

THE RIGHT TO KNOW?: DELIMITING
DATABASE PROTECTION AT THE JUNCTURE
OF THE COMMERCE CLAUSE,
THE INTELLECTUAL PROPERTY CLAUSE,
AND THE FIRST AMENDMENT

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“In the life of a nation, few ideas are more dangerous than good solutions to the wrong problems.”¹

Except, perhaps, bad solutions to non-existent problems.²

We the people of the United States have a constitutional right to know; the government has a duty not to block access to information. The First Amendment and the Intellectual Property Clause cabin the Commerce Clause. Congress cannot create a quasi-property³ right to exclude others from information without clearly dem-

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¹ ROBERT B. REICH, *THE WORK OF NATIONS* 243 (1992) (referring to schemes to make corporations “based” in the United States profitable rather than to increase the quality of jobs available in the United States); *see also* 144 CONG. REC. H7101 (daily ed. Aug. 4, 1998) (remarks of Rep. Markey) (noting that Congress has made an “implicit deal with the American people where we are going to let the low-end jobs go, [therefore] it is critical for us to garner the lion’s share of the high-end jobs.”). The wrong problem targeted by the Collections of Information Antipiracy Act, *see infra* notes 5-13, is the alleged threat to “American” database producers.

² Response by author. The non-existent problem targeted by the Collections of Information Antipiracy Act, *see infra* notes 5-13, is market failure in the database industry.

³ Oversimplifying (and speaking as if legal terms refer to more than humans’ choice of how to use these terms), “property” is a right against the world, as contrasted with “contract” which is a right against a specific entity. “Quasi-property” is in-between. *See, e.g.*, *International News Serv. v. Associated Press*, 248 U.S. 215 (1918), which is discussed at length *infra* section I.D. *International News Service* held that Associated Press had a “property” right in “hot news” as against its direct competitor, International News Service, even though Associated Press had no “property” right in news as against the public. Under the terms of proposed Article 2B of the UCC, the contract/property divide becomes even more problematic. *See, e.g.*, Mark A. Lemley, *Beyond Preemption: The Federal Law and Policy of Intellectual Property Licensing*, 87 CAL. L. REV. (forthcoming 1999) (text accompanying n.24) (“[C]ontracts under UCC 2B are really more akin to property rights: the contracts can be viewed as equitable servitudes that ‘run with’ the goods in much the way some property owners once tried to impose restrictions on chattel.”); Letter from Charles R. McManis, Professor of Law, *Washington University School of Law*, to ALI Ad Hoc Committee on UCC Article 2B at 3 (June 19, 1998) (on file with CARDOZO ARTS & ENT. L.J.) (visited July 10,

onstrating market failure.⁴

Why say this now? On May 19, 1998, the Collections of Information Antipiracy Act ("May House Act"),⁵ passed the House of Representatives.⁶ The House passed a slightly different version of the May House Act, also entitled the Collections of Information Antipiracy Act ("August House Act"),⁷ on August 4, 1998.⁸ A largely identical companion bill to the May House Act ("Companion Bill")⁹ was introduced in the Senate on July 10, 1998, and re-

1998) <<http://www.softwareindustry.org/issues/guide/docs/cmcali2.html>> ("[O]ne could persuasively argue that both as a practical and a conceptual matter, mass marketing licenses as defined and made enforceable in Article 2, do create rights that are 'equivalent' to copyright, in that they can effectively bind the whole world.").

⁴ Microeconomics defines a properly working market as one where independent decisions of consumers and suppliers lead to spontaneous creation of efficient production and allocation. Markets fail for four main reasons: types of monopoly, externalities, severe informational imbalances, and public goods. See, e.g., ROBERT COOTER & THOMAS ULEN, *LAW AND ECONOMICS* 37-41 (1988). Law and economics theory currently uses two different standards of "efficiency." The Kaldor-Hicks definition is that efficient transactions produce a net gain; this definition allows combining gains and losses from different individuals. The Pareto definition of "efficiency" requires that no individual's position be worsened. If the winners in a Kaldor-Hicks efficient transaction compensate the losers, the transaction will also be Pareto efficient. See Richard A. Epstein, *Property, Speech, and the Politics of Distrust*, 59 U. CHI. L. REV. 41, 51-52 at nn.35-37 (1992). Intellectual property is usually a public good, i.e., consumption is non-rival. Public goods are prone to market failure because producers may not be able to extract payment from users. Underproduction occurs when inability to extract economic returns leads potential suppliers to supply less of a good than the public would be willing to buy. See, e.g., COOTER & ULEN, *supra*, at 40-41; Wendy J. Gordon, *Asymmetric Market Failure and Prisoner's Dilemma In Intellectual Property*, 17 U. DAYTON L. REV. 853, 854 (1992).

⁵ H.R. 2652, 105th Cong. (1998).

⁶ See 144 CONG. REC. H3398-H3404 (daily ed. May 19, 1998).

⁷ Digital Millennium Copyright Act, H.R. 2281, 105th Cong., tit. V (1998). The Collections of Information Antipiracy Act was title V of the Digital Millennium Copyright Act as it passed the House in August 1998. In October, when the Digital Millennium Copyright Act was signed into law, the Collections of Information Antipiracy Act had been excised. See Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998).

⁸ See 144 CONG. REC. H7074-H7104 (daily ed. Aug. 4, 1998). The full text of the August House Act and my suggested edits constitute Part III of this article.

⁹ Collections of Information Antipiracy Act, S. 2291, 105th Cong. (1998). This bill, as contrasted to the May House Act: (i) adds a section alleging congressional "findings" (which are not supported by the evidence introduced in the hearings before the House Subcommittee on Intellectual Property and the Courts), see *infra* note 238 (text of the "findings"); (ii) slightly rewords proposed subsection 1203(c) of U.S.C. Title 17 allowing use of information for verification, see *infra* note 408 and accompanying text; (iii) gives greater protection to database proprietors by rewording proposed subsection 1205(g) of U.S.C. Title 17 on the interaction of the database protection statute with the Securities Exchange Act and Commodity Exchange Act provisions on market information, see *infra* note 416 and accompanying.

The August House Act is different from the May House Act and the Companion Bill as to: (i) the exceptions for verification, see Collections of Information Antipiracy Act, H.R. 2281, 105th Cong. § 502 (1998) (written to amend 17 U.S.C. by adding § 1303(c)); (ii) nonprofit educational, scientific, or research use, see *id.* (written to amend 17 U.S.C. by adding § 1303(d)); (iii) news reporting, see *id.* (written to amend 17 U.S.C. by adding § 1303(e)); and (iv) securities and commodities market information, see *id.* (written to amend 17 U.S.C. by adding § 1303(c)). See also *infra* notes 408-10 and accompanying text. Only the Companion Bill includes "findings." See *infra* note 238 (quoting these "find-

ferred to the Senate Judiciary Committee.¹⁰ On October 13, 1998, the Companion Bill was routed to the Subcommittee on Technology, Terrorism and Government.¹¹ The Senate took no further action before the summer adjournment.

All three versions of the Collections of Information Antipiracy Act (collectively, "CIAA")¹² provide strong remedies against:

[a]ny person who extracts, or uses in commerce, all or a substantial part, measured either quantitatively or qualitatively, 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 harm to the actual or potential market of that other person¹³

The CIAA is both unconstitutional and ill-considered. The CIAA's supporters admit that they cannot demonstrate market failure. This article is a rapid response in time for consideration by the 106th Congress. Part I of this article covers the constitutional constraints on database protection.¹⁴ Part II discusses less theoretical issues; economics, the progress of science, and cultural concerns caution against the CIAA; the recently enacted Digital Millennium Copyright Act¹⁵ independently provides overprotec-

ings"). For specific differences between the three versions, see the Balanced Bill, *infra* Part III.

¹⁰ Senate Bill 2291 was introduced, read twice, and referred to the Committee on the Judiciary. See 144 CONG. REC. 7959 (daily ed. July 10, 1998).

¹¹ Collections of Information Antipiracy Act, S. 2291, 105th Cong. (visited October 15, 1998) <<http://thomas.loc.gov/cgi-bin/bdquery/z?d105:SN02291:@@X>>.

¹² Though there are differences among them, see *supra* note 9, the three versions are essentially the same. One technical difference is that the August House Act places database protection into Chapter 13 of title 17, and the May House Act and the Companion Bill use Chapter 12 of title 17. Except where otherwise noted, citations to the CIAA will be to the August House Act as the Collections of Information Antipiracy Act, H.R. 2281, using Chapter 13 of title 17.

¹³ Collections of Information Antipiracy Act, H.R. 2652 § 2 (1998) (written to amend 17 U.S.C. by adding § 1202); S. 2291 § 3 (written to amend 17 U.S.C. by adding § 1202); H.R. 2281 § 502 (written to amend 17 U.S.C. by adding § 1302).

¹⁴ Some of these issues are discussed more fully in my earlier articles. See, e.g., Malla Pollack, *Time to Dilute the Dilution Statute and What Not to Do When Opposing Legislation: Beyond a Comment on Professor Port's The "Unnatural" Expansion of Trademark Rights: Is a Federal Dilution Statute Necessary?* 78 J. PAT. & TRADEMARK OFF. SOC'Y 519 (1996) [hereinafter Pollack, *Time to Dilute*]; *Unconstitutional Incontestability?: The Intersection of the Intellectual Property and Commerce Clauses of the Constitution: Beyond a Critique of Shakespeare Co. v. Silstar Corp.*, 18 UNIV. OF SEATTLE L. REV. 259 (1995) [hereinafter Pollack, *Unconstitutional Incontestability*]; *A Rose Is a Rose — But Is a Costume a Dress?*, 41 J. COPYRIGHT SOC'Y OF THE U.S.A. 1 (1993); *Your Image Is My Image: When Advertising Dedicates Trademarks to the Public Domain — With an Example from the Trademark Counterfeiting Act of 1984*, 14 CARDOZO L. REV. 1391 (1993); Malla Pollack & Monroe E. Price, *The Author in Copyright: Notes for the Literary Critic*, 10 CARDOZO ARTS & ENT. L.J. 703 (1992), reprinted in, *THE CONSTRUCTION OF AUTHORSHIP* (Martha Woodmansee & Peter Jaszi eds., 1994); Malla Pollack, Note, *Intellectual Property Protection for the Creative Chef, or How to Copyright a Cake: A Modest Proposal*, 12 CARDOZO L. REV. 1477 (1991).

¹⁵ Pub. L. No. 105-304, 112 Stat. 2860 (1998).

tion for database providers. Part III supplies a redraft of the CIAA (“the Balanced Bill”)¹⁶ which, without violating the Constitution, solves all the “problems” expressly relied upon by the CIAA’s sponsors at least as well as the CIAA itself.

No new statute is warranted. But if one is enacted, all thinking, reading, and researching persons in the United States require the protections of the Balanced Bill.

I. CONSTITUTIONAL CONSTRAINTS

A. *Creativity and Copyright*

In the beginning was the United States Constitution:

[T]he Congress shall have power *To promote the Progress of Science and useful Arts*, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries¹⁷

Pursuant to the Intellectual Property Clause,¹⁸ in 1790, the first Congress enacted both the first federal copyright statute¹⁹ and the first federal patent statute.²⁰ Perhaps because federal statutes have been in place since 1790, the United States Supreme Court has seldom discussed the constitutional limits of congressional power over Writings and Discoveries. In 1966, however, the Court declared that the Constitution prevented Congress from granting patents on improvements which were not sufficiently innovative.²¹ Patents may be granted only on advances which are not “obvious . . . to a person having ordinary skill in the [relevant] art”²² *because* the Constitution specifies the purpose of such grants to be

¹⁶ The Balanced Bill is a redraft of the August House Act. However, the Balanced Bill transposes Chapter 13 of the August House Act to Chapter 14, because the recently enacted Digital Millennium Copyright Act, *see id.*, created Chapters 12 and 13 to title 17 of the U.S. Code.

¹⁷ U.S. CONST. art. I, § 8, cl. 8 (emphasis added).

¹⁸ *Id.* Most persons name this the Copyright and Patent Clause; I decline to do so because the Founders chose not to use the already coined terms of art “copyright” and “patent.” The more usual name, furthermore, may lead to confusion between statutory and constitutional limits on rights for Authors and Inventors in Writings and Discoveries. *See* Pollack, *Unconstitutional Incontestability*, *supra* note 14, at 289-92 and accompanying notes (discussing confusion of statutory and constitutional limits). The language of the Intellectual Property Clause is instrumentalist. *But see* John O. McGinnis, *The Once and Future Property-Based Vision of the First Amendment*, 63 U. CHI. L. REV. 49, 80 (1996) (asserting that “[t]he text of the [Intellectual Property] Clause reads as if it were protecting a natural right, but protecting it only to the extent that enforcement through statute would redound to society’s benefit.”).

¹⁹ The Copyright Act of 1790, ch. 15, 1 Stat. 124 (1790) (amended 1802, 1831, 1856, 1870, 1891, 1897; repealed 1909).

²⁰ The Patent Act of 1790, ch. 7, 1 Stat. 109 (1790) (repealed 1793).

²¹ *See* *Graham v. John Deere Co.*, 383 U.S. 1, 3 (1966).

²² *Id.*

“promot[ing] the Progress of . . . useful Arts.”²³ For the same reason, Congress lacks the power to issue patents “remov[ing] existent knowledge from the public domain.”²⁴

Constitutional limits on copyrightable subject matter were not forthcoming as quickly. Early Supreme Court cases focused on the *expandability* of Congress’ power to protect new media: “Writings” of “Authors” could include any “original intellectual conceptions of the author,” including those unknown to the Founders, such as photographs.²⁵ The current statute carefully includes “works of authorship fixed in any tangible medium of expression, *now known or later developed*”²⁶ including (but not limited to) eight categories.²⁷

The creativity requirement for authorship was also obscured by statutory lists of protectable works. The 1790 statute mentioned maps, charts and books.²⁸ Maps were expressly mentioned in copyright statutes until the 1909 Act was repealed by the 1976 Act.²⁹ Maps are archetypical “sweat of the brow works” requiring labor and accuracy, but not necessarily creativity. Without Supreme Court guidance, the federal circuits split on the protectability of such sweat works. Commentators differ on the contour of the split.³⁰ Certainly, the Second and Ninth Circuits rejected sweat

²³ *Id.* at 6.

²⁴ *Id.*

²⁵ See *Burrows-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 57-61 (1884) (holding that it was within Congress’ power under the Intellectual Property Clause to grant a copyright in a photograph (of Oscar Wilde)).

²⁶ 17 U.S.C. § 102(a) (1994) (emphasis added).

²⁷ The eight categories are: “Literary works”; “musical works, including any accompanying words”; “dramatic works, including any accompanying music”; “pantomimes and choreographic works”; “pictorial, graphic, and sculptural works”; “motion pictures and other audiovisual works”; “sound recordings”; and “architectural works.” *Id.* “The terms ‘including’ and ‘such as’ are illustrative and not limitative.” *Id.* § 101.

