, the person extracting it:

i. Made reasonable, good faith efforts to obtain the information from other sources; and

ii. Made a written request to the person asserting protection under this chapter, which clearly identified the information to be extracted and described the reasonable, good faith efforts made under clause (i).

(D) The person claiming protection under this chapter did not make the requested government information available within a reasonable time, in the person's chosen form, at the cost of the information's identification, extraction and delivery.

Section (c) addresses concerns raised in testimony before the subcommittee about access to government information contained entirely, or as a substantial part of, another collection of information protected under this Act. It provides a complete defense to an action for a violation of section 1402, but only on a limited basis. The stipulations detailed in this section reflect the committee's intent to balance a limited need on the part of certain nonprofit entities to extract and use government information contained in non-government collections of information against the ability of owners of protected collections of information to gain market returns on their investment of substantial monetary or other resources. Testimony has demonstrated that there may indeed be narrow instances in which there is a clear need on the part of nonprofit entities to gain access to such government information. At the same time, however, the committee does not believe it fair to overburden owners of protect collections of information created before the date of enactment. Therefore, Section 1408 (c) assures that owners are not required to provide access to collections of government information, so that such information may be used in a manner that might diminish their ability to gain a return on their investments in such collections of information will receive a shortened term of protection against violations of section 1402.

The defense is available generally only to nonprofit educational, scientific and research institutions and to their legitimate agents and employees and only where the information sought is not available from the government or any other source. Educational, scientific and research institutions comprise a large primary and related market for many collections of information, and in order to avoid harming the owners of such products and services, the committee believes that requests for extraction must be granted only under extreme circumstances.

Further, when any such institution or person wishes to extract government information from a protected collection of information, it must first make reasonable, good faith efforts to obtain the information from other sources. Similarly, when requesting extraction, it must describe such efforts to the owner and identify clearly in writing the information to be extracted.

Once these conditions are met, the owner of the protected collection of information must make the information available within a reasonable time after receiving a bona fide request. The owner of the protected collection of information from which the government information is extracted is entitled to recover the cost of identifying, extracting and delivering the requested item or items.

The form in which the government information is delivered may, at the request of the nonprofit institution, employee or agent, in-

clude the form in which the government information was first obtained from the government entity. However, owners of protected collections of information may need not fill requests for extraction, if they cannot reasonably identify and extract the requested information in the form it was first obtained from the government entity, employee, agent or exclusive licensee. This condition recognizes that in the last fifteen years, private sector, value-added publishers have not always segregated government information from larger, protected collections of information in a manner that facilitates easy identification or extraction of such information in whole or in part. Nor have these owners ever been obligated to archive and store government information and may not be able to retrieve or deliver it as would be the case if disseminated by the government itself.

Section 1404(c)(2) limits applicability of this defense to those collections of information existing before the date of enactment of the Act. This provision is intended to complement the exclusion from protection contained in section 1404 (a). Neither government nor the public at large is likely to create new opportunities and incentives for greater access to the collections of information that government gathers, organizes or maintains or to the storage or archiving of such information, if value-added publishers can be the point of access of last resort. Neither will owners of protected collections of information containing government information be likely to risk investing in such products and services, if they know that they will become *de facto* or *de jure* low-cost providers of portions of their protected collections.

This subsection only applies to collections of information existing before the effective date of this chapter and only if the person claiming protection can reasonably identify and extract the requested information in the form first obtained from the government.

Section 1409. Limitations on actions.

This section provides that no criminal or civil proceedings may be maintained unless it is commenced within 3 years after the cause of action arises. An additional 15-year limit on actions is established in paragraph (b). The fifteen years is measured from the date of the first offer for sale in commerce, subsequent to the investment of resources that qualified the relevant portion of the collection for protection. The investment in producing a collection is generally ongoing in nature, and the point at which it becomes substantial may be difficult to ascertain. Moreover, the facts as to what investment was completed at what time may not be available to the public. The visible act of an offer for sale is therefore used in order to provide a definite starting point for the fifteen years.

The fifteen year limitation on actions means that protection will not be perpetual; the substantial investment that is protected under the Act cannot be protected for more than fifteen years. At the same time, however, the language of this section allows new investments in an existing collection, if they are substantial enough to be worthy of protection, to themselves be protected, ensuring that producers have the incentive to make such investments in expanding and refreshing the collection.

