

*San Francisco Daily Journal, 10/20/99, p. 18.
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Dueling Database Bills: the Saga Continues

by Samuel Trosow, Boalt Express Librarian

In *Feist Publications v Rural Telephone*, 299 U.S. 340 (1991), the U.S. Supreme Court held that a compilation of facts must have a modicum of creativity in its selection, coordination or arrangement in order to qualify for copyright protection. This ruling, which placed the contents of most databases outside the scope of copyright protection, was recently relied upon by the Second Circuit when they denied West Publishing's claim of copyright in their page numbering and other factual materials in reported court decisions. (*Matthew Bender & Co. v West Publishing*, 158 F.3d 674, cert. den. 522 U.S. 3732)

Since the *Feist* decision, passage of a new law extending copyright-type restrictions to such databases has been high on the information industry's wish-list, and this has only intensified since the Supreme Court has effectively closed the door on West's copyright-litigation strategy. H.R. 3531 in the 104th Congress and H.R. 2652 in the 105th were failed attempts to create new copyright-type limitations on databases and compilations even though they could not qualify for protection under existing copyright law. While these measures had the strong support of the well-funded and powerful information industry, a broad coalition of educators, librarians and researchers mounted an effective opposition. Despite a last minute maneuver to include the database bill in the Digital Millennium Copyright Act of 1998, the bill did not make it into the final law.

This legislative battle has extended into the current 106th Congress. H.R. 354. would provide the industry with the additional legal rights they were seeking, but it has again met with the strong opposition of educational, library, and research interests who feared the bill would adversely affect the public's access to information and stifle technological innovation. The bill seeks to establish a new property right for "collections of information," complete with civil and criminal remedies for unauthorized use. Like its predecessors, it seen as an overbroad expansion of narrow property interests to the detriment of the broader public interest in access to data.

In May of this year, the House Judiciary Committee approved H.R. 354 much to the delight of the big legal publishers, the real-estate industry and others who would like to see stronger restrictions on the use of data. Similar in scope to the bills from the previous two Congresses, H.R. 354 would do much more than simply provide creators of compilations with remedies against competitors who engage in acts of misappropriation. Its broad prohibitions would reach the conduct of end-users of data, even if the data was generated by the government. With inadequate protections for fair use and unduly harsh penalties, H.R. 354, has drawn the opposition of a broad group of research, high technology and consumer oriented forces. The key objections to H.R. 354 include:

It is overbroad in scope and is a radical departure from the current intellectual property framework that seeks to balance the interests of users and owners.

It would allow content owners excessive control over the uses of information including downstream, transformative use of facts including those generated by the government.

The exemption for education and research activities, is too narrow. The term of protection is in too long and is perpetual, in effect, for dynamic collections. But this year, instead of just opposing the bad bill, an alternative has been offered. H.R. 1858, the Consumer and Investor Access to Information Act of 1999 would protect owners of databases from commercial misappropriation by competitors without placing unreasonable restrictions on information users. In August, the House Commerce Committee unanimously approved H.R. 1858 including an amendment offered by the American Association of Law Libraries (AALL) that would insure that primary legal materials remain accessible to end-users:

Protection under this chapter shall not extend to primary legal materials, including court opinions, statutes, codes, regulations, or administrative agency decisions, from any Federal, state, or local jurisdiction, unless such materials were permanently available on an interactive computer network, without restriction, in an official, no-fee, publicly accessible electronic form at the time that the extraction occurred.

While the outcome of the August 5th Commerce Committee mark-up session was a major victory for those wishing to maintain open access to the rule of law, a showdown between the Commerce and Judiciary bills, leading to a potential floor fight, now seems likely . For up to date status reports on these bills, including their full text, current status, and list of co-sponsors is available through <http://thomas.loc.gov>. Also check the AALL Washington Affairs website through <http://www.aallnet.org>.

The ability to make transformative uses of information is critical to the legal profession which is highly "information intensive." It is also essential for the advancement of scientific and scholarly research in a variety of fields and for the development of vibrant e-commerce. Members of the legal profession should be particularly concerned with the negative implications of HR 354. Writing a letter to your representative asking them to co-sponsor or support H.R 1858 with AALL's amendment and to oppose H.R. 354 is an important step we can all take in maintaining open access to the rule of law.

Sumbitted by Samuel Trosow (Boalt Express Librarian and Member, AALLGovernment Relations Committee.) The author may be reached at strosow@library.berkeley.edu.

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