²⁸ The Copyright Act of 1790, 1 Stat. 124 (1790). Successive copyright statutes added additional categories: prints in 1802, 2 Stat. 171; musical compositions in 1831, 4 Stat. 436; dramatic compositions in 1856, 11 Stat. 138; photographs in 1865, 13 Stat. 540; paintings, drawings, sculptures, models or designs for works of the fine arts in 1870, 16 Stat. 212. The totally revised Copyright Act of 1909 covered “all the writings of an author.” Copyright Act of 1909, § 4, 35 Stat. 1075, *repealed by* The Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (effective Jan. 1, 1978). The 1909 Act provided categories for registration purposes: books, periodicals, lectures, dramatic compositions, musical compositions, maps, works of art, models for works of art, reproductions of works of art, technical drawings, photographs, prints, motion pictures, and sound recordings. *Id.* at § 5.

²⁹ Pub. L. No. 94-553, 90 Stat. 2541 (effective Jan. 1, 1978).

³⁰ Compare Testimony of Professor Jane C. Ginsburg, *infra* note 32, with 1 NIMMER ON COPYRIGHT § 2.11[E] at 2-169 (1986) (“The discovery of a fact, regardless of the quantum of labor and expense, is simply not the work of an author.”), *quoted in* *Worth v. Selchow & Righter Co.*, 827 F.2d 569, 573 (9th Cir. 1987). The academic literature pre-*Feist* discussed the protection of factual works as an unsolved puzzle. See, e.g., Robert C. Denicola, *Copyright in Collections of Facts: A Theory for the Protection of Nonfiction Literary Works*, 81 COLUM. L. REV. 516 (1981) (favoring protection with careful fair use limitations); Jane C. Ginsburg, *Creation and Commercial Value: Copyright Protection of Works of Information*, 90 COLUM. L. REV. 1865 (1990) (favoring protection while recognizing inconsistency in recent case law).

copyright protection by the 1980s.³¹ The Supreme Court, however, did not reach the issue until 1991 when, according to some respected authorities, the Court “dropped a [constitutional] bomb” on the sweating brow of telephone directory publishers by holding that the Constitution forbids copyright protection without originality.³² Facts are not original by definition; in compilations of facts, only the selection and arrangement are protectable by copyright; selection and arrangement, furthermore, are not protectable absent creativity.³³

The bombed plaintiff, however, had not really sweated.³⁴ *Feist Publications, Inc. v. Rural Telephone Service Co.*³⁵ was a clear case of a government-protected monopolist attempting to prevent a competitor from marketing a value-added product in a downstream market category. Rural Telephone Service (“Rural”) had the sole right to provide local telephone service in a section of Kansas and, therefore, the duty to publish a telephone directory.³⁶ This is

³¹ See, e.g., *Worth*, 827 F.2d at 573 (finding game Trivial Pursuit entitled to use facts from encyclopedia for trivia; “to the extent that *Leon* [*v. Pacific Tel. & Tel. Co.*, 91 F.2d 848 (9th Cir. 1937)] suggests that research or labor is protectable [under copyright], later cases have rejected that theory”); *Financial Info. Inc. v. Moody’s Investor Serv.*, 808 F.2d 204, 207 (2d Cir. 1986) (holding that financial reporting service was entitled to copy information from bond call cards; “[t]o grant copyright protection based merely on the ‘sweat of the author’s brow’ would risk putting large areas of factual research material off limits and threaten the public’s unrestrained access to information”); *Hoehling v. Universal City Studios*, 618 F.2d 972, 979 (2d Cir. 1980) (indicating that it is not copyright infringement to copy facts about Hindenburg disaster; declining to “subscribe to the view that an author is absolutely precluded from saving time and effort by referring to and relying upon prior published material. . . . It is just such wasted effort that the proscription against the copyright of ideas and facts . . . are designed to prevent.”) (citation and internal quotations omitted). But see *Moody’s*, 808 F.2d at 207 n.1 (mentioning exception for “wholesale appropriation”). The *Moody’s* court presumably meant wholesale appropriation “of expression.” *Accord Hoehling*, 618 F.2d at 974 (“[A]bsent wholesale usurpation of another’s expression” copyright in factual works is rarely infringed).

The Copyright Office started questioning the registrability of mere-sweat works in 1987. See U.S. COPYRIGHT OFFICE, REPORT ON LEGAL PROTECTION FOR DATABASES 33 (1997) (“Beginning in 1987, the Office began to question the copyrightability of works where sweat of the brow was the only basis for registration.”) [hereinafter COPYRIGHT OFFICE REPORT] (visited May 15, 1998) <<http://lcweb.loc.gov/copyright/reports>>.

³² *Continued Hearings on H.R. 2652, The “Collections of Information Antipiracy Act”*: Hearing Before the Subcomm. on Courts, Intellectual Property and the Administration of Justice of the Comm. on the Judiciary, 105th Cong. 2 (Feb. 12, 1998) [hereinafter *Feb. 1998 Hearings*] (visited May 14, 1998) <<http://www.house.gov/judiciary/41147.html>> (testimony of Professor Jane C. Ginsburg quoting the then-Register of Copyrights).

³³ See *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 344, 348, 358 (1991). Many compilations of “facts,” however, have been protected after *Feist*. See, e.g., Michelle R. Silverstein, *The Copyrightability of Factual Compilations: An Interpretation of Feist Through Cases of Maps and Numbers*, 1996 ANN. SURV. AM. L. 147 (1996) (collecting cases).

³⁴ Congress seemingly agreed, as it statutorily prevented other telephone providers from blocking would-be-publishers of competing telephone directories. See 47 U.S.C. § 222(f)(3) (WESTLAW through Aug. 7, 1998) (referred to in the Balanced Bill § 1405(f), *infra* Part III).

³⁵ 499 U.S. 340 (1991).

³⁶ *Id.* at 342-43.

hardly an onerous duty considering that (i) Rural obtained all needed information while operating its main, government-protected business of providing telephone service, (ii) directories encourage telephone calls (for which Rural charges its customers), and (iii) Rural could reuse the listings to publish a classified directory in which it sold advertisements. Feist wished to publish a better telephone directory — one which covered a much larger geographical area. Rural, however, refused to license its listings; Rural was the sole holdout of eleven local telephone companies.³⁷ Feist copied the listings anyway; Rural sued. The district court granted summary judgment to Rural; the Tenth Circuit affirmed; the Supreme Court reversed.³⁸

Justice O'Connor emphatically rested the Court's opinion on the Constitution.³⁹ She depended on the words "Authors" and "Writings."⁴⁰ Justice O'Connor also relied on the Constitution's stated purpose:⁴¹

It may seem unfair that much of the fruit of the compiler's labor may be used by others without compensation. As Justice Brennan has correctly observed, however, this is not "some unforeseen by product of a statutory scheme." It is, rather, "the essence of copyright," and a constitutional requirement. The primary objective of copyright is not to reward the labor of authors, but "[t]o promote the Progress of Science and useful Arts." . . . As

³⁷ *Id.* at 343.

³⁸ *Id.* at 344.

³⁹ *Id.* ("Originality is a constitutional requirement;" "originality requires independent creation plus a modicum of creativity."); *id.* at 351 ("As we have explained, originality is a constitutionally mandated prerequisite for copyright protection."); *id.* at 363 ("As a constitutional matter, copyright protects only those constituent elements of a work that possess more than a *de minimis* quantum of creativity."). Justice O'Connor mentioned, but did not rely upon, a possible statutory escape hatch: the state regulation ordered Rural to select all telephone subscribers. *Id.* ("[O]ne could plausibly conclude that this selection was dictated by state law, not by Rural."). See also Paul J. Heald, *The Vices of Originality*, 1991 SUP. CT. REV. 143, 144 (Justice O'Connor "bludgeon[ed] the [constitutional] point home in at least seven places" and ignored four available narrower grounds for decision). Justice O'Connor did say that the drafters of the 1976 Copyright Act *intended* to codify an originality requirement. *Feist*, 499 U.S. at 354-58. This legislative history comment, however, was dicta. Since creativity is a constitutional requirement, the intent of the legislation's drafters is bootless, even if the drafters' intent is legislative intent, and even if legislative intent is a coherent or relevant concept — both suppositions of which are under attack. See, e.g., ANTONIN SCALIA, A MATTER OF INTERPRETATION 23-25, 29-37 (1997); *infra* note 368 (discussion of cases). But see Russ VerSteeg, *Sparks in the Tinderbox: Feist, "Creativity," and the Legislative History of the 1976 Copyright Act*, 56 U. PITT. L. REV. 549 (1995) (arguing that the drafters of the 1976 Copyright Act did not intend to require creativity as a prerequisite for copyright protection).

⁴⁰ *Feist*, 499 U.S. at 346.

⁴¹ *Id.* at 349 (citation omitted). Justice O'Connor's statement echos, but does not cite, the Court's much earlier logic constitutionalizing the non-obviousness requirement for protecting the Discoveries of Inventors through the Patent Act. See *supra* note 14 and accompanying text.

applied to a factual compilation, assuming the absence of original written expression, only the compiler's selection and arrangement may be protected; the raw facts may be copied at will. This result is neither unfair nor unfortunate. It is the means by which copyright advances the progress of science and art.⁴²

While O'Connor assured publishers that copyright required only a "minimal level of creativity," a mere "creative spark," she found none in the selection or arrangement of Rural's alphabetically arranged all-inclusive telephone directory.⁴³

Feist started a turbulent discussion over whether Congress could use the Commerce Clause to protect sweat works.⁴⁴ The discussion is now centered on the CIAA.⁴⁵

⁴² *Feist*, 499 U.S. at 349-50 (citations omitted).

⁴³ *Id.* at 358-59, 362.

⁴⁴ The academic literature on *Feist* and the post-*Feist* status of databases is voluminous. Relevant articles include: David O. Carson, *Copyright Protection for Factual Compilations After Feist: A Practitioner's Views*, 17 U. DAYTON L. REV. 969, 992-94 (1992) (assuming without discussing that "Congress could enact noncopyright legislation under the Commerce Clause to prevent misappropriation of works that are not entitled to copyright," but arguing that no action should be taken until later decisions clarify the effect of *Feist*); Michael B. Gerdes, Comment, *Getting Beyond Constitutionally Mandated Originality as a Prerequisite for Federal Copyright Protection*, 24 ARIZ. ST. L. J. 1461, 1468 n.42, 1471-74 (1992) (arguing that *Railway Labor Executives' Ass'n v. Gibbons*, 455 U.S. 457 (1981), shows only that the Commerce Clause is limited by "explicit or affirmative limitations" in other clauses — originality is not explicit in the Copyright Clause; that the Lanham Act and the Court's decisions on the spending and taxing power show Congress has the power to protect "sweat of the brow" items under its choice of the Commerce Clause or the Copyright Clause; and that *Feist's* invocation of a constitutional need for originality is dicta in relation to all works except compilations); Jane C. Ginsburg, No "Sweat?": *Copyright and Other Protection of Works of Information After Feist v. Rural Telephone*, 92 COLUM. L. REV. 338 (1992) (stating that a misappropriation act would have to be distinguishable from copyright statutes); Paul Goldstein, *Copyright*, 38 J. COPYRIGHT SOC'Y 109, 119 (1991) (reading *Feist's* reference to the *Trade-Mark Cases*, 100 U.S. 82 (1879), as the Court's suggestion for protection of databases under the Commerce Clause); Heald, *supra* note 39, at 149-51, 175 (arguing that constitutionalizing the originality requirement has undesirable practical consequences; suggesting that Congress use spending power to compensate); Dennis S. Karjala, *Copyright and Misappropriation*, 17 U. DAYTON L. REV. 885 (1992) (noting that limits of copyright protection for works should look at social harm of piracy, i.e., misappropriation, and, therefore look to the creativity, skill, and effort involved in the work's fixation; *Feist* should be read narrowly); Philip H. Miller, Note, *Life After Feist: The First Amendment and the Copyright Status of Automated Databases*, 60 FORDHAM L. REV. 507, 526, 536-38 nn.180-95 (1991) (suggesting, without real analysis of limits on the Commerce Clause, that Congress use it as authority to protect automated databases); L. Ray Patterson, *Copyright Overextended: A Preliminary Inquiry into the Need for a Federal Statute of Unfair Competition*, 17 U. DAYTON L. REV. 385, 407-10 (1992) (arguing that protection of low-authorship works under copyright is a historically-driven error and recommending a trade regulation statute under the Commerce Clause be substituted; reading *Feist's* subject as the Copyright Act, not the Copyright Clause); Leo J. Raskind, *Assessing the Impact of Feist*, 17 U. DAYTON L. REV. 331, 332 (1992) ("To the extent that *Feist* results in lesser copyright protection for compilations of data . . . [i]t is likely that there will be active consideration given to state and federal legislation establishing some version of misappropriation principles for the protection of data bases"; no discussion of constitutional limits of such legislation).

⁴⁵ Recent articles focusing on the debate over a new statute include: Jane C. Ginsburg,

B. *The Commerce Clause Alternative*

In the beginning, the Constitution also granted Congress the power:

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.⁴⁶

This commerce power generally⁴⁷ grew over the years until Congress seemingly could do anything by invoking the magic word "commerce."⁴⁸ Recently, however, the Rehnquist Court reigned in the run-away commerce power. Congress cannot use the Commerce Clause as a federal police power.⁴⁹ Congress cannot force the states to stand suit in federal courts by invoking the Commerce Clause as a sword against the states' Eleventh Amendment sovereign immunity.⁵⁰

Copyright, Common Law, and Sui Generis Protection of Databases in the United States and Abroad, 66 U. CIN. L. REV. 151 (1997) (stating that databases are amply protected in the United States under misappropriation and contract doctrines; that proposed *sui generis* legislation in U.S. and European Union offer over protection; that any legislation should give users some rights against database producers, e.g., require licensing of sole-source data); William Patry, *The Enumerated Powers Doctrine and Intellectual Property: An Imminent Constitutional Collision*, GEO. L.J. (forthcoming 1999) (arguing that the CIAA is unconstitutional); J.H. Reichman & Pamela Samuelson, *Intellectual Property Rights in Data?*, 50 VANDERBILT L. REV. 51 (1997) (stating that under protection of sub-patentable and sub-copyrightable works is a serious problem, but current proposals have been pushed by industry spokespersons into even more damaging over protection; that a limited liability regime is needed, such as automatic licenses); John Tessensohn, *The Devil's in the Details: The Quest for Legal Protection of Computer Databases and the Collections of Information Act*, H.R. 2652, 38 IDEA 439 (1998) (stating that some misappropriation statute is needed, but May House Act harmfully overprotects).

⁴⁶ U.S. CONST. art. I, § 3, cl. 8.

⁴⁷ Regarding "generally," see, e.g., *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) (invalidating National Industrial Recovery Act as beyond Congress' Commerce Clause power).

⁴⁸ For a fuller discussion see Pollack, *Unconstitutional Incontestability*, *supra* note 14, at 270-74 and accompanying notes.

⁴⁹ See *United States v. Lopez*, 514 U.S. 549 (1995) (holding that criminalization of carrying a gun near a school is beyond Congress' power under the Commerce Clause); see also Lawrence Lessig, *Translating Federalism: United States v. Lopez*, 1995 SUP. CT. REV. 125 (1995) (reading *Lopez* as a return from textualism to originalism).