By focusing on the investment that made the particular portion of the collection that has been disseminated or extracted or used eligible for protection, the provision avoids providing ongoing protection to the entire collection every time there is an additional substantial investment made in its scope or maintenance. The last sentence of the provision makes clear that a user remains free to take material directly from a copy of a preexisting collection after its fifteen years of protection has expired, regardless of any additional protection extended due to subsequent investments in that collection.

Paragraph (d) places the burden of proof for an action under this chapter on the plaintiff. The one asserting protection has the burden of demonstrating that the portion of the collection of information in dispute was first offered in commerce no more than fifteen years prior to the violation.

The provisions of paragraphs (b) and (d), taken together, respond to concerns that information older than 15 years would not be distinguishable from information in which a substantial investment was made within the preceding 15 years, thereby resulting in de facto perpetual protection. However, it is critical for the user of information collections to be able to identify whether information they wish to make available or extract falls within the 15 year protection of this chapter. Together, paragraphs (b) and (d) are intended to assure that users of collections of information are able to determine that the information that they wish to make available or extract is either protected under this chapter or no longer protected under the 15 year term of protection provided by this chapter.

Section 3 of the Act makes several changes to Title 28 of the United States Code which enable actions created by this legislation to be maintained in Federal court. Additionally, the section provides that the Register of Copyrights and the Assistant Attorney General for Antitrust should conduct a joint study and submit a joint report to Congress concerning the issue of sole source information. The study and report should be completed no more than 3 years from the date of enactment of the legislation.

Section 4. Effective Date

The provisions of this Act take effect upon enactment and are applicable to acts committed on or after that date, with respect to collections of information existing on that date or produced after that date. However, no person can be liable for the use of information from a collection of information where the information was lawfully extracted prior to the date of enactment of this Act.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italics, existing law in which no change is proposed is shown in roman):

TITLE 17, UNITED STATES CODE

CHAPTER 14—COLLECTIONS OF INFORMATION

§ 1401. Definitions

As used in this chapter:

(1) COLLECTION OF INFORMATION.—The term "collection of information" means information that has been collected and has been organized for the purpose of bringing discrete items of information together in one place or through one source so that persons may access them. The term does not include an individual work which, taken as a whole, is a work of narrative literary prose, but may include a collection of such works.

(2) INFORMATION.—The term "information" means facts, data, works of authorship, or any other intangible material capable of being collected and organized in a systematic way.

(3) PRIMARY MARKET.—The term "primary market" means all markets—

(A) in which a product or service which incorporates a collection of information is offered; and

(B) in which a person claiming protection with respect to that collection of information under section 1402 derives or reasonably expects to derive revenue, directly or indirectly.

(4) RELATED MARKET.—The term "related market" means any market—

(A)(i) in which products or services which incorporate collections of information similar to a product or service offered by a person claiming protection under section 1402 are offered; and

(ii) in which persons offering such similar products or services derive or reasonably expect to derive revenue, directly or indirectly; or

(B) any market in which a person claiming protection with respect to a collection of information under section 1402 has taken demonstrable steps to offer in commerce within a short period of time a product or service incorporating that collection of information with the reasonable expectation to derive revenue, directly or indirectly.

(5) COMMERCE.—The term "commerce" means all commerce which may be lawfully regulated by the Congress.

(6) MAINTAIN.—To "maintain" a collection of information means to update, verify, or supplement the information the collection contains.

§ 1402. Prohibition

(a) MAKING AVAILABLE OR EXTRACTING TO MAKE AVAILABLE.—Any person who makes available to others, or extracts to make available to others, 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 cause material harm to the primary market or a related market of that other person, or a successor in interest of that other person, for a product or service that incorporates that collection of information and is offered or intended to be offered in commerce by that other person, or a successor in interest of that person, shall be liable to that person or successor in interest for the remedies set forth in section 1406.

(b) OTHER ACTS OF EXTRACTION.—Any person who extracts 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 cause material harm to the primary market of that other person, or a successor in interest of that other person, for a product or service that incorporates that collection of information and is offered or intended to be offered in commerce by that other person, or a successor in interest of that person, shall be liable to that person or successor in interest for the remedies set forth in section 1406.

