GENERAL COUNSEL OF THE
UNITED STATES DEPARTMENT OF COMMERCE
Washington, D.C. 20230

August 4, 1998

Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate
Washington, DC 20510-6275

Dear Mr. Chairman:

In the coming weeks, the Senate may consider S. 2291, the Senate counterpart to H.R. 2652, the "Collections of Information Antipiracy Act."

The Administration supports legal protection against commercial misappropriation of collections of information. We believe that there should be effective legal remedies against "free-riders" who take databases gathered by others at considerable expense and reintroduce them into commerce as their own. This situation has arisen in recent case law and we believe that digital technology may increase opportunities for such abuses.

At the same time, the Administration has a number of concerns with H.R. 2652, including the concern that the Constitution imposes significant constraints upon Congress's power to enact legislation of this sort.

From a policy perspective, the Administration believes that legislation addressing collections of information should be crafted with the following principles in mind:

1. A change in the law is desirable to protect commercial database developers from commercial misappropriation of their database products where other legal protections and remedies are inadequate.

2. Because any database misappropriation regime will have effects on electronic commerce, any such law should be predictable, simple, minimal, transparent, and based on rough consensus in keeping with the principles expressed in the Framework for Global Electronic Commerce. Definitions and standards of behavior should be reasonably clear to data producers and users prior to the development of a substantial body of case law.

3. Consistent with Administration policies expressed in relevant Office of Management and Budget (OMB) circulars, databases generated with Government funding generally should not be placed under exclusive control, *de jure* or *de facto*, of private parties.

4. Any database misappropriation regime must carefully define and describe the protected interests and prohibited activities, so as to avoid unintended consequences; legislation should not affect established contractual relationships and should apply only prospectively and with reasonable notice.

5. Any database misappropriation regime should provide exceptions analogous to "fair use" principles of copyright law; in particular, any effects on non-commercial research should be *de minimis*.

6. Consistent with the goals of the World Trade Organization (WTO) and U.S. trade policy, legislation should aim to ensure that U.S. companies enjoy available protection for their database products in other countries on the same terms as enjoyed by nationals of those countries.

With these principles in mind, the Administration has several specific concerns with the present provisions of S. 2291 and H.R. 2652, including the following:

+ The Administration is concerned that aspects of H.R. 2652 may increase transaction costs in data use, particularly in situations where larger collections integrate datasets originating from different parties or where different parties have added value to a collection through separate contributions of gathering, refining, and/or maintaining the data. This is especially important for large-scale data management activities, where public investment has leveraged contributions from the private and non-profit sectors.

+ The Administration agrees with section 1204(a)'s general intent that data collected with taxpayer funds not be subject to any database protection regime. However, we are concerned that H.R. 2652 does not fully take into account the data policies set forth in relevant OMB circulars and the many different arrangements under which government-funded data are gathered, maintained, and/or organized or under which the data may be subsequently redistributed. It is important that legislation not create inappropriate opportunities or incentives to "capture" government information or government-funded data with relatively small investments in maintenance, organization, or supplemental data.

+ Given the difficulty of foreseeing how "substantiality," "extraction" and other terms in H.R. 2652 will play out in a complex and rapidly changing environment, we are concerned that H.R. 2652 lacks a balancing mechanism analogous to the fair use doctrine in copyright sufficient to address the wide range of circumstances in which information is aggregated, used, and reused. We are especially concerned that the section 1203(d) exception for non-commercial research and educational uses does not ensure that legitimate non-commercial research and educational activities are not disrupted by the prohibition against commercial misappropriation. Equitable issues of access and use may be especially important in markets exclusively served by a single data producer. Finally, we believe it is important to make clear that the legitimate data-gathering activities of law enforcement and intelligence agencies will not be affected by the bill.

+ While the Administration appreciates the efforts of the House Judiciary Committee to define "potential" markets as used in section 1202, we remain concerned that this definition may be broader than market definitions used in other areas of the law, that the definition could be subject to manipulation by private entities, and that potentially the definition too easily exposes legitimate business practices to substantial liability, especially given the provisions for calculating damages. Congress should carefully consider how encompassing "potential markets" may affect entrepreneurs who develop new products and services that add significant value and do not compete directly with the original.

+ While we agree with the House Judiciary Committee's decision to shield non-profit researchers and educators from any criminal liability under section 1207, we believe that the existing criminal provisions could be further refined, particularly by drawing a distinction between misdemeanor and felony conduct and requiring minimum amounts of damage under each.

+ The Administration believes that, given our limited understanding of the future digital environment and the evolving markets for information, it would be desirable for the bill to include a provision for an interagency review of the law's impact at periodic intervals following implementation of the law. This would be consistent with laws and proposed laws in other emerging technologies where Congress has mandated examination of a new law's economic impact. Such a study might be conducted under the auspices of the Secretary of Commerce in consultation with the Office of Science and Technology Policy and the Register of Copyrights.

+ The Department of Justice has serious constitutional concerns that the First Amendment restricts Congress's ability to enact legislation such as H.R. 2652, and that the Intellectual Property Clause also may impose some constraints on legislation of this sort. We note that those constitutional concerns are closely related, in many instances, to some of the points described above, particularly fair use, the effects on potential markets and transformative uses of data.

We would be happy to elaborate on these constitutional questions and policy aspects of H.R. 2652 and S. 2291. Thank you for your time and consideration.

Sincerely,

Andrew J. Pincus