⁵⁰ See *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996) (holding that the allowance of federal court suits against states pursuant to the Indian Gaming Regulatory Act, 25 U.S.C. § 2710(d), is ineffective; facts of case deal only with the Indian Commerce Clause, U.S. CONST. art. I, § 8, cl. 3; dicta says that no Article I power is sufficient to overcome the Eleventh Amendment, but that Section Five of the Fourteenth Amendment is sufficient.); see also Daniel J. Meltzer, *The Seminole Decision and State Sovereign Immunity*, 1996 SUP. CT. REV. 1 (1996) (discussing Congress' post-*Seminole* power over States' amenability to suit in federal courts). Congress granted plaintiffs the right to sue states in federal court in the Lanham Act, 15 U.S.C. § 1122, the Copyright Act, 17 U.S.C. § 501(a), and the Patent Act, 35 U.S.C. § 296. The validity of these waivers after *Seminole* is unclear. Compare *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 148 F.3d 1343 (Fed. Cir. 1998) ("Congress abrogated state immunity [from patent infringement suits] pursuant to a valid exercise of power"), with *Genentech, Inc. v. Regents of the Univ. of Cal.*, 143 F.3d 1446, 1591 (Fed. Cir. 1998) (refusing to reach constitutionality of state liability provision in Patent Act because Regents' actions had waived any Eleventh Amendment immunity), and

Even at its strongest, furthermore, the Commerce Clause was not sufficient to override the express limitation in another constitutional clause. The Bankruptcy Clause allows Congress to pass only “uniform Laws on the subject of Bankruptcies throughout the United States.”⁵¹ Congress attempted to bypass the uniformity requirement by relying on the Commerce Clause to help the employees of one insolvent railroad. In the 1982 case *Railway Labor Executives’ Ass’n v. Gibbons*, the Court struck down the statute as unconstitutional.⁵²

The record is not totally clear. The 1884 *Head Money Cases*⁵³ could be read as allowing Congress to bypass the “general welfare” limit on the Taxing Clause⁵⁴ by using the Commerce Clause. The *Head Money Cases*, however, are not strong enough to shield a database protection act from the Intellectual Property Clause.⁵⁵

First, no bypass was actually at issue. The Court surmised that Congress could have shown, if called upon to do so, that the impost of fifty cents per immigrant passenger did promote the gen-

Chavez v. Arte Publico Press, 157 F.3d 282 (5th Cir. 1998) (holding that Congress’ purported waivers of state sovereign immunity in the Copyright Act and the Lanham Act are ineffective), and *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 131 F.3d 353 (3d Cir. 1997) (holding that waiver in Lanham Act is ineffective), and *Sofamor Danek Group, Inc. v. Brown*, 124 F.3d 1179 (9th Cir. 1997) (affirming district court’s refusal to dismiss for lack of jurisdiction due to Eleventh Amendment immunity from Lanham Act; availability of suits against state officials requesting prospective injunctions pursuant to doctrine of *Ex Parte Young*, 209 U.S. 123 (1908), survives *Seminole*), and *United States ex rel. Berge v. Board of Trustees of the Univ. of Ala.*, 104 F.3d 1453, 1458-59 (4th Cir. 1997) (stating that it is dicta that Eleventh Amendment does not affect the False Claims Act because the United States is the real party in interest and the Eleventh Amendment does not prevent the United States from suing a state), *cert. denied*, 118 S. Ct. 301 (1997), and *Rodriguez v. Texas Comm. on the Arts*, 992 F. Supp. 876 (N.D. Tex. 1998) (indicating that waiver in Copyright Act is ineffective).

The CIAA handles the uncertainty by allowing “relief” against “a State governmental entity to the extent permitted by applicable law,” Collections of Information Antipiracy Act, H.R. 2281, § 502 (1998) (written to amend 17 U.S.C. by adding § 1306(g)), and by allowing state courts jurisdiction in database misappropriation cases “against State governmental entities,” *id.* § 504 (written to amend 28 U.S.C. § 1338(d)).

⁵¹ U.S. CONST. art. I, § 8, cl. 4. Federal bankruptcy statutes must be uniform geographically (rather than personally), therefore, federal statutes may incorporate state exemptions (which vary among the states). See *Hanover Nat’l Bank v. Moyses*, 186 U.S. 181, 188-90 (1902).

⁵² 455 U.S. 457, 471 (1982) (Rehnquist, J.); see also Ginsburg, *supra* note 44, at 369-74 (concluding that *Railway Labor* merely requires Congress to differentiate protection of sweat works under the Commerce Clause from the copyright regime); Heald, *supra* note 39, at 168-75 (stating that *Railway Labor* limits Congress’ power to protect sweat works pursuant to the Commerce Clause); COPYRIGHT OFFICE REPORT, *supra* note 31, at 109-10 (admitting that *Railway Labor* is a problem case, but arguing that *Railway Labor* can be distinguished because the statute at issue there admitted that it was an attempt to bypass the Bankruptcy Clause).

⁵³ 112 U.S. 580 (1884).

⁵⁴ U.S. CONST. art. I, § 8, cl. 1 (“The Congress shall have power to lay and collect Taxes, Duties, Imports, and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States.”).

⁵⁵ U.S. CONST. art. I, § 8, cl. 8.

eral welfare of the United States.⁵⁶

Second, since 1884 the Court has eroded the “general welfare” limit of the Taxing/Spending Clause. The Court defers “substantially” to Congress’ judgment about the “general welfare.” The deference may be so extreme that “general welfare” is no longer justiciable.⁵⁷ Since Congress’ ability to spend is not limited to the fields in which Article I allows federal legislation,⁵⁸ the Spending Power is more extensive than the Commerce Power. Repeated Supreme Court dicta, however, have insisted that the Spending Power is limited by other constitutional provisions.⁵⁹ *A fortiori*, the Commerce Power is limited by other constitutional clauses. This argument, unfortunately, both (i) conflates the Taxing and Spending Powers, and (ii) stands dicta on dicta — hardly sure footing.

Now, let us apply the analyses used in *Railway Labor* to the database problem. First, what questions should one ask to disentangle the Intellectual Property Clause from the Commerce Clause? When disentangling the Bankruptcy Clause, the Court at

⁵⁶ If it were necessary to prove that the imposition of this contribution on owners of ships is made for the general welfare of the United States, it would not be difficult to show that it is so, and particularly that it is among the means which Congress may deem necessary and proper for that purpose; and beyond this we are not permitted to inquire.

Head Money Cases, 112 U.S. at 595.

⁵⁷ See *South Dakota v. Dole*, 483 U.S. 203, 207-08 & n.2 (1987). The Court has even opined that “general welfare” is an extensive power to spend, rather than a type of limitation. See *Buckley v. Valeo*, 424 U.S. 1, 90 (1976) (*per curiam*) (“Appellants’ ‘general welfare’ contention erroneously treats the General Welfare Clause as a limitation upon congressional power. It is rather a grant of power, the scope of which is quite expansive, particularly in view of the enlargement of power by the Necessary and Proper Clause.”) (citation omitted).

⁵⁸ See *Dole*, 483 U.S. at 207.

⁵⁹ *Id.* at 208 (dicta) (holding that Congress may use Spending Power to prevent state governments from dictating how local governments use federal payments in lieu of taxes) (citing *Lawrence County v. Lead-Deadwood Sch. Dist.*, 469 U.S. 256, 269-70 (1985)); *Buckley*, 424 U.S. at 89 (dicta) (holding that Congress may use Spending Power to include in income tax forms a check-off contribution to political campaigns); *King v. Smith*, 392 U.S. 309, 333 n.34 (1968) (dicta) (holding that Congress may use Spending Power to prevent state from redefining “father” in limitations on children entitled to aid money). Most recently, the Supreme Court stated that subsidies cannot be used to “suppress[] dangerous ideas” or “manipulated to have a coercive effect.” *National Endowment for the Arts v. Finley*, 118 S. Ct. 2168, 2178 (1998). The Court held constitutional Congress’ charge to the National Endowment for the Arts that when judging grant applications it should “tak[e] into consideration general standards of decency and respect for the diverse beliefs and values of the American public,” *id.* (O’Connor, J., joined by Rehnquist, C.J., Stevens, Kennedy, Breyer & Ginsburg, JJ.), while simultaneously declaring that “the Government may allocate competitive funding according to criteria that would be impermissible were direct regulation of speech or a criminal penalty at stake,” *id.* at 2179 (O’Connor, J., joined by Rehnquist, C.J., Stevens, Kennedy, Breyer, JJ., but not Ginsburg, J.). Justices Scalia and Thomas, concurring only in the judgment, stated clearly that the denial of a subsidy cannot infringe the First Amendment. See *id.* at 2184 (“[T]he distinction between ‘abridging’ speech and funding it [is] a fundamental divide, on this side of which the First Amendment is inapplicable.”).

tempted to “[d]istinguish[] a congressional exercise of power under the Commerce Clause from an exercise under the Bankruptcy Clause.”⁶⁰ We now need to distinguish an exercise of power under the Intellectual Property Clause from an exercise of power under the Commerce Clause.

Second, what prompted congressional action? When confronted with the Bankruptcy/Commerce Clause problem, the Court emphasized that Congress was reacting to a bankruptcy crisis.⁶¹ The CIAA targets the protection gap created by *Feist*.⁶² Here, Congress is reacting to a copyright crisis allegedly created by the *Feist* decision. The CIAA is an unconstitutional use of the Intellec-

⁶⁰ *Railway Labor Executives' Ass'n v. Gibbons*, 455 U.S. 457, 465 (1982).

⁶¹ The events surrounding the passage of RITA [the statute under constitutional scrutiny], as well as its legislative history, indicate that Congress was exercising its powers under the Bankruptcy Clause. In RITA, Congress was responding to the crisis resulting from the demise of the Rock Island [Railroad] as an operating entity. The Act was passed almost five years after the Rock Island had initiated reorganization proceedings under section 77 of the Bankruptcy Act, and approximately 10 months after a strike had rendered the Rock Island unable to pay its operating expenses.

Id. at 467-68.

⁶² See, e.g., Collections of Information Antipiracy Act, S. 2291, 105th Cong. § 2 (1998) (“Congress finds that . . . as a result of the decision of the United States Supreme Court in *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991), and certain decisions of the inferior courts of the United States, the copyright law affords members of the United States business community, both individuals and entities who create and distribute compilations of data, little or no protection against piracy.”); 144 CONG. REC. E1052 (daily ed. June 5, 1998) (Letter from Rep. Henry Hyde, Chairman, House Judiciary Comm., to Rep. Tom Bliley, Chairman, House Commerce Comm. (June 3, 1998)) (placed on Record by Rep. Hyde) (“The bill was developed in the aftermath of the Supreme Court’s 1991 decision in *Feist Publications v. Rural Tel. Serv. Co.* . . . The bill . . . was suggested as one viable way of ‘filling in’ the ‘Feist gap’ in a Report issued by the Copyright Office of the United States on Database Protection in September, 1997.”); 144 CONG. REC. E2000 (daily ed. Oct. 9, 1997) (remarks of Rep. Coble) (introducing House Bill 2652 and stating that the bill provides protection removed by the Supreme Court’s 1991 decision in *Feist*); *Feb. 1998 Hearings, supra* note 32, at 1-3 (introductory remarks by Rep. Coble, Chairman, Subcomm. on Courts and Intellectual Property); *Hearings on the “Collections of Information Antipiracy Act” Before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary*, 105th Cong. 1-2 (1997) [hereinafter *Oct. 1997 Hearings*] (remarks of Marybeth Peters, Register, U.S. Copyright Office) (explaining that the bill is intended to protect sweat works which were held unprotected by copyright in *Feist*); COPYRIGHT OFFICE REPORT, *supra* note 31, at 3-18 (tracing suggestion for statute to *Feist*); H.R. REP. NO. 105-525 (1998), at 7 (visited June 17, 1998) <ftp://ftp.loc.gov/pub/thomas/cp105/hr525.txt> (tracing need for May House Act to *Feist*); 144 CONG. REC. S7959 (daily ed. July 10, 1998) (remarks of Sen. Grams introducing the Companion Bill, S. 2291) (“[A]fter a 1991 Supreme Court decision, it is increasingly unclear whether most databases are adequately protected from piracy by U.S. copyright law.”). To the extent that H.R. 2652 was prompted by the E.C. Database Directive, we should note that the E.C. Directive was itself partly prompted by *Feist*. See, e.g., Mark Powell, *The European Union’s Database Directive: An International Antidote to the Side Effects of Feist?*, 20 FORDHAM INT’L L. J. 1215, 1221 (1997). The European Union’s Database Directive is Directive 96/9/EC of the European Parliament and of the Council of 11, March 11, 1996, on the Legal Protection of Databases, 1996 O.J. (L77) 20 (visited April 25, 1998) <HTTP://WWW2.ECHO.LU/LEGAL/EN/IPR/DATABASE/TEXT.HTML> [hereinafter EC Directive]. The EC Directive is discussed *infra* Part II.B.4.

tual Property power.⁶³

Third, echoing the Court's question about statutes passed pursuant to the Bankruptcy Clause,⁶⁴ what types of rights has Congress created pursuant to its Intellectual Property power? The Copyright Act⁶⁵ gives time-limited⁶⁶ exclusive rights⁶⁷ in, *inter alia*, literary and pictorial *res*.⁶⁸ The exclusive rights allow the copyright holder to prevent unauthorized copying, distribution, and derivative works. While economic harm is not an element of copyright infringement, economic harm in actual or potential markets is the key to barring the alleged infringement from the safe haven of fair use.⁶⁹ The CIAA creates exclusive rights and allows right holders to prevent unauthorized copying, distribution, and derivative works on a showing of economic harm to actual or potential markets. The CIAA, therefore, is an unconstitutional exercise of the Intellectual Property power.⁷⁰

We need to be vigilant against sliding into the invalid argu-

⁶³ The same logic may apply to the Vessel Hull Design Protection Act, H.R. 2696, 105th Cong. (1997), which would create a federal right against splash molding boat hulls in response to the Court's decision finding a similar state statute preempted by federal patent law in *Bonito Boats v. Thunder Craft Boats*, 489 U.S. 141 (1989). See *The "Vessel Hull Design Protection Act": Hearings on H.R. 2696 Before the Subcomm. on Courts, Intellectual Property and the Administration of Justice of the Comm. on the Judiciary*, 105th Cong. (1997) [hereinafter *Vessel Hull Hearings*] (visited May 14, 1998) <<http://www.house.gov/judiciary/41111.htm>> (statement of Rep. Coble, Subcomm. Chair) ("This bill, in large part, represents a legislative response to the case of *Bonito Boats* . . ."). House Bill 2696 passed the House on March 19, 1998, see 144 CONG. REC. H1247 (daily ed. March 19, 1998), and was sent to the Senate Judiciary Comm. on March 19, 1998, see 146 CONG. REC. S2295 (daily ed. March 19, 1998). On August 4, 1998, as Title VI of the House version of the Digital Millennium Copyright Act, the House again passed a version of the Act as the Vessel Hull Design Protection Act. See 144 CONG. REC. H7088-91, H7103 (daily ed. Aug. 4, 1998). In October 1998, a different version of the Vessel Hull Design Protection Act was enacted as Title V of the Digital Millennium Copyright Act. Vessel Hull Design Protection Act, Pub. L. No. 105-304, tit. V, 112 Stat. ___ (1998). But see *infra* notes 86-97 and accompanying text (discussing possible non-constitutional basis of *Bonito Boats*).