§ 1403. Permitted acts

(a) REASONABLE USES.—Notwithstanding section 1402, the making available or extraction of information for purposes such as illustration, explanation, example, comment, criticism, teaching, research, or analysis is not a violation of this chapter, if it is reasonable under the circumstances. In determining whether such an act is reasonable under the circumstances, all of the following factors shall be considered:

(1) The extent to which the making available or extraction is commercial or nonprofit.

(2) Whether the amount of information made available or extracted is appropriate and for the purpose.

(3) The good faith of the person making available or extracting the information.

(4) The extent to which and the manner in which the portion made available or extracted is incorporated into an independent work or collection, and the degree of difference between the collection from which the information is made available or extracted and the independent work or collection.

(5) The effect of the making available or extraction on the primary or related market for a protected collection of information.

(b) CERTAIN NONPROFIT EDUCATIONAL, SCIENTIFIC, OR RESEARCH USES.— Notwithstanding section 1402, no person shall be

restricted from making available or extracting information for nonprofit educational, scientific, or research purposes in a manner that does not materially harm the primary market for the product or service referred to in section 1402.

(c) INDIVIDUAL ITEMS OF INFORMATION AND OTHER INSUBSTANTIAL PARTS.—Nothing in this chapter shall prevent the making available or extraction of an individual item of information, or other insubstantial part of a collection of information, in itself. An individual item of information, including a work of authorship, shall not itself be considered a substantial part of a collection of information under section 1402. Nothing in this subsection shall permit the repeated or systematic making available or extracting of individual items or insubstantial parts of a collection of information so as to circumvent the prohibition contained in section 1402.

(d) GATHERING OR USE OF INFORMATION OBTAINED THROUGH OTHER MEANS.—Nothing in this chapter shall restrict any person from independently gathering information or making available information obtained by means other than extracting it from a collection of information gathered, organized, or maintained by another person through the investment of substantial monetary or other resources.

(e) MAKING AVAILABLE OR EXTRACTION OF INFORMATION FOR VERIFICATION.—Nothing in this chapter shall restrict any person from making available or extracting information from a collection of information within any entity or organization, for the sole purpose of verifying the accuracy of information independently gathered, organized, or maintained by that person. Under no circumstances shall the information so used be made available to others or extracted from the original collection in a manner that harms the primary market or a related market for the collection of information from which it is made available or extracted.

(f) NEWS REPORTING.—Nothing in this chapter shall restrict any person from making available or extracting information for the sole purpose of news reporting on any subject (including news gathering, dissemination, comment, and feature or general interest reporting) unless the information so made available or extracted is time sensitive and has been gathered by a news reporting entity, and making available or extracting the information is part of a consistent pattern engaged in for the purpose of direct competition.

(g) TRANSFER OF COPY.—Nothing 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.

(h) GENEALOGICAL INFORMATION.—

(1) IN GENERAL.—Notwithstanding section 1402, no person shall be restricted from—

(A) making available or extracting genealogical information for nonprofit, religious purposes; or

(B) making available or extracting, for private, noncommercial purposes, genealogical information that has been gathered, organized, or maintained for nonprofit, religious purposes.

(2) DEFINITION.—For purposes of this subsection, "genealogical information" includes, but is not limited to, data indi-

cating the date, time, or place of an individual's birth, christening, marriage, death, or burial, the identity of an individual's parents, spouse, children, or siblings, and other information useful in determining the identity of ancestors.

(i) INVESTIGATIVE, PROTECTIVE, OR INTELLIGENCE ACTIVITIES.—Nothing in this chapter shall prohibit—

(1) an officer, agent, or employee of the United States, a State, or a political subdivision of a State; or

(2) a person acting under contract with an officer, agent, or employee described in paragraph (1),

from making available or extracting information as part of lawfully authorized investigative, protective, or intelligence activities.

§ 1404. Exclusions

(a) GOVERNMENT COLLECTIONS OF INFORMATION.—

(1) EXCLUSION.—Protection under this chapter shall not extend to collections of information gathered, organized, or maintained by or for a government entity, whether Federal, State, or local, including by any employee or agent of such government entity, or any person substantially funded by, exclusively licensed by, or working under contract to such government to achieve a government purpose or fulfill a government obligation as established by law or regulation, if such collections of information are gathered, organized, or maintained within the scope of the employment, agency, license, grant, contract, or funding. Nothing in this subsection shall preclude protection under this chapter for information gathered, organized, or maintained by such a person that is not within the scope of such employment, agency, license, grant, contract, or funding, or by a Federal or State educational institution in the course of engaging in education or scholarship.

(2) EXCEPTION.—The exclusion under paragraph (1) does not apply to any information required to be collected and made available—

(A) under the Securities Exchange Act of 1934 by a national securities exchange, a registered securities association, or a registered securities information processor, subject to section 1405(g) of this title; or

(B) under the Commodity Exchange Act by a contract market, subject to section 1405(g) of this title.

(b) COMPUTER PROGRAMS.—

(1) PROTECTION NOT EXTENDED.—Subject to paragraph (2), protection under this chapter shall not extend to computer programs, including, but not limited to, any computer program used in the manufacture, production, operation, or maintenance of a collection of information, or any element of a computer program necessary to its operation.

(2) INCORPORATED COLLECTIONS OF INFORMATION.—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.

(c) DIGITAL ONLINE COMMUNICATIONS.—Protection under this chapter shall not extend to a product or service incorporating a collection of information gathered, organized, or maintained to ad-

dress, route, forward, transmit, or store digital online communications, register addresses to be used in digital online communications, or provide or receive access to connections for digital online communications.

§ 1405. Relationship to other laws

(a) OTHER RIGHTS NOT AFFECTED.—Subject to subsection (b), nothing in this chapter shall affect rights, limitations, or remedies concerning copyright, or any other rights or obligations relating to information, including laws with respect to patent, trademark, design rights, antitrust, trade secrets, privacy, access to public documents, and the law of contract.

(b) PREEMPTION OF STATE LAW.—On or after the effective date of this chapter, all rights that are equivalent to the rights specified in section 1402 with respect to the subject matter of this chapter and protected by this chapter shall be governed exclusively by Federal law, and no person is entitled to any equivalent right in such subject matter under the common law or statutes of any State. State laws with respect to trademark, design rights, antitrust, trade secrets, privacy, access to public documents, and the law of contract shall not be deemed to provide equivalent rights for purposes of this subsection.

(c) RELATIONSHIP TO COPYRIGHT.—Protection under this chapter is independent of, and does not affect or enlarge the scope, duration, ownership, or subsistence of, any copyright protection or limitation, including, but not limited to, fair use, in any work of authorship that is contained in or consists in whole or part of a collection of information. This chapter does not provide any greater protection to a work of authorship contained in a collection of information, other than a work that is itself a collection of information, than is available to that work under any other chapter of this title.

(d) ANTITRUST.—Nothing in this chapter shall limit in any way the constraints on the manner in which products and services may be provided to the public that are imposed by Federal and State antitrust laws, including those regarding single suppliers of products and services.

(e) LICENSING.—Nothing in this chapter shall restrict the rights of parties freely to enter into licenses or any other contracts with respect to making available or extracting collections of information.

(f) COMMUNICATIONS ACT OF 1934.—Nothing in this chapter shall affect the operation of the provisions of the Communications Act of 1934 (47 U.S.C. § 151 et seq.), or shall restrict any person from making available or extracting subscriber list information, as such term is defined in section 222(f)(3) of the Communications Act of 1934 (47 U.S.C. § 222(f)(3)).

(g) SECURITIES AND COMMODITIES MARKET INFORMATION.—

(1) AUTHORITY OF SEC AND CFTC.—The Securities and Exchange Commission shall have the authority to modify the application of this chapter as it affects securities issues over which it has jurisdiction, and the Commodity Futures Trading Commission shall have the authority to modify the application of this chapter as it affects commodities issues over which it has jurisdiction.

(2) FEDERAL AGENCIES AND ACTS.—Notwithstanding paragraph (1), nothing in this chapter shall affect—

(A) the operation of the provisions of the Securities Exchange Act of 1934 (15 U.S.C. § 78a et seq.) or the Commodity Exchange Act (7 U.S.C. § 1 et seq.);

(B) the jurisdiction or authority of the Securities and Exchange Commission or the Commodity Futures Trading Commission; or

(C) the functions and operations of self-regulatory organizations and securities information processors under the provisions of the Securities Exchange Act of 1934 and the rules and regulations thereunder, including making market information available pursuant to the provisions of that Act and the rules and regulations thereunder.