⁶⁴ See *Railway Labor Executives' Ass'n v. Gibbons*, 455 U.S. 457 (1982).

⁶⁵ 17 U.S.C. §§ 101-1101 (1994).

⁶⁶ *Id.* §§ 301-305.

⁶⁷ *Id.* § 106.

⁶⁸ *Id.* § 102.

⁶⁹ See *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 566 (1985) (stating that the effect of use on potential market of the copyrighted work is "undoubtedly the single most important element of fair use.") (footnote omitted).

⁷⁰ See H.R. REP. NO. 105-525, at 25 (statements of Rep. Lofgren) (stating that provisions of the May House Act "believe the 'misappropriation' label and look suspiciously analogous to those of copyright (infringement, fair use, etc.); concluding that the logic of *Railway Labor* prevents the Commerce Clause from grounding the May House Act). The test used by the author in the text resembles (but is not identical) to the test routinely used for judging if a state law cause of action is preempted by the express preemption clause of the Copyright Act, 17 U.S.C. § 301(a). A cause of action is statutorily preempted if it involves the type of work generally protectable under the copyright act, but does not require an extra element substantively different from any element of copyright violation. See, e.g., *Kregos v. Associated Press*, 3 F.3d 656, 665-66 (2d Cir. 1993) (holding that state unfair competition claim, premised on defendant's alleged use of baseball statistics form with

ment that Congress can appease the Constitution by adding to the CIAA some single element which is absent from the Copyright Act.⁷¹ The language of the Intellectual Property Clause is crucial when discussing constitutional limitations. The Clause does not discuss copyrights or patents — legal terms of art known to the Founders. Instead, the Clause discusses “exclusive rights” of “authors” and “inventors” in “writings” and “discoveries” — which I name authors’ exclusive rights (“AERs”) and inventors’ exclusive rights (“IERs”).⁷² Whenever Congress oversteps any one of the constitutional terms, its actions must be scrutinized carefully. As O’Connor recognized, the terms of the Intellectual Property Clause are interwoven. For example, the definitional limits of “writings” and “authors” are set by the purpose preamble.⁷³

Accepting that Congress may not do an end run around a limitation in one clause of the Constitution by invoking a more general clause, Congress may not grant (at least some types of) exclusive rights to something close to, but not quite, the writings of authors or the discoveries of inventors. The shielded subject matter is not limited to statutorily copyrightable or patentable *res*.

This formulation, however, is not complete. We still must deal with the other textual parts of the Intellectual Property Clause: the time limit (“for limited times”), and the purpose preamble (“in order to promote the progress of science and useful arts”). As I have argued in other articles, the best reading of the time limit seems to be that Congress may not grant perpetual rights in IERs, AERs, or in *res* that too closely track IERs or AERs.⁷⁴

Now add the purpose preamble. Congress cannot grant rights in any *res* similar to AERs or IERs unless these rights promote the progress of science and useful arts. The Court could also strike a statute giving time-limited protection to AERs or IERs if Congress lacked a rational basis for concluding that the statute promoted the progress of science and the useful arts.⁷⁵ The Intellectual Prop-

false copyright information, was preempted by Copyright Act because no extra element was required), *cert. denied*, 510 U.S. 1112 (1994).

⁷¹ *But see* Ginsburg, *supra* note 44, at 370-74 (stating that a database protection statute under the Commerce Clause would need to be different from the “copyright model”).

⁷² *See* Pollack, *Unconstitutional Incontestability*, *supra* note 14, at 290-91.

⁷³ *See* Feist Publications, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 349-50 (1991); *supra* note 42 and accompanying text.

⁷⁴ *See* Pollack, *Unconstitutional Incontestability*, *supra* note 14 (arguing that incontestable Lanham Act rights in functional marks violate the time limit of the Intellectual Property Clause). I still believe that the time limit should be read in terms of the economic life of the protected *res* but that subject is beyond this article. *Id.* at 327.

⁷⁵ I encourage my more economically oriented colleagues to make such an argument about long term protection for functional works such as computer programs. *See generally* Pamela Samuelson et al., *A Manifesto Concerning the Legal Protection of Computer Programs*, 94

erty Clause imposes both these limits by negative implication,⁷⁶ but does not bar time-limited rights in *res* which are not quite IERs or AERs on a strong showing that the rights “promote the progress of science and useful arts.”

I conclude that a database protection act grounded on the Commerce Clause can pass constitutional scrutiny only if the act is carefully limited to situations of market failure.⁷⁷ A database protection act would promote the progress of science and the useful arts if, and only if, without protection the facts would not be collected for use by other persons. The need for protection, furthermore, would have to be commercial. Market failure due to the inability to exclude free riders from non-rival goods would be an acceptable commercial reason. The increased ability of others to use these collected facts would qualify as promoting the progress of science and useful arts. The CIAA, similarly, would only be constitutional if it guarded against right-holders obtaining too much power to prevent potential users from accessing the collected facts; otherwise the act would not promote the progress of science and the useful arts.

Market failure, of course, would not read the words “writings” and “authors” out of the Intellectual Property Clause. Market failure, however, might be sufficient reason to allow the Commerce Clause to ground time-limited protection for an unoriginal work *because market failure allows a well-grounded conclusion that Congress is not doing an end run around the Intellectual Property Clause* — both in the sense of Congress’ intent and in the sense that the result is unlikely to harm the avowed purpose of the Intellectual Property Clause, the progress of science and useful arts.

In what depth should the Court examine a Congressional

COLUM. L. REV. 2308, 2316, 2320 (1994) (“[P]rograms exist to make computers perform tasks. . . . [S]oftware [is] a machine whose medium of construction happens to be text.”).

⁷⁶ For a more thorough discussion of this argument and the lack of historical material to help explain the Intellectual Property Clause see Pollack, *Unconstitutional Incontestability*, *supra* note 14. The use of negative implication in reading the Constitution was recently reaffirmed by the Court. See *United States v. Lopez*, 514 U.S. 549, 567 (1995) (refusing to accept government’s argument on breadth of Commerce Clause because “[t]o do so would require us to conclude that the Constitution’s enumeration of powers does not presuppose something not enumerated . . .”).

⁷⁷ Market failure is not the failure of a specific business (such as Warren Publishing Co., discussed *infra* note 245) to survive competition. Market failure usually occurs in markets for non-rival, public goods (such as intellectual property) when inability to extract economic returns leads potential suppliers to supply less of a good than the public would be willing to buy. See, e.g., Gordon, *supra* note 4, at 854. Market failure is “asymmetric” when giving a property right to one side (but not the other) would allow the market to function. *Id.* Asymmetric market failure is the economic explanation of why giving limited rights to authors and inventors in their respective writings and discoveries leads to the progress of science and useful arts. *Id.*

claim of market failure? The Court was silent on the level of scrutiny it employed in the Bankruptcy Clause case.⁷⁸ The *Lopez* Court used rational basis scrutiny to decide that the Gun Free School Zone Act did not regulate interstate commerce.⁷⁹ *Lopez*, however, is inapposite; no one can rationally doubt that a database protection act would substantially affect interstate commerce.⁸⁰

I conceded above that the Court should use rational basis scrutiny if the issue were whether Congress had sufficient basis to conclude that (i) some specific time-limited right (ii) given to authors or inventors (iii) in a writing or discovery (iv) would promote the progress of science and the useful arts. This issue, however, presents the common scenario of Congress acting facially within constitutional grounds — not the more suspect case of Congress attempting to bypass a textual limit in the Constitution.

The current question is whether Congress is allowed to conclude that market failure has been shown sufficiently to entitle Congress to use the Commerce Clause to bypass the textual limits of the Intellectual Property Clause. This question is different from earlier scenarios.⁸¹ Rather than trying to formulate a totally novel theory on levels of scrutiny, I suggest we continue substantive analysis, as this moves us out of *terra incognita* into the worn (albeit confusing) paths of First Amendment jurisprudence.

⁷⁸ *Railway Labor Executives' Ass'n v. Gibbons*, 455 U.S. 457 (1982).

⁷⁹ *Lopez*, 514 U.S. at 557 (“Since that time, the Court has heeded that warning and undertaken to decide whether a rational basis existed for concluding that a regulated activity sufficiently affected interstate commerce.”). Chief Justice Rehnquist, writing for the Court, did not mention that the Court’s rational basis scrutiny often has little bite. *See, e.g.*, David A. Strauss, *Affirmative Action and the Public Interest*, 1995 SUP. CT. REV. 1, 33 & n.89 (“For the most part, rational basis review has been notoriously toothless;” citing as deferential opinions *FCC v. Beach Comm. Inc.*, 508 U.S. 307 (1993); *Nordlinger v. Hahn*, 505 U.S. 1 (1992); *Burlington N. R.R. v. Ford*, 504 U.S. 648 (1992)).

⁸⁰ *But see* *Goldstein v. California*, 412 U.S. 546 (1973), where the Supreme Court *sua sponte* decided that record piracy was a *local* (not an interstate) problem, despite no supporting submissions and opposite factual statements in the briefs. *See, e.g.*, Brief of Recording Indus. Ass’n of America, Inc. as Amici Curiae in support of Respondent at 22-23 & n.53, *Goldstein*, 412 U.S. 546 (No. 71-1192) (stating that ten states have anti-piracy statutes similar to the California statute at issue; supporting California); Brief of American Fed’n of Musicians and American Fed’n of Television and Radio Artists as Amici Curiae for Respondents at 20-26, *Goldstein*, 412 U.S. 546 (No. 71-1192) (amassing statistics to support the notion that “[t]he nationwide and deleterious scope of unauthorized tapping of musical sound recordings fully justifies the exercise of California’s police power to penalize such actions”; supporting California).

⁸¹ The Court did look merely to the rationality of Congress’ supposed decision that the United States Olympic Committee had added considerable value and recognition to the word “olympic,” but the opinion admitted neither that this conclusion was very debatable nor that the issue was of deep constitutional concern. *See* *San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 483 U.S. 522, 532-33 (1987); *see also* *United Christian Scientists v. Christian Science Bd. of Dir.*, 829 F.2d 1152 (D.C. Cir. 1987) (holding that the private law granting church an extended copyright on all editions of a religious text is unconstitutional under the Establishment Clause).

Even without reaching the First Amendment, however, some scholars have read *Feist* to impose more stringent limits than I concluded above. Justice O'Connor wrote that "raw facts may be copied at will." She also declared copying to be "'the essence of copyright,' and a constitutional requirement."⁸² Does Justice O'Connor's phrasing recognize a constitutional right to copy which cannot be abrogated by Congress in any manner?⁸³ If so, is this right to copy based solely on the Intellectual Property Clause?

Such a robust right to copy is not mirrored by the language of the Intellectual Property Clause. That Clause is worded as a limited grant of power to Congress; pushing the language this far approaches inducing pregnant negatives to birth monsters. Such a robust right to copy, furthermore, is at odds with the Supreme Court's earlier inconsistency on the right to copy unpatented or unpatentable quasi-inventions.⁸⁴ Additionally, the most recent quasi-invention right to copy case, *Bonito Boats*, is not necessarily grounded on the Constitution.⁸⁵

In *Bonito Boats Inc. v. Thunder Craft Boats, Inc.*,⁸⁶ the Court, again speaking through Justice O'Connor, held that a Florida statute was preempted by "the operation of the federal patent system."⁸⁷ Florida had prohibited using the direct molding process to

⁸² *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349-50 (1991).

⁸³ See, e.g., David L. Lange, *The Intellectual Property Clause in Contemporary Trademark Law: An Appreciation of Two Recent Essays and Some Thoughts About Why We Ought to Care*, 59 LAW & CONTEMP. PROBS. 232 (1996) (quoting and construing Theodore H. Davis, Jr., *Copying in the Shadow of the Constitution: The Rational Limits of Trade Dress Protection*, 80 MINN. L. REV. 595, 595 (1996) ("[T]he Intellectual Property Clause creates and defines a public domain that trumps all federal intellectual property legislation and not just that in *Feist*")); Patry, *supra* note 45 (stating that the Intellectual Property clause creates a public right to copy all unoriginal material).

⁸⁴ I use "quasi-invention" to mean a *res* which fails IER's non-obviousness requirement. Compare *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225 (1964) (right to copy unpatented inventions), *Compco Corp. v. Day-Brite Lighting*, 376 U.S. 234 (1964) (right to copy unpatented inventions), and *Bonito Boats v. Thunder Craft Boats* 489 U.S. 141 (1989) (right to copy unpatented inventions), with *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470 (1974) (holding that the state trade secret law is not in violation of a federal right to copy unpatented inventions). *Accord Kewanee*, 416 U.S. at 494 (Douglas, J., dissenting) ("Today's decision is at war with the philosophy of *Sears, Roebuck* and *Compco* . . . [There, we] held that when an article is unprotected by a patent, state law may not forbid others to copy it, because every article not covered by a valid patent is in the public domain."). But see Paul Heald, *Federal Intellectual Property Law and the Economics of Preemption*, 76 IOWA L. REV. 959, 961 (1991) ("The accepted wisdom has long been that the Court's decisions in the area are unreconcilable and unguided by any consistent rationale"; article argues that the Court's decisions are consistent from an economic perspective).

⁸⁵ Perhaps the best argument that *Bonito Boats* is a constitutionally based decision is that economically-minded authorities find the decision baffling. See, e.g., John S. Wiley, Jr., *Bonito Boats: Uninformed but Mandatory Innovation Policy*, 1989 SUP. CT. REV. 283, 309 (concluding that "the opinion deserves only the respect that nine votes can give to unpersuasive assertion").

⁸⁶ 489 U.S. 141 (1989).

⁸⁷ *Id.* at 156 (Citing Fla. Stat. Ch. 559.94 (1987)).

copy unpatented boat hulls.⁸⁸ Justice O'Connor's *Bonito Boats* opinion rests the federal patent scheme on the Constitution:

[T]he [Intellectual Property] Clause contains both a grant of power and certain limitations upon the exercise of that power. Congress may not create patent monopolies of unlimited duration, nor may it authorize the issuance of patents whose effects are to remove existent knowledge from the public domain, or to restrict free access to materials already available.⁸⁹

This Constitutional recitation opens Justice O'Connor's legal argument.

Justice O'Connor, however, quickly slides into statute: "From their inception, the federal patent laws have embodied a careful balance between the need to promote innovation and the recognition that imitation and refinement through imitation are both necessary to invention itself and the very lifeblood of a competitive economy."⁹⁰ This slide is resoundingly silent on how far Congress' statutory choices were constrained by the Constitution. Later language ambiguously credits Congress with determining *either* the general proposition that "knowledge that is already available to the public" should not be protected by patent *or* the specific formulation of sections of the code which "operate in tandem to exclude [such knowledge] from patent protection."⁹¹

Justice O'Connor's closing section is also ambiguous: "It is for Congress to determine if the present system of design and utility patents is ineffective in promoting the useful arts in the context of industrial design."⁹² Justice O'Connor did not reiterate that Congress is limited by the Intellectual Property Clause of the Constitution. Congressman Coble (also the main sponsor of the May House Act)⁹³ reads Justice O'Connor's unnecessary sentence as au-

⁸⁸ *Id.* at 144.