(3) PROHIBITION.—Notwithstanding any provision of subsection (a), (b), (c), (d), (e), (g), (h), or (i) of section 1403, nothing in this chapter shall permit the making available, extraction, resale, or other disposition of real-time market information except as the Securities Exchange Act of 1934, the Commodity Exchange Act, and the rules and regulations thereunder may otherwise provide. Nothing in subsection (f) of section 1403 shall be construed to permit any person to make available or extract real-time market information in a manner that constitutes a market substitute for a real-time market information service (including the real-time systematic updating of or display of a substantial part of market information) provided on a real-time basis.

(4) DEFINITION.—As used in this subsection, the term "market information" means information relating to quotations and transactions that is collected, processed, distributed, or published pursuant to the provisions of the Securities Exchange Act of 1934 or by a contract market that is designated by the Commodity Futures Trading Commission pursuant to the Commodity Exchange Act and the rules and regulations thereunder.

(h) PROTECTION OF PRIVACY.—Nothing in this chapter shall limit, impair, or annul in any manner the protections under Federal or State law or regulation relating to the collection or use of personally identifying information, including medical information.

§ 1406. Civil remedies

(a) CIVIL ACTIONS.—Any person who is injured by a violation of section 1402 may bring a civil action for such a violation in an appropriate United States district court without regard to the amount in controversy, except that any action against a State governmental entity may be brought in any court that has jurisdiction over claims against such entity.

(b) TEMPORARY AND PERMANENT INJUNCTIONS.—Any court having jurisdiction of a civil action under this section shall have the power to grant temporary and permanent injunctions, according to the principles of equity and upon such terms as the court may deem reasonable, to prevent a violation of section 1402. Any such injunction may be served anywhere in the United States on the person enjoined, and may be enforced by proceedings in contempt or other-

wise by any United States district court having jurisdiction over that person.

(c) IMPOUNDMENT.—At any time while an action under this section is pending, the court may order the impounding, on such terms as it deems reasonable, of all copies of contents of a collection of information made available or extracted in violation of section 1402, and of all masters, tapes, disks, diskettes, or other articles by means of which such copies may be reproduced. The court may, as part of a final judgment or decree finding a violation of section 1402, order the remedial modification or destruction of all copies of contents of a collection of information made available or extracted in violation of section 1402, and of all masters, tapes, disks, diskettes, or other articles by means of which such copies may be reproduced.

(d) MONETARY RELIEF.—When a violation of section 1402 has been established in any civil action arising under this section, the plaintiff shall be entitled to recover the actual damages sustained by the plaintiff as a result of the violation and any profits of the defendant that are attributable to the violation and are not taken into account in computing the actual damages sustained by the plaintiff. The court shall assess such profits or damages or cause the same to be assessed under its direction. In assessing profits the plaintiff shall be required to prove defendant's gross revenue only and the defendant shall be required to prove all elements of cost or deduction claims. In assessing damages the court may enter judgment, according to the circumstances of the case, for any sum above the amount found as actual damages, not exceeding three times that amount. The court in its discretion may award reasonable costs and attorney's fees to the prevailing party and shall award such costs and fees if it determines that an action was brought under this chapter in bad faith against a nonprofit educational, scientific, or research institution, library, or archives, or an employee or agent of such an entity, acting within the scope of his or her employment.

(e) REDUCTION OR REMISSION OF MONETARY RELIEF FOR NONPROFIT EDUCATIONAL, SCIENTIFIC, OR RESEARCH INSTITUTIONS AND EMPLOYEES THEREOF.—The court shall reduce or remit entirely monetary relief under subsection (d) in any case in which a defendant believed and had reasonable grounds for believing that his or her conduct was permissible under this chapter, if the defendant was a nonprofit educational, scientific, or research institution, library, or archives, or an employee or agent of such an institution, library, or archives acting within the scope of his or her employment.

(f) ACTIONS AGAINST UNITED STATES GOVERNMENT.—Subsections (b) and (c) shall not apply to any action brought against the United States Government.

(g) RELIEF AGAINST STATE ENTITIES.—The relief provided under this section shall be available against a State governmental entity to the extent permitted by applicable law.

(h) RELIEF AGAINST INTERNET SERVICE PROVIDERS.—(1) The relief provided under this section shall not be available against any Internet service provider unless such provider violates section 1402 willfully.