⁸⁹ *Id.*

⁹⁰ *Id.* at 146.

⁹¹ *Id.* at 148 ("Sections 102(a) and (b) [of the Patent Act, 35 U.S.C. §§ 1-376 (1984)] operate in tandem to exclude from consideration for patent protection knowledge that is already available to the public. They express a congressional determination that the creation of a monopoly in such information would not only serve no socially useful purpose, but would in fact injure the public by removing existing knowledge from public use."); *id.* at 150 ("Taken together, the novelty and nonobviousness requirements [of the Patent Act] express a congressional determination that the purposes behind the Patent Clause are best served by free competition and exploitation of either that which is already available to the public or that which may be readily discerned from publicly available material."); *id.* at 151 ("The novelty and nonobviousness requirements of patentability embody a congressional understanding, implicit in the Patent Clause itself, that free exploitation of ideas will be the rule, to which the protection of a federal patent in the exception.").

⁹² *Id.* at 168.

⁹³ See 143 CONG. REC. E2000 (daily ed. Oct. 9, 1997) (Rep. Coble introducing H.R.

thorization to pass a federal statute protecting boat hulls, including hulls that fail the protectability tests of utility patent, design patent, and copyright statutes.⁹⁴ One could just as easily read Justice O'Connor's closing to mean that Congress could protect industrial designs (including boat hulls) in a copyright-type act which would not have to meet the non-obviousness standard the Constitution imposes on *patent* statutes.⁹⁵ One could also dismiss the sentence as mere dicta. The originality (or creativity) standard for copyrightability was not declared constitutional until the *post-Bonito Boats* decision in *Feist*.⁹⁶ Even after *Feist* and *Graham v. John Deere Co.*,⁹⁷ Congress may be empowered to protect industrial designs under the lesser constitutional standard imposed on the Writings of Authors (creativity), rather than the higher constitutional standard imposed on the Discoveries of Inventors (non-obviousness to a person of ordinary skill in the art).

The Supreme Court and Justice O'Connor, furthermore, are well practiced in the lawyerly skill of shifting ground — even ground that was relied upon to support another recent opinion.⁹⁸ We must be wary of over-reading Supreme Court language that we cannot ground on constitutional principles. We have too little documentation regarding the background and purposes of the Intellectual Property Clause to count on swaying originalists on the Court to read this Clause robustly.⁹⁹ Furthermore, the language of the Clause itself is not clear enough to count on swaying textualists to read this Clause robustly.

To summarize, the Constitution, case law, and history allow

2652); 143 CONG. REC. H9038 (daily ed. Oct. 22, 1997) (Rep. Coble introducing H.R. 2696 for himself and Rep. Shaw).

⁹⁴ See *Vessel Hull Hearings*, *supra* note 63, at 1 (Rep. Coble citing *Bonito Boats*).

⁹⁵ Unenacted title II of the bill that became the Copyright Act of 1976 was a scheme to protect industrial designs. See *Second Supplemental Report of the Register of Copyrights on the General revision of the U.S. Copyright Law: 1975 Revision Bill* at 22 (*Kaminstein Legislative History Project*, item 131).

⁹⁶ Compare *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141 (1989), with *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991).

⁹⁷ 383 U.S. 1 (1966) (holding that Intellectual Property Clause sets creativity floor for protectable inventions).

⁹⁸ A recent shift involved affirmative action. Compare *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 490-92 (1989) (O'Connor, J., plurality) (holding that because the Fourteenth Amendment targeted possible obstruction of Reconstruction by the states, strict scrutiny must be applied to allegedly benign racial classification at issue), with *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995) (O'Connor, J., plurality) (refusing to review allegedly benign racial classification by federal government any more leniently than classification made by state).

⁹⁹ For the very limited historical information available, see Pollack, *Unconstitutional Incontestability*, *supra* note 14. See also William Patry, *The Failure of the American Copyright System: Protecting the Idle Rich*, 72 NOTRE DAME L. REV. 907, 910-14 (1997) (mentioning the absence of information about the constitutional clause; attempting to gain guidance from actions of the Continental Congress and the Federalist Papers).

the Court to locate (create?) a robust constitutional right to copy premised solely on the Intellectual Property Clause, but do not force such a discovery (creation?).

A stronger and more supportable constitutional right to copy rests on the intersection of the Intellectual Property Clause and the First Amendment.¹⁰⁰ While theoretically a high card, this right can be trumped; Congress can, after all, out bid First Amendment interests.¹⁰¹

¹⁰⁰ The now-extensive academic literature on the intersection of the First Amendment and the Copyright Act may date from around 1970. See Paul Goldstein, *Copyright and the First Amendment*, 70 COLUM. L. REV. 983, 984 & n.9 (1970) (discussing censorship possibilities of the Copyright Act, asserting that interrelationship of copyright and First Amendment has largely been ignored); Melville B. Nimmer, *Does Copyright Abridge the First Amendment Guaranties of Free Speech and Press?*, 17 UCLA L. REV. 1180 (1970) (arguing that limitations built into copyright law, such as idea/expression dichotomy, are sufficient to prevent a First Amendment problem); Lionel S. Sobel, *Copyright and the First Amendment: A Gathering Storm?*, in 19 COPYRIGHT L. SYMP. (ASCAP) 43 (1971); see also, e.g., Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533 (1993); Alfred C. Yen, *A First Amendment Perspective on the Idea/Expression Dichotomy and Copyright in a Work's "Total Concept and Feel,"* 38 EMORY L.J. 393 (1989). But see McGinnis, *supra* note 18, at 79 (denying any "fundamental tension" between the First Amendment and the Intellectual Property Clause).

One interesting theory is that the academic First Amendment/Copyright Act debate was set off by Time Inc.'s unsuccessful copyright suit, see *Time Inc. v. Bernard Geis Assocs.*, 293 F. Supp. 130 (S.D.N.Y. 1968), against the reuse of the Zapruder film of John F. Kennedy's assassination, especially since Time Inc. had refused to license the pictures. See Stephen Fraser, *The Conflict Between the First Amendment and Copyright Law and Its Impact on the Internet*, 16 CARDOZO ARTS & ENT. L. J. 1, 21-31 (1998) (pointing out that both Goldstein's and Nimmer's 1970 articles discuss the case). See also Sobel, *supra* (discussing the case); *infra* note 106 (discussing Zapruder film case). A "new" copyright area of First Amendment concern is the right to read anonymously. See, e.g., Julie E. Cohen, *A Right To Read Anonymously: A Closer Look at "Copyright Management" In Cyberspace*, 28 CONN. L. REV. 981 (1996) (arguing that a statute preventing consumers from opting out of the data-collection aspects of electronic distribution systems would violate the First Amendment).

Another promising new topic of academic discussion is the need to impose in intellectual property law suits the procedural protections held necessary to protect the First Amendment in areas such as libel. See, e.g., Mark Lemley & Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 DUKE L. J. ____ (forthcoming 1998) (visited May 21, 1998) <<http://www.law.ucla.edu/faculty/volokh/copying.htm>>; Eugene Volokh & Brett McDonnell, *Freedom of Speech and Independent Judgment Review in Copyright Cases*, 107 YALE L.J. 2431 (1998).

¹⁰¹ "[T]he First Amendment . . . does not guarantee absolute freedom of speech." Board of County Comm'r Wabaunsee County v. Umbehr, 116 S. Ct. 2342, 2347 (1996); see also Epstein, *supra* note 4, at 45 ("Whatever the virtues of stirring rhetoric, it is clear that the First Amendment cannot prohibit all regulation of speech by all government at all levels."). But see *Koningsberg v. State Bar*, 366 U.S. 36, 61 (1961) (Black, J., dissenting) ("[T]he men who drafted our Bill of Rights did all the 'balancing' that was to be done in that field"). Justice Black unsuccessfully advocated an absolute First Amendment, but balanced reality by limiting greatly the scope of material to be protected as "speech." See, e.g., *Cox v. Louisiana*, 379 U.S. 559, 578 (1965) (Black, J., concurring in No. 24) ("Picketing, though it may be utilized to communicate ideas, is not speech, and therefore is not of itself protected by the First Amendment."); see also John P. Frank, *The Shelf Life of Justice Hugo L. Black*, 1997 WIS. L. REV. 1, 10-13, 26-28 (1997). See generally ROGER K. NEWMAN, *There Are 'Absolutes' in Our Bill of Rights*, and *The First Amendment with Passion*, in HUGO BLACK: A BIOGRAPHY 488-514 (1994). Alexander Meiklejohn agreed with Justice Black on absolute protection for at least political speech. See Frank, *supra*, at 11-12. Chafee, to the contrary, carefully assured readers that his ground-breaking advocacy of free speech was "in no way

C. *The Right to Know?*¹⁰² *The Intersection of the First Amendment and the Intellectual Property Clause*

The United States was founded¹⁰³ to the resounding rhetoric of a public *need to know*.¹⁰⁴ James Madison penned the famous matching bromides that “[k]nowledge will forever govern ignorance” and “[a] popular government without popular information [] or the means of acquiring it is but a prologue to a farce or a tragedy or perhaps both.”¹⁰⁵

an argument that any one should be allowed to say whatever he wants anywhere and at any time.” ZECHARIAH CHAFEE, *FREE SPEECH IN THE UNITED STATES* 3 (1942). Similarly, popular discussions of the First Amendment do not unanimously call for an absolute right to know. *See, e.g.*, WILLIAM H. MARNELL, *THE RIGHT TO KNOW: MEDIA AND THE COMMON GOOD* at xi-xv (1973) (stating that public reaction to the press release of the Pentagon Papers included outrage that individual members of the press had usurped the right to decide national security issues); Potter Stewart, “*Or of the Press*,” 26 *HASTINGS L. J.* 631, 631 (1975) (reporting that public opinion polls show that “some Americans firmly believe that the former Vice President and former President of the United States were hounded out of office by an arrogant and irresponsible press that had outrageously usurped dictatorial power”; arguing that the press had “performed precisely the function” intended by the Founders). *Compare* *New York Times Co. v. United States*, 403 U.S. 713, 714 (1981) (*per curiam*) (stating that government has not met the heavy burden of showing need for prior restraint against publication of the Pentagon Papers), *with id.* at 733 (White, J., concurring) (warning press that the Court’s “terminat[ion] of the ban on publication . . . does not mean . . . that they will be immune from criminal action if they do” proceed with publication).

The quasi-property right of publicity has also been allowed to trump First Amendment concerns when the plaintiff’s market was sufficiently threatened. *See Zacchini v. Scripps-Howard Broad.*, 433 U.S. 562 (1977) (holding that the First Amendment did not bar state law monetary relief when a local television news program broadcast all fifteen seconds of a human cannonball’s performance without the cannonball’s permission).

¹⁰² This article does not purport to fully analyze the gamut of the possible rights to know. On May 29, 1998, I queried JLR (journal and law review) file of WESTLAW for articles published after 1979 which included the exact phrase “right to know” in their title fields. WESTLAW retrieved eighty-one items.

¹⁰³ The First Amendment, of course, was not in the “original” Constitution.

¹⁰⁴ Litigation of the First Amendment Speech Clause, however, did not bloom until the twentieth century. *See, e.g.*, CHAFEE, *supra* note 101, at 3 (“Never in the history of our country, since the Alien and Sedition Laws of 1798, has the meaning of free speech been the subject of such sharp controversy as during the years since 1917. Over nineteen hundred prosecutions and other judicial proceedings during the war . . . were followed after the armistice by a widespread legislative consideration of bills punishing the advocacy of extreme radicalism.”); G. Edward White, *The First Amendment Comes of Age: The Emergence of Free Speech in Twentieth-Century America*, 95 *MICH. L. REV.* 299, 300-01 & n.5 (1996). Many commentators consider the first modern free speech case to be *Schenck v. United States*, 249 U.S. 47 (1919). *See e.g.*, White, *supra*, at 312-13.

¹⁰⁵ Letter from James Madison to W.T. Berry (Aug. 4, 1822), in JAMES MADISON, *THE COMPLETE MADISON* 337 (Saul K. Padover ed., 1953); *see also* William J. Barnds, *The Right to Know, to Withhold and to Lie*, in *THE COUNCIL OF RELIGION AND INTERNATIONAL AFFAIRS: THE RIGHT TO KNOW, TO WITHHOLD AND TO LIE* 7, 9 (1969) [hereinafter *COUNCIL OF RELIGION*] (quoting Madison’s letter); *infra* note 115.

One hazy sign that the right to know is important is the Supreme Court’s acceptance of failure to obtain information as a legally cognizable injury. “[A] plaintiff suffers an ‘injury in fact’ when the plaintiff fails to obtain information which must be publicly disseminated pursuant to a statute.” *Federal Election Comm’n v. Akins*, 118 S. Ct. 1777, 1781 (1998) (holding that person who requested information from the American Israel Public Affairs Committee (“AIPAC”) has standing to sue the the Federal Election Commission (“FEC”) regarding the FEC’s decision that AIPAC is not a “political committee” required to

The Supreme Court, however, has never held an intellectual property right unconstitutional on the ground¹⁰⁶ that the First Amendment requires a fair use defense¹⁰⁷ or an idea/expression dichotomy.¹⁰⁸ Hardly surprising, the Court does not reach the Constitution needlessly.¹⁰⁹ Copyright statutes with the fair use defense and the idea/expression dichotomy¹¹⁰ in place have not presented a First Amendment problem, at least not one visible to the Court.¹¹¹ The Court, therefore, has limited itself to dicta rhap-

provide such information to the FEC pursuant to 2 U.S.C. § 431(4); *United States v. Richardson*, 418 U.S. 166 (1974), deals solely with taxpayer standing under the Accounts Clause). *But see id.* at 1790-91 (Scalia, J., dissenting) (reading *Richardson* to hold that, a voter stated a generalized grievance and lacked standing when voter claimed that he could not fulfill his obligations as a member of the electorate, because the federal government refused to release more details about CIA operations; voter's claim was pursuant to U.S. CONST. art. I, § 9, cl. 7, requiring "a regular Statement and Account of the Receipts and Expenditures of all public Money," rather than pursuant to any statute).

¹⁰⁶ The extent to which courts manipulate other admitted grounds of decision to match perceived tensions with the First Amendment is a different issue. *Compare* *Time Inc. v. Bernard Geis Associates*, 293 F. Supp. 130, 146 (S.D.N.Y. 1968) (finding that printing Zapruder's pictures of the John F. Kennedy assassination without licence from copyright holder, *Time Inc.*, is fair use because, *inter alia*, plaintiff was not harmed financially), *with* *Nimmer*, *supra* note 100, at 1201 (colorfully arguing that court misapplied economic harm prong of fair use).