(2) For purposes of this subsection, the term "Internet service provider" means an entity offering the transmission, routing, or pro-

viding of connections for digital online communications, between or among points specified by a user, of material of the user's choosing, without modification to the content of the material as sent or received.

§ 1407. Criminal offenses and penalties

(a) VIOLATION.—

(1) IN GENERAL.—Any person who violates section 1402 willfully either—

(A) for purposes of direct or indirect commercial advantage or financial gain;

(B) causes loss or damage aggregating $100,000 or more during any 1-year period to the person who gathered, organized, or maintained the information concerned; or

(C) causes loss or damage aggregating $50,000 or more in any 1-year period to the person who gathered, organized, or maintained the information concerned,

shall be punished as provided in subsection (b).

(2) INAPPLICABILITY.—This section shall not apply to any employee or agent of a nonprofit educational, scientific, or research institution, library, archives, or law enforcement agency, or to any employee or agent of such an institution, library, archives, or agency acting within the scope of his or her employment.

(b) PENALTIES.—(1) Any person who commits an offense under subsection (a)(1)(A) shall be fined not more than $250,000, imprisoned not more than 5 years, or both.

(2) Any person who commits a second or subsequent offense under subsection (a)(1)(A) shall be fined not more than $500,000, imprisoned not more than 10 years, or both.

(3) Any person who commits an offense under subsection (a)(1)(B) shall be fined not more than $250,000, imprisoned not more than 3 years, or both.

(4) Any person who commits a second or subsequent offense under subsection (a)(1)(B) shall be fined not more than $500,000, imprisoned not more than 6 years, or both.

(5) Any person who commits an offense under subsection (a)(1)(C) shall be fined not more than $100,000, imprisoned not more than 1 year, or both.

(c) VICTIM IMPACT STATEMENT.—(1) During preparation of the presentence report pursuant to Rule 32(c) of the Federal Rules of Criminal Procedure, victims of the offense shall be permitted to submit, and the probation officer shall receive, a victim impact statement that identifies the victim of the offense and the extent and scope of the injury and loss suffered by the victim, including the estimated economic impact of the offense on that victim.

(2) Persons permitted to submit victim impact statements shall include—

(A) persons who gathered, organized, or maintained the information affected by conduct involved in the offense; and

(B) the legal representatives of such persons.

§ 1408. Defenses to claims

(a) AFFIRMATIVE DEFENSE WHEN USER CANNOT DETERMINE WHEN COLLECTION FIRST OFFERED IN COMMERCE.—No monetary relief shall be available for a violation of section 1402 if the person who made available or extracted all or a substantial part of the collection of information that is the source of the violation could not reasonably determine whether the date on which the portion of the collection that was made available or extracted was first offered in commerce following the investment of resources that qualified that portion of the collection for protection under this chapter by the person claiming protection under this chapter or that person's predecessor in interest was a date more than 15 years prior to making available or extracting the information.

(b) NOTICE.—In the case of a collection of information into which all or a substantial part of a government collection of information is incorporated after the effective date of this chapter, no monetary relief shall be available for a violation of section 1402 unless a statement appeared in connection with the version of the collection of information from which the information was made available or extracted, in a manner and location so as to give reasonable notice, identifying the government collection and the government entity from which it was obtained.

(c) ACCESS TO GOVERNMENT INFORMATION.—

(1) IN GENERAL.—In the case of a collection of information that incorporates all or a substantial part of a government collection of information, a nonprofit educational, scientific, or research institution, library, or archives, or an employee or agent of such an institution, library, or archives, acting within the scope of his or her employment, shall have a complete defense to an action for a violation of section 1402 for extracting the government information, if all of the following circumstances apply:

(A) The government information was not publicly available from the government or reasonably available from any other source.

(B) The information was extracted for the purpose of engaging in nonprofit educational, scientific, or research activities and not for the purpose of offering the information obtained for sale or otherwise in the market.

(C) Prior to extracting the government information, the person who extracted it—

(i) made reasonable, good faith efforts to obtain the information from other sources; and

(ii) made a written request to the person asserting protection under this chapter, which clearly identified the information to be extracted and described the reasonable, good faith efforts made under clause (i).

(D) The person claiming protection under this chapter did not make the government information available within a reasonable time after receipt of the request, in any form of that person's choosing, including the form in which the government information was first obtained from the government entity or its employee, agent, or exclusive licensee, at

the cost of the information's identification, extraction, and delivery.