¹⁰⁷ The fair use doctrine is currently codified at 17 U.S.C. section 107. It states: "Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work . . . for purposes such as criticism, comment, news reporting, teaching . . . scholarship, or research is not an infringement of copyright." *Id.* The doctrine (but not the term "fair use") first appears as dicta in *Folsom v. Marsh*, 9 F. Cas. 342 (C.C.D. Mass. 1841) (Story, J.) (holding that re-use of several hundred pages of another author's biography of George Washington is infringement, but smaller reuse might be allowable). *See, e.g.*, MARSHALL LEAFFER, *UNDERSTANDING COPYRIGHT LAW* 319 (2d ed. 1995) (crediting Judge Story's decision in *Folsom*). The Supreme Court's latest explanation of the fair use doctrine is *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994) (indicating that a commercially marketed rap song parodying "Oh, Pretty Woman" may be a fair use; remanding for fact finding).

¹⁰⁸ The idea/expression dichotomy is codified at 17 U.S.C. section 102(b). It states: "In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work." *Id.* The classic case on the doctrine is *Baker v. Selden*, 101 U.S. 99 (1879) (holding that copyright on book explaining a system of book-keeping is not infringed by another book discussing a similar system).

¹⁰⁹ *See, e.g.*, *Superintendent, Mass. Correctional Inst. v. Hill*, 472 U.S. 445, 453 (1985) (not deciding an issue because of "the rule of judicial restraint requiring [the Supreme Court] to avoid unnecessary resolution of constitutional issues"); *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 346-48 (1936) (Brandeis, J., concurring) (listing multiple rules restraining Court from reaching constitutional issues).

¹¹⁰ The idea/expression dichotomy is one of the major mediating strategies for legitimizing copyright property in the United States without admitting that such property is "merely a utilitarian, revocable state grant," or succumbing to the tensions between the artificial categories of public and private. *See* James Boyle, *A Theory of Law and Information: Copyright, Spleens, Blackmail, and Insider Trading*, 80 CAL. L. REV. 1413, 1421, 1461-70 (1992). To Boyle, the others are the romantic author and the associated theme of originality. *Id.* at 1526. Databases lack all three attributes.

¹¹¹ *See* *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 560 (1985) (holding that the First Amendment does not shield Nation's verbatim copying of several hundred words from Gerald Ford's unpublished memoirs; "In view of the First Amendment protections already embodied in the Copyright Act's distinction between copyrightable

sodizing on the harmony between the First Amendment and the existing copyright regime (which includes the fair use defense and the idea/expression dichotomy).¹¹²

Perhaps we can learn more by examining harder-fought First Amendment arenas. The press has continually asserted its rights under the Press Clause as embodying the public's right to know,¹¹³ an argument that has not resulted in unlimited access, but has succeeded in many litigations.¹¹⁴

expression and uncopyrightable facts and ideas, and the latitude for scholarship and comment traditionally afforded by fair use, we see no warrant for expanding the doctrine of fair use to create what amounts to a public figure exception to copyright.”)

¹¹² See, e.g., *id.*; see also *id.* at 556 (“[C]opyright’s idea/expression dichotomy strikes a definitional balance between the First Amendment and the Copyright Act by permitting free communication of facts while still protecting an author’s expression.”) (internal quotations and editing omitted; citation omitted). The Court ducked a similar trademark issue regarding the word “Olympic.” It expressly declined to reach the issue of whether Congress could grant property rights in a generic word on the fragile factual finding that “Olympic” has substitutes. See *San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 483 U.S. 522, 532-34 (1987); see also *infra* notes 199-212 and accompanying text (discussing case). I have been unable to locate any copyright suit where the defendant won solely because of the First Amendment Speech or Press Clause. One district court did expressly hold that a defendant was protected by the First Amendment despite failure to prove fair use, but the court of appeals affirmed on fair use grounds. See *Triangle Publications v. Knight-Ridder Newspapers*, 445 F. Supp. 875 (S.D. Fla. 1978), *aff’d on other grounds*, 626 F.2d 1171 (5th Cir. 1980). In an unpublished case, the First Amendment was relied on, but perhaps only in strong dicta. George Holiday videotaped the arrest and beating of Rodney King by the Los Angeles police. Holiday seemingly licensed various broadcasters to use the tape, but then sued alleging use beyond the license. Judge Hill first held that the alleged infringing uses were within the scope of the licenses and, only then, declared that the First Amendment prevented a finding of copyright infringement in such unusual circumstances. See Charles L. Sanders, *Photojournalism, Fair Use and the First Amendment*, N.Y.L.J., Jan. 21, 1994, at 5 (discussed in Fraser, *supra* note 100, at 35-36). Several similar cases (but involving news reporting professionals) were spawned by the beating of Reginald Denny during the Los Angeles riots that erupted after the policemen who beat Rodney King were acquitted of criminal charges. Neither of these cases accepted a First Amendment defense. See *Los Angeles News Serv. v. KCAL-TV Channel 9*, 108 F.3d 1119 (9th Cir. 1997) (reversing summary judgment of fair use, despite First Amendment defense); *Los Angeles News Serv. v. Reuters TV Int’l*, 942 F. Supp. 1265 (C.D. Cal. 1996) (denying defendants’ motion for summary judgment; no mention of First Amendment in the opinion). One circuit case did void a copyright-type property on First Amendment grounds, but under the Establishment Clause, not the Free Speech or Press Clauses. See *United Christian Scientists v. Christian Science Bd. of Dir.*, 829 F.2d 1152 (D.C. Cir. 1987) (holding that private law granting church an extended copyright on all editions of a religious text is unconstitutional under the Establishment Clause). My thanks to Professor Eugene Volokh, UCLA Law School, for bringing this case to my attention.

¹¹³ See, e.g., Kent Cooper, *The Right to Know: An Exposition of the Evils of News Suppression and Propaganda* (Author’s Note, unnumbered page) (1956) (stating that the press clause is “the people’s right . . . not merely a selfish right of printers alone”; the First Amendment means that “the government may not, and the newspapers and broadcasters should not, by any method whatever curb delivery of any information essential to the public welfare and enlightenment”). Cooper has been credited with originating the phrase “the right to know.” See Eugenia Zerbinos, *The Right to Know: Whose Right and Whose Duty?*, reprinted in 3 CENSORSHIP, SECRECY, ACCESS, AND OBSCENITY: READINGS FROM COMMUNICATIONS AND THE LAW 209, 209 (Theodore R. Kufperman ed., 1990).

¹¹⁴ The press and the public have been awarded and denied the same level of access. Compare *Press-Enter. Co. v. Superior Court of California*, 478 U.S. 1 (1986) (holding that the First Amendment requires reporters to be allowed access to transcript of preliminary

The public's right to know is the philosophical basis of many statutes that force government entities to provide documents on request or to allow the public into meetings.¹¹⁵

The right to know has an estimable pedigree among First Amendment theoreticians. Thomas I. Emerson,¹¹⁶ for example,

criminal hearing absent specific showing), *with* United States v. Sells Eng'g, Inc., 463 U.S. 418, 424 (1983) (no access to grand jury transcript), *and* California First Amendment Coalition v. Calderon, 138 F.3d 1298 (9th Cir. 1998) (holding that the press and other witnesses may be excluded from viewing process of preparation for execution by lethal injection, i.e., strapping down condemned man, inserting tubes, and starting saline solution even though witness complaints led to court ruling barring California from using gas chamber). *See generally*, Anthony Lewis, *A Public Right to Know About Public Institutions: The First Amendment As a Sword*, 1980 SUP. CT. REV. 1, 2-3, 23 (arguing that *Richmond Newspapers v. Virginia*, 448 U.S. 555 (1980), which holds that press and public have a right to access in criminal trials, is a "bold" first step into acknowledging a constitutional right for citizens to obtain the information they need to perform their constitutional duty as "ultimate sovereigns" to hold the government accountable; accountability also provides a principled basis for limiting "generalized, unsophisticated claims of 'the right to know'" to those instances where the public has no alternative way of enforcing accountability).

¹¹⁵ For example, the "government in the sunshine," "right-to-know," and "freedom of information" acts, while not constitutionally mandated, are grounded on cognate concerns. *See, e.g.*, Freedom of Information Act, 5 U.S.C. §§ 552-59 ("FOIA"). Contemporaneous commentary saw the passage of the FOIA in 1966 as a response to public, press, and bar outrage over Vietnam-era deception by the federal government. *See, e.g.*, William J. Barnds, *supra* note 105, at 3, 9; Daniel C. Maguire, *Secrecy and the Myths of Power*, in COUNCIL OF RELIGION, *supra* note 105, at 36, 43; Wilson Carey McWilliams, *Honesty and Political Authority*, in COUNCIL OF RELIGION, *supra* note 105, at 50, 66. *See also* Statement by the President Upon Signing the "Freedom of Information Act," Pub. Papers: II Lyndon B. Johnson 1966, No. 316 at 699 (July 4, 1966) (reporting his "deep sense of pride that the United States is an open society in which the people's right to know is cherished and guarded"). The same commentators differed dramatically on whether FOIA had advanced government honesty. Compare Barnds, *supra* note 105, at 29 (arguing that the checks and balances of press and government are generally successful at achieving sufficient disclosure), *with* Maguire, *supra*, at 43-45 (arguing that the FOIA may help but federal agencies have not even followed FOIA's opening requirement of timely creation of regulations implementing access), *and* McWilliams, *supra*, at 66 (arguing that study shows federal agencies routinely withhold or doctor documents to deceive both public and other government actors, including the President).

Another aspect of the government's assumption of a duty to share information is the statutory requirement that federal agencies make "public information" available timely, equitably, and for no more than the cost of dissemination. 44 U.S.C. § 3506(d), (e). The rapidity of this article is made possible by *Thomas*, the Library of Congress' Internet access to congressional activities, located at <<http://thomas.loc.gov/>>.

¹¹⁶ Emerson's First Amendment writings are cited in 37 Supreme Court cases. *See* Alexander v. United States, 509 U.S. 544, 554 n.2 (1993); Osborne v. Ohio, 495 U.S. 103, 145 (1990) (dissent); Ward v. Rock Against Racism, 491 U.S. 781, 808 (1989) (dissent); Connick v. Myers, 461 U.S. 138, 164 n.4 (1983) (dissent); Minneapolis Star and Tribune Co. v. Minnesota Comm. of Revenue, 460 U.S. 575, 580 (1983); *Richmond Newspapers v. Virginia*, 448 U.S. 555, 587 (1980); Carey v. Brown, 447 U.S. 455, 466 (1980); Consolidated Edison Co. v. Public Serv. Comm. of N.Y., 447 U.S. 530, 534 (1980); Brown v. Glines, 444 U.S. 348, 354 n.10 (1980); FCC v. National Citizens Comm. for Broad., 436 U.S. 775, 801 (1978); *In re Primus*, 436 U.S. 412, 437 n.2 (1978); First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 776 n.11, 777 n.12 (1978); *id.* at 805 nn.3, 4 (dissent); Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 589 (1976); Greer v. Spock, 424 U.S. 828, 844 (1976) (concurrency); Southeastern Promotions v. Conrad, 420 U.S. 546, 560 n.10 (1975); Cox Broad. Corp. v. Cohn, 420 U.S. 469, 487 n.15 (1975); Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 253, 254 (1974); Gertz v. Robert Welch, Inc., 418 U.S. 323, 365 n.2, 400 n.41 (1974) (dissent); Procunier v. Martinez, 416 U.S. 396, 428 n.14 (1974) (concurrency); Paris Adult

finds multiple entitlements in the First Amendment, including the rights “to hear the views of others and to listen to their version of the facts,” “the right to inquire,” and “to a degree, the right of access to information.”¹¹⁷ Emerson finds four main “premises” (I would say functions) for the “system of freedom of expression”: (i) assuring individual self-fulfillment, (ii) allowing the advancement of knowledge and the search for truth, (iii) providing all members of society with participation in decision-making, and (iv) achieving a more stable and adaptable community through reasoned consensus as opposed to forced, grudging acquiescence.¹¹⁸ The second function mirrors the purpose statement of the Intellectual Property Clause, “in order to promote the progress of science and useful arts.”¹¹⁹ The last three functions have obvious links to knowledge.¹²⁰ As for individual self-fulfillment, even though many

Theater I v. Slaton, 413 U.S. 49, 79 n.6, 106 n.24 (1973) (dissent); United States v. 12, 200 Foot Reels of Super 8MM. Film, 413 U.S. 123, 133 n.3 (1973) (dissent); Columbia Broad. Sys., Inc. v. Democratic Nat’l Comm., 412 U.S. 94, 139 n.7, 140 n.9, 151, 152, 160 (1973) (concurrence); *id.* at 192 (dissent); Branzburg v. Hayes, 408 U.S. 665, 727 (1972) (dissent); Police Dep’t of the City of Chicago v. Mosley, 408 U.S. 92, 94 n.3 (1972); Grayned v. City of Rockford, 408 U.S. 104, 116 n.32 (1972); New York Times v. United States, 403 U.S. 713, 724 (1971) (concurrence); Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 44, 48 n.17 (1971); Stanley v. Georgia, 394 U.S. 557, 566 (1969); Epperson v. Arkansas, 393 U.S. 97, 109 n.15 (1968); Ginsberg v. New York, 390 U.S. 629, 637 n.5, 638 n.6 (1968); United States v. Robel, 389 U.S. 258, 263 n.7 (1967); Freedman v. Maryland, 380 U.S. 51, 58 n.4 (1965); Garrison v. Louisiana, 379 U.S. 64, 69 (1964); A Quantity of Copies of Books v. Kansas, 378 U.S. 205, 222 n.5 (1964) (dissent); Sherbert v. Verner, 374 U.S. 398, 406 n.6 (1963); Times Film Corp. v. City of Chicago, 365 U.S. 43, 55, 56 n.2 (1961) (dissent); American Communications Ass’n, C.I.O. v. Douds, 339 U.S. 382, 697 (1950) (concurrency/dissent). Emerson represented Griswold in *Griswold v. Connecticut*, 381 U.S. 479 (1965) and *Sweezy* in *Sweezy v. New Hampshire*, 354 U.S. 234 (1957).

¹¹⁷ THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 3 (1970). Emerson also posits rights to form and hold beliefs; to remain silent; and to assemble and associate in order to discuss. *Id.*

¹¹⁸ *Id.* at 6-7; see also Thomas I. Emerson, *Legal Foundations of the Right to Know*, 1976 WASH. U.L.Q. 1, 2 (1975) (arguing that the right to know includes the right to “receive communications” and the “right to obtain information as a basis for transmitting ideas on facts to others”). Chafee distills

two kinds of interests in free speech. There is an individual interest, the need of many men to express their opinions on matters vital to them if life is to be worth living, and a social interest in the attainment of truth, so that the country may not only adopt the wisest course of action but carry it out in the widest way. . . . Truth can be sifted out from falsehood only if the government is vigorously and constantly cross-examined [even during war time].

CHAFEE, *supra* note 101, at 33. *But see* Epstein, *supra* note 4, at 50-51, 53-54 (arguing that the distrust of government is the sole underpinning of both First Amendment and Fifth Amendment takings clause).

¹¹⁹ U.S. CONST. art. I, § 8, cl. 8. According to the property theory of the First Amendment, the goal of increasing human knowledge is the central First Amendment concern. See McGinnis, *supra* note 18, at 71.