(2) APPLICABILITY.—This subsection applies only to collections of information existing before the effective date of this chapter and only if the person claiming protection under this chapter can reasonably identify and extract the requested information in the form first obtained from the government entity, employee, agent, or exclusive licensee.

§ 1409. Limitations on actions

(a) CRIMINAL PROCEEDINGS.—No criminal proceeding shall be maintained under this chapter unless it is commenced within three years after the cause of action arises.

(b) CIVIL ACTIONS.—No civil action shall be maintained under this chapter unless it is commenced within three years after the cause of action arises or claim accrues.

(c) ADDITIONAL LIMITATION.—No criminal or civil action shall be maintained under this chapter for making available or extracting all or a substantial part of a collection of information that occurs more than 15 years after the portion of the collection that is made available or extracted was first offered in commerce following the investment of resources that qualified that portion of the collection for protection under this chapter. In no case shall any protection under this chapter resulting from a substantial investment of resources in maintaining a preexisting collection prevent any information from being made available or extracted from a copy of the preexisting collection after the 15 years have expired with respect to the portion of that preexisting collection that is so made available or extracted, and no liability under this chapter shall thereafter attach to the making available or extraction of such information.

(d) BURDEN OF PROOF ON PLAINTIFF TO SHOW PORTION FIRST OFFERED IN COMMERCE NO MORE THAN 15 YEARS OLD.—No action for a violation of section 1402 may be maintained unless the person claiming protection under this chapter proves that the date on which the portion of the collection that was made available or extracted was first offered by that person or that person's predecessor in interest in commerce following the investment of resources that qualified that portion of the collection for protection under this chapter was no more than 15 years prior to the time when it was made available or extracted by the defendant.

§ 1410. Study and report

No later than 3 years after the date of enactment of this Act, the Register of Copyrights and the Assistance Attorney General, Antitrust Division of the Department of Justice, shall conduct a joint study and submit a joint report to Congress on whether the defense provided for in section 1408(c) should be expanded to include collections of information that do not incorporate all or a substantial part of a government collection of information where the extracted information is not publicly available from any other source.

TITLE 28, UNITED STATES CODE

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PART IV—JURISDICTION AND VENUE

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CHAPTER 85—DISTRICT COURTS; JURISDICTION

Sec.
1330. Actions against foreign states.

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1338. Patents, plant variety protection, copyrights, mask works, designs, [trade-marks,] *trademarks, collections of information,* and unfair competition.

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§ 1338. Patents, plant variety protection, copyrights, mask works, designs, [trade-marks,] *trademarks, collections of information,* and unfair competition

(a) The district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to patents, plant variety protection, copyrights and [trade-marks] *trademarks*. Such jurisdiction shall be exclusive of the courts of the states in patent, plant variety protection and copyright cases.

(b) The district courts shall have original jurisdiction of any civil action asserting a claim of unfair competition when joined with a substantial and related claim under the copyright, patent, plant variety protection or [trade-mark] *trademark* laws.

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(d) The district courts shall have original jurisdiction of any civil action arising under chapter 14 of title 17, relating to collections of information. Such jurisdiction shall be exclusive of the courts of the States, except that any action against a State governmental entity may be brought in any court that has jurisdiction over claims against such entity.

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CHAPTER 87—DISTRICT COURTS; VENUE

Sec.
1391. Venue generally.

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[1400. Patents and copyrights, mask works, and designs.]
1400. Patents and copyrights, mask works, designs, and collections of information.

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§ 1400. Patents and copyrights, mask works, and designs

§ 1400. Patents and copyrights, mask works, designs, and collections of information.

(a) * * *

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(c) Civil actions arising under chapter 14 of title 17, relating to collections of information, may be brought in the district in which the defendant or the defendant's agent resides or may be found.

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CHAPTER 91—UNITED STATES COURT OF FEDERAL CLAIMS

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§ Patent and copyright cases

(a) * * *

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(e) Subsections (b) and (c) of this section apply to exclusive rights and mask works under chapter 9 of title 17 *and to protections afforded collections of information under chapter 14 of title 17*, and to exclusive rights and designs under chapter 13 of title 17, to the same extent as such subsections apply to copyrights.

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