¹²⁰ A popular government, without popular information or the means of acquiring it, is but a prologue to a farce or a tragedy; or perhaps both. . . . [A] people who mean to be their own governors, must arm themselves with the power knowledge gives.

persons choose paths that are not lined with hard-edged facts, an uninformed choice among paths lacks authenticity (or, in legal terminology, is neither knowing nor intelligent).¹²¹

I posit a right to know in the form of a duty by the government not to block access to information. Congress does not have the power to use the Commerce Clause to create a right to exclude others from information (i.e., a quasi-property right) if that right (i) deters the progress of science and the useful arts, (ii) limits the freedom of the press, (iii) limits the right to petition the government, or (iv) limits the freedom of discussion through speech. The mutually reinforcing Intellectual Property Clause and First Amendment may not be bypassed merely by stating that a statute is enacted pursuant to the Commerce Clause.¹²²

We can reach the same conclusion by a different First Amendment route. Sunstein divides pre-cyberspace First Amendment theorists into two main camps: proponents of a free Market Place in

Letter from James Madison to W.T. Barry, 1822, *quoted in* Zerbinos, *supra* note 113, at 210; *see also* MADISON, *supra* note 105, at 337.

¹²¹ Besides Emerson, Alexander Meiklejohn, Wallace Parks and David Mitchell Ivester have posited some constitutional right to know. *See* ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 115 (1948); Wallace Parks, *The Open Government Principle: Applying the Right to Know Under the Constitution*, 26 *GEO. WASH. L. REV.* 1, 8-9, 12 (1957) (arguing that the emergence of "big government" requires interpretation of Constitution's First, Fifth, Ninth, and Fourteenth Amendments to prevent executive and legislative branches from "withholding information beyond that reasonably required for the exercise of delegated powers or the protection of other rights") (emphasis omitted); David Mitchell Ivester, *The Constitutional Right to Know*, 4 *HASTINGS CONST. L.Q.* 109 (1977) (positing a First Amendment constitutional right to know about government activities, which can be limited only when necessary to further a compelling state interest; the right to know is part of structural and functional limitations of a democracy because the people never transfer all power to the formal government). At least one scholar argues that the lower courts are expanding Supreme Court precedent into an affirmative public right to obtain government information. *See* Racial V. Reid, *An Affirmative First Amendment Access Right, in* *CENSORSHIP, SECRECY, ACCESS, AND OBSCENITY* 403 (Theodore R. Kupferman ed. 1990).

¹²² Sketching the nuances of this right in other circumstances and matching this limit against each intellectual property statute passed with congressional mention of the commerce clause are both beyond the scope of this article. One relatively close subject is a constitutional right to perform research, partially grounded on the First Amendment right-to-know, right-to-learn, right-to-receive-information, and right-to-gather-information cases. *See, e.g.,* Richard Delgado & David R. Millen, *God, Galileo, and Government: Toward Constitutional Protection for Scientific Inquiry*, 55 *WASH. L. REV.* 349, 389 (1978) ("A constitutional challenge would lie if the scientist has been either denied funding or compelled to forego research in certain areas as a condition of receiving funding, and if he can demonstrate that the funding decision was based on *impermissible* considerations of the content of his proposed research."); Gary L. Francione, *Experimentation and the Marketplace Theory of the First Amendment*, 136 *U. PA. L. REV.* 417 (1987) (arguing that except for limitations intended to prevent ultimate expression, the market theory of free speech allows rational basis review of limitations on scientific experimentation because experimentation is not speech, and because the marketplace theory cannot support stronger protection for experimentation as a pre-condition of speech); John A. Robertson, *The Scientist's Right to Research: A Constitutional Analysis*, 51 *S. CAL. L. REV.* 1203 (1977) (arguing for a right to choose research topics and a large amount of autonomy on methods of research, at least when the methods involve willing sources and materials).

balance.¹³³ No case, however, enforces an acknowledged First Amendment “right to know” limit on copyright. Does any case hold against such a right?

The leading “problem” case is *International News Service v. Associated Press*,¹³⁴ a battered relic of World War I. First, the legally recognized story. International News Service (“INS”) and the Associated Press (“AP”) were directly competing news services. AP-member¹³⁵ newspapers habitually put out bulletin boards where the public could read the published news without charge. Because of cumbersome formalities, the published stories were not protected by copyright.¹³⁶ Even if the stories had been copyrighted, the facts in the stories would have been incapable of copyright protection under the idea/expression dichotomy. Agents of INS read the stories posted by AP-member newspapers and sent the information (verbatim or rewritten) by wire to INS-customer newspapers. Because of time zones and production delays, West Coast INS-customer newspapers often published stories acquired from AP at the same time as West Coast AP-member newspapers. AP sued to enjoin INS’ free riding. In 1918, the Supreme Court, through Justice Pitney, held that AP had a quasi-property right in its hot news as against its direct competitor, INS — though not a right against the public. This quasi-property right could support an injunction against INS’ reprinting news appropriated from AP — but only for a short period of time, seemingly a few hours. Pitney’s opinion speaks of the injustice of reaping what another has sown. Pitney’s economic assumption is that without protection no news service would have sufficient incentive to provide publicly beneficial news reporting services.¹³⁷

International News Service still lives,¹³⁸ despite the Erie doctrine,¹³⁹ and despite the preemption clause of the Copyright Act of

state law may not forbid others to copy it, because every article not covered by a valid patent is in the public domain.”).

¹³³ See, e.g., *Harper & Row Publishers v. Nation Enters.*, 471 U.S. 539 (1985).

¹³⁴ 248 U.S. 215 (1918) (allowing misappropriation remedy against direct competitor’s copying of facts from publicly posted news bulletins).

¹³⁵ AP was organized as a cooperative association whose customers were technically “members.” INS was not. See *International News Serv. v. Associated Press*, 248 U.S. 215, 229-30 (1918). The difference is unimportant for present purposes.

¹³⁶ Registration and notice formalities were substantially eliminated as of March 1, 1989. See *Berne Convention Implementation Act of 1988*, Pub. L. No. 100-568, 102 Stat. 2853 (1988).

¹³⁷ See *International News Serv.*, 248 U.S. at 221-246.

¹³⁸ See, e.g., Howard B. Abrams, *Copyright, Misappropriation, and Preemption: Constitutional and Statutory Limits of State Law Protection*, 1983 SUP. CT. REV. 509, 575-81 (giving an overview of case law on preemption of misappropriation claims).

¹³⁹ See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938) (holding that the federal courts must use state law as the rule of decision on state law claims). Misappropriation is a state

1976.¹⁴⁰ But it lives in narrow form. In 1997, the Second Circuit disallowed a misappropriation action against a pager service's transmission of real time scores from National Basketball Association games.¹⁴¹ The Second Circuit explained that the Copyright Act of 1976 preempts misappropriation claims unless, as in *International News Service*, the claims involve:

- (i) a plaintiff [who] generates or gathers information at cost;
- (ii) . . . information [that] is time-sensitive;
- (iii) a defendant's use of the information [which] constitutes free riding on the plaintiff's efforts;
- (iv) [a] defendant [who] is in direct competition with a product or service offered by the plaintiffs; and
- (v) the ability of other parties to free-ride on the efforts of the plaintiff or others would so reduce the incentive to produce the product or service that its existence or quality would be substantially threatened.¹⁴²

Congress can expand misappropriation by creating a federal statutory right¹⁴³ only if *International News Service* survives *Feist's* constitutionalization of the idea/expression dichotomy. Proponents of the CIAA rely on ambiguous language in *Feist*:

Protection for the fruits of such [factual] research . . . may in certain circumstances be available under a theory of unfair competition. But to accord copyright protection on this basis alone distorts basic copyright principles in that it creates a monopoly in public domain materials without the necessary justification of protecting and encouraging the creation of "writings" by "authors."¹⁴⁴

This passage is tantalizing, but "certain circumstances" is not a clear statement of the surviving limits on "unfair competition." This passage, furthermore, is in tension with *Feist's* one mention of *International News Service*.

Decisions of this Court applying the 1909 [Copyright] Act make

law claim. See, e.g., *National Basketball Assoc. v. Motorola, Inc.*, 105 F.3d 841, 844 (2d Cir. 1997) (adjudicating misappropriation claim under New York law).

¹⁴⁰ 17 U.S.C. § 301(a) (1994).

¹⁴¹ *National Basketball Assoc.*, 105 F.3d at 843. The decision also covered supplying coverage of on-going games through an Internet server. *Id.* at 844 (stating that a site on America-On-Line Internet server presents the same legal issues as the pager).

¹⁴² *Id.* at 845.

¹⁴³ Copyright Act statutory preemption currently does not preempt federal statutory remedies. See 17 U.S.C. § 301(d) ("Nothing in this title annuls or limits any rights or remedies under any other Federal statute.").

¹⁴⁴ *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 354 (1991) (citing 1 M. NIMMER & D. NIMMER, *NIMMER ON COPYRIGHT* § 3.04[B][1] (1990) (footnote omitted)).

Ideas and proponents of public deliberation.¹²³ Public deliberation theorists, such as Meiklejohn, allow more government regulation than do free market theorists. The government may regulate speech in order to promote deliberation on issues of public concern.¹²⁴ The above discussion of Emerson has already demonstrated that this camp would find constitutionally problematic any property right in facts.

Free markets are not created by government inaction; free market theorists, therefore, recognize that free markets cannot function without government-supported background rules of property and contract. Free market First Amendment theorists also allow government to act to prevent market failure, especially by preventing monopolistic practices.¹²⁵ By creating a novel property right in facts, the CIAA perversely regulates the Market Place of Ideas to create a previously absent precondition for unacceptable monopoly. **The CIAA is unconstitutional without both (i) a strong showing that the Market Place of Ideas requires such regulation to remedy pre-existing market failure, and (ii) strong controls to prevent later monopolization.**¹²⁶ Both are missing from the CIAA.

Just as obviously, or even more so, the words “the right to know” do not appear in the United States Constitution.¹²⁷ Justice Potter Stewart read the Press Clause to assure merely the existence of the free press as an institution: “The press is free to do battle against secrecy and deception in government. But the press cannot expect from the Constitution any guarantee that it will succeed. . . . The Constitution itself is neither a Freedom of Information Act nor an Official Secrets Act.”¹²⁸

Some scholars find the concept of a “right to know” absurd because it implies that government has a positive duty to keep the public informed.¹²⁹ Negative rights, however, like the public’s pos-

¹²³ See CASS R. SUNSTEIN, *The First Amendment in Cyberspace*, in FREE MARKETS AND SOCIAL JUSTICE 167, 169 (1997). The merits of Sunstein’s thesis is beyond the scope of this article. Delgado & Millen consider Emerson’s second basis (advancement of knowledge and discovery of truth) to be equivalent to the market place of ideas theory. See Delgado & Millen, *supra* note 122, at 363; see also Francione, *supra* note 122, at 427. Chafee considered the First Amendment to be “a declaration of national policy in favor of the public discussion of all public questions.” CHAFEE, *supra* note 101, at 6.

¹²⁴ SUNSTEIN, *supra* note 123, at 170-71.

¹²⁵ *Id.* at 169.

¹²⁶ *Accord* United States v. Lopez, 514 U.S. 549, 561-62 (1995) (stating that the second reason Gun Free School Zone Act is unconstitutional is that section “922(q) contains no jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce.”).

¹²⁷ See Zerbinos, *supra* note 113, at 210.

¹²⁸ Stewart, *supra* note 101, at 636.

¹²⁹ See, e.g., Lillian R. BeVier, *An Informed Public, an Informing Press: The Search for a Constitutional Principle*, 68 CAL. L. REV. 482 (1980) (arguing that neither case law nor constitu-

sible right not to have the government block access to information, are common in the Constitution. A negative right not to be excluded from information by government action is sufficient to render the CIAA unconstitutional.¹³⁰ I posit such a negative right.¹³¹

The above discussion leads to two questions. How speaks case law? What showing must Congress make to constitutionalize a seemingly contradictory statute?

D. Case Law

To recap: some Supreme Court cases can be read to describe a constitutional right to copy unpatentable technology or uncopyrightable writings, but the record is unclear.¹³² Dicta extol the idea/expression dichotomy as part of the copyright/free speech

tional theory support an affirmative duty for the government to keep the public informed). *But see, e.g.,* Melville B. Nimmer, *Is Freedom of the Press a Redundancy?: What Does It Add to Freedom of Speech?*, 26 HASTINGS L.J. 639, 658 (1975) (arguing that the additional impact of Press Clause is not yet decided, such clarification is "past due"). Emerson agreed with Nimmer that, as of 1975, a separate right to obtain information was merely "emerging." Emerson, *supra* note 118, at 23.

¹³⁰ Much more, of course, can be built on aspirational theories of the Constitution that ground positive rights requiring government action. *See, e.g.,* SUNSTEIN, *supra* note 123, at 167, 189-92, 199-200 (arguing for the constitutionality of legislation that harnesses new technology to promote public deliberation including legislation that promotes substantive programing, universal access to the Internet, or requires carriers to set aside a certain number of channels for educational or public-affairs programs; Sunstein is discussing communication law, not the public domain); ROBIN WEST, *PROGRESSIVE CONSTITUTIONALISM: RECONSTRUCTING THE FOURTEENTH AMENDMENT* 146 (1994) (arguing that First Amendment theory should be refocused onto the community bonds it creates; West is discussing hate speech, not the public domain).

¹³¹ *See* Anita Bernstein, *Treating Sexual Harassment With Respect*, 111 HARV. L. REV. 445, 486-87, 486-87 nn.250-51 (1997) (giving overview of negative right/positive right dichotomy, collecting works). Bernstein's article suggests and describes a Kantian "respectful person" standard for sexual harassment cases, *id.* at 483-85 (developing Kantian basis of respect, i.e., treating each person as a fellow reasoning being capable of making choices), a standard Bernstein finds compatible with the liberal tradition of negative rights, *id.* at 486-87 (indicating a duty to refrain from disrespectful conduct). Bernstein briefly points to the respectfulness aspect of communitarian First Amendment concerns with "hate speech," i.e., speech that projects disrespect of others. *Id.* at 517-21 (focusing on the work of Robin West and Steven Heyman). This same respectful treatment of others is even clearer in a duty not to block others from obtaining accurate information. The central harm of lying or hiding the truth is the manipulation of others' choices, i.e., the refusal to allow them to act as agents worthy of Kantian respect. *See, e.g.,* SISELLA BOK, *LYING* 20 (1989). Kant himself, of course, went further by labeling any lie as destructive of both the deceiver and all humanity, regardless of extenuating circumstances. *Id.* at 37-38.

¹³² With respect to copyright, see *Feist Publications Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991). With respect to patent, compare *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225 (1964) (right to copy unpatented inventions), *Compco Corp. v. Day-Brite Lighting, Inc.*, 376 U.S. 225 (1964) (right to copy unpatented inventions), and *Bonito Boats v. Thunder Craft Boats, Inc.*, 489 U.S. 141 (1989) (right to copy unpatented inventions), with *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470 (1974) (state trade secret law is not in violation of a federal right to copy unpatented inventions). *Accord Kewanee*, 416 U.S. at 495 (Douglas, J., dissenting, joined by Brennan, J.) ("Today's decision is at war with the philosophy of *Sears, Roebuck & Co.* and *Compco* [There, we] held that when an article is unprotected by a patent,

clear that the statute did not permit the “sweat of the brow” approach. The best example is *International News Service v. Associated Press*. In that decision, the Court stated unambiguously that the 1909 Act conferred copyright protection only on those elements of a work that were original to the author. International News Service had conceded taking news reported by Associated Press and publishing it in its own newspapers. Recognizing that § 5 of the Act specifically mentioned “‘periodicals, including newspapers,’” the Court acknowledged that news articles were copyrightable. It flatly rejected, however, the notion that the copyright in an article extended to the factual information it contained: “The news element — the information respecting current events contained in the literary production — is not the creation of the writer, but is a report of matters that ordinarily are *publici juris*; it is the history of the day.” [Justice O’Connor’s unnumbered footnote:] *The Court ultimately rendered judgment for Associated Press on noncopyright grounds that are not relevant here.*¹⁴⁵

To my eye, Justice O’Connor’s footnote rejects the theory that misappropriation is applicable to protect the facts in sweat works. Unfair competition claims must be based on other grounds, such as misstatements of origin or authorship.¹⁴⁶ This premise is supported by O’Connor’s explanation in another case that “unfair competition” is rooted in the “common law tort of deceit” and is generally concerned with “protecting consumers from confusion.”¹⁴⁷ But my eye is that of a dedicated low protectionist; my hopeful reading of dicta is no more authoritative than a high protectionist’s opposite jump into the unknown. We can only look for a constitutional principle that might convince the Court to use the dicta as we would wish.¹⁴⁸

Even if *International News Service* survives *Feist*, it does not protect the CIAA. *International News Service* goes no further than the Second Circuit’s reading: a few hours’ protection against free-riding, direct competition in the plaintiff’s primary market if market failure is likely to result absent such protection. Such very limited protection would meet the high level of scrutiny suggested in the

¹⁴⁵ *Feist*, 499 U.S. at 353-54 (emphasis added) (internal citations and editing omitted).

¹⁴⁶ Such rights are currently provided by the Lanham Act, 15 U.S.C. § 1125(a) (1994). Justice Holmes would have limited AP’s victory to a short term injunction forcing INS to acknowledge the source of the appropriated stories. See *International News Serv. v. Associated Press*, 248 U.S. 215, 248 (1918) (Holmes, J., dissenting in part and concurring in part).

¹⁴⁷ See *Bonito Boats v. Thunder Craft Boats*, 489 U.S. 141, 157 (1989). I owe this point to Hon. Zoe Lofgren. See H.R. REP. NO. 105-525, at 25 (1998).

¹⁴⁸ Another unsettling quirk of *International News Service* is that Congress had considered and failed to pass a statute giving eight hours of protection to hot news. See *International News Serv.*, 248 U.S. at 264-65 & n.1 (Brandeis, J., dissenting).

next section.¹⁴⁹

International News Service is, moreover, a dangerous precedent for action on databases; the *International News Service* Court failed to deal with the most important background facts. Both INS and AP had the ability to reuse each other's news for years, but neither had done so. INS was dominated by the Hearst newspapers, which were pro-German during the beginning of WWI. In retaliation, the British and French barred INS from using transatlantic cable services and from access to the front.¹⁵⁰ AP's bylaws allowed any AP-member newspaper to effectively stop a competitor from joining AP, presumably one reason why many newspapers stayed with INS despite INS' inability to obtain war news.¹⁵¹ Under this extreme pressure, INS started taking the war news (and only the war news) from AP-members' publicly posted updates.¹⁵² I agree emphatically with Richard Epstein that the Court should have allowed INS a "necessity" or "just cause" exception to the extent of allowing use in exchange for reasonable payment.¹⁵³ INS's actions are analogous to a captain's landing his boat at a private dock during a storm — cause for payment for services rendered, but no more.¹⁵⁴

To summarize, the intersection of *Feist* and *International News Service*¹⁵⁵ will be clear only in hindsight after the Court refocuses dicta to support some later opinion.¹⁵⁶ I counsel standing on the

¹⁴⁹ See *infra* section I.E. (level of scrutiny).

¹⁵⁰ The war problem is mentioned only in passing by the dissent. See *International News Serv.*, 248 U.S. at 263 (Brandeis, J., dissenting).

¹⁵¹ A less excluding set of AP bylaws was held to violate the antitrust statutes. See *Associated Press v. United States*, 326 U.S. 1 (1945); see also Diane L. Zimmerman, *Information as Speech, Information as Goods: Some Thoughts on Marketplaces and the Bill of Rights*, 33 WM. & MARY L. REV. 665, 719-22 (1992) (arguing that the Court in *International News Service* decided the case as involving property rights by down playing facts relevant to First Amendment concerns).

¹⁵² This factual reorganization is from Richard A. Epstein, *International News Serv. v. Associated Press: Custom and Law as Sources of Property Rights in News*, 78 VA. L. REV. 85, 90-91, 94-95, 105 (1992).

¹⁵³ *Id.* at 119.

¹⁵⁴ *Id.* Perhaps in 1918 neither attorneys nor the Court were as conditioned to respond to any limitation on material for public debate as we are now. First Amendment case law was in its infancy when *International News Service* was decided. See *supra* note 104; Zimmerman, *supra* note 151, at 725 (arguing that property/free speech paradoxes in case law largely result from "bad timing; the First Amendment doctrine was a late bloomer . . .").

¹⁵⁵ At least one scholar has hopefully read *Feist's* citations to the *Trade-Mark Cases*, 100 U.S. 82 (1879), as a suggestion that Congress pass *Feist*-bypassing legislation in reliance on the Commerce Clause. See Goldstein, *supra* note 44. *Feist* cites the *Trade-Mark Cases* as the earliest decision denying protection of a type of *res* (trademarks), because it did not meet the Intellectual Property Clause's test of authorship. The statute at issue was held unconstitutional because, in 1879, Commerce Clause grounding required the statute to include use between states, or between a foreign nation and a state, as part of the cause of action. The Commerce Clause has expanded since 1879, but the *Trade Mark Cases* do not tell us how far.

¹⁵⁶ For a recent example of refocusing, see *Federal Election Comm'n v. Aikins*, 118 S. Ct.

firmer ground of constitutional principles.¹⁵⁷

E. *Level of Scrutiny*

Rational basis scrutiny would be enough to kill the CIAA if the Supreme Court actually scrutinized.¹⁵⁸ The CIAA, however, belongs under a much stronger spot light.

The CIAA is not a restriction on any one type of speech. It is a restriction on all speech "in commerce" that "uses" (not just quotes or copies) any facts from a database.¹⁵⁹ No one, absent minor, largely-illusory exceptions, may extract or use facts from a database sold in commerce without paying the new right holder. The statute covers political pamphlets using statistics to support a candidate's position on a major campaign issue. The statute covers non-profit organizations marshaling facts to lobby the government for more police, or higher welfare benefits, or more military parades. The statute covers churches writing tracts to demonstrate that children born out of wedlock are unlikely to be baptized unless the reader donates funds. The statute covers magazines' explanations of reader demographics to possible advertisers (of political or of commercial information). The statute covers scientists mapping the human genome.

The statute is not a mere time, place, and manner restriction. Everyone must pay the new right holder for every use in commerce of the facts (absent some very minor, almost illusory exceptions). You cannot paraphrase without paying. You cannot speak freely in the evening. You cannot speak freely in the park. You cannot speak freely if you stay away from hospitals. You cannot speak freely if you refrain from using loud sound trucks, giant billboards, and obscene gestures.¹⁶⁰

1777, 1785-86 (1998) (explaining that conclusion "x is a generalized grievance," a conclusion that seems to be the deciding point in many opinions rejecting putative plaintiffs' standing to sue, is not sufficient to bar standing if injury x is concrete, rather than abstract). *See also* Board of Trustees of State University of New York v. Fox, 492 U.S. 469, 476-77 (1989) (clarifying that despite supporting formulations in several cases and assumptions in dicta, narrow tailoring required of restrictions on commercial speech does not limit government to use of least restrictive means); *id.* at 486 (Blackmun, J., dissenting, joined by Brennan & Marshall, JJ.) (stating that the majority reaches its holding by "recasting a good bit of contrary language in our past cases" and by characterizing the previous holding as dicta).

¹⁵⁷ *See* ROBERT L. STERN ET AL., SUPREME COURT PRACTICE § 14.17(a), at 595 (7th ed. 1993) (stating that successful arguments and briefs to the Court emphasize principles, not prior cases).

¹⁵⁸ *See infra* section II.B. (economic arguments for and against the CIAA). The Court, however, often removes the teeth from rational basis scrutiny. *See* Strauss, *supra* note 79.

¹⁵⁹ For the text of the August House Act (with my suggested changes), *see infra* Part III (Balanced Bill).

¹⁶⁰ I use "freely," not "free," because the right-holder has no obligation to deal, or to

“In commerce” does not mean “commercial speech” (*à la* First Amendment) or “for commercial profit” (*à la* copyright fair use).¹⁶¹ The CIAA defines “commerce” to mean “all commerce that may be lawfully regulated by the Congress.”¹⁶² In almost identical language, the Lanham Act covers use of marks “in commerce” with “commerce” meaning “all commerce which may lawfully be regulated by Congress.”¹⁶³ Ample case law warns us that this definition of “commerce” includes non-profit, civic, and charitable organizations;¹⁶⁴ use in commerce includes core First Amendment speech, including political slogans used by competing political organizations,¹⁶⁵ and non-profit organizations lobbying for political action.¹⁶⁶

The CIAA is not analogous to asking speakers to pay for paper, ink, meeting rooms, or pamphlets. First, the necessity is different. One can speak using alternative sources of paper, ink, or meeting rooms when some sources are overpriced or uncooperative. You can speak using other items: computers, billboards, or street corners. You cannot talk (sensibly) without using the limited set of facts relevant to your chosen topic. Second, the pedigree of the property right is different. No common law property right attaches to facts. The CIAA is government action creating an unprecedented property right allowing private persons to force payment for the factual content, the structural steel, of speech. The CIAA even lacks any provision requiring right holders to sell these irreplaceable structural components on a non-discriminatory basis to all comers.

deal reasonably. The CIAA does not create a statutory license. The CIAA does not even create an obligation for the right-holder to supply readily available notice of its identity and location.

¹⁶¹ “Commercial speech” within the meaning of the First Amendment is “speech that proposes a commercial transaction.” *Fox*, 492 U.S. at 482. This First Amendment category is much narrower than “speech for profit.” The Supreme Court agrees that “[s]ome of our most valued forms of fully protected speech are uttered for a profit.” *Id.*

¹⁶² Collections of Information Antipiracy Act, H.R. 2281, 105th Cong. § 502 (1998) (written to amend 17 U.S.C. by adding § 1301(4)).

¹⁶³ 15 U.S.C. § 1127 (1996).

¹⁶⁴ See J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 9.5 (4th ed. 1996). See, e.g., *Kappa Sigma Fraternity v. Kappa Sigma Gamma Fraternity*, 654 F. Supp. 1095, 1101 (D.N.H. 1987) (involving a college fraternity that solicits alumni contributions); *American Diabetes Ass’n v. National Diabetes Ass’n*, 533 F. Supp. 16, 20 (E.D. Pa. 1981) (requesting charitable donations), *aff’d*, 681 F.2d 804 (3d Cir. 1982); *United States Jaycees v. San Francisco Junior Chamber of Commerce*, 354 F. Supp. 61, 64, 65 (N.D. Cal. 1972) (involving a society for young men interested in community affairs), *aff’d*, 513 F.2d 1226 (9th Cir. 1975).

¹⁶⁵ See, e.g., *United We Stand America v. United We Stand America*, New York, 128 F.3d 86, 89 (2d Cir. 1997).

¹⁶⁶ See, e.g., *Committee for Idaho’s High Desert v. Yost* 881 F. Supp. 1457, 1470-71 (D. Idaho 1995), *aff’d*, 92 F.3d 814 (9th Cir. 1996); *Brach Van Houten Holding, Inc. v. Save Brach’s Coalition for Chicago*, 856 F. Supp. 472, 475-76 (N.D. Ill. 1994).

The CIAA attempts to disguise this overreaching theft from the public domain by announcing that it does not prevent anyone from independently collecting facts just because the facts are also in a commercially available database,¹⁶⁷ but this cosmetic statement fixes neither the practical nor the inter-related constitutional problem. Society wastes vast resources if it forces each user to collect the same facts. This is burdening speech acts with the cost of constantly reinventing the wheel. Furthermore, how many speakers, a/k/a “fact users,” have the time, resources, or expertise (let alone the access) to collect all the facts they use?

The Court, furthermore, rejected a cognate argument in *Bonito Boats v. Thunder Craft Boats*.¹⁶⁸ *Bonito Boats* held that the federal patent scheme preempted a state statute barring reproduction of unpatented boat hulls. The losing plaintiffs argued that the state statute did not conflict with the federal patent scheme because the state statute only prohibited one specific method of copying — the direct molding process; the boat hulls otherwise remained in the public domain.¹⁶⁹ Justice O’Connor deflected this quibble:¹⁷⁰

It is difficult to conceive of a more effective method of creating substantial property rights in an intellectual creation than to eliminate the most efficient method for its exploitation. *Sears* [*Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225 (1964),] and *Compco* [*Corp. v. Day-Brite Lighting*, 376 U.S. 225 (1964),] protect more than the right of the public to contemplate the abstract beauty of an otherwise unprotected intellectual creation — they assure its efficient reduction to practice and sale in the marketplace.¹⁷¹

Property rights are not always absolute. Other intellectual property rights (such as patents and copyrights) are bounded by clear statutory limits, but they are still “property.”¹⁷² Denying all right to copy

¹⁶⁷ See H.R. 2281 § 502 (written to amend 17 U.S.C. by adding § 1303(b)); see also 144 CONG. REC. E1052 (daily ed. June 5, 1998) (Letter from Rep. Hyde, Chairman, House Judiciary Comm., to Rep. Bliley, Chairman, House Commerce Comm. (June 3, 1998)) (“The House Act’ does not, as your letter indicates, create a new federal property right; rather, like the Lanham Act for trademark protection, it prohibits misappropriation of another’s collection under certain circumstances.”); H.R. REP. NO. 105-525 (1998), at 8 (“The bill avoids conferring a monopoly on facts . . .”). But see *id.* at 24-25 (dissenting remarks of Rep. Lofgren) (“[T]he bill seeks to establish a new property right for ‘collections of information’ . . .”).

¹⁶⁸ 489 U.S. 141 (1989).

¹⁶⁹ See *id.* at 146 (discussing opinion of dissenters in Florida Supreme Court).

¹⁷⁰ *Id.* at 159, 163-64.

¹⁷¹ *Id.* at 164. Heald, *supra* note 84, at 984-88, criticizes this paragraph in *Bonito Boats* on the ground that the patent system clearly provides stronger protection.

¹⁷² See, e.g., *Stewart v. Abend*, 495 U.S. 207, 219 (1990) (describing copyrights as a form of personal property); *Ethicon, Inc. v. United States Surgical Corp.*, 135 F.3d 1456, 1465

equals forcing the public to pay for reinventing the wheel. Denying the most efficient way to copy requires the public to pay for reinventing all improvements to the wheel since the axle.¹⁷³ Placing my own meaning into the linguistic form of O'Connor's conclusion in *Bonito Boats*: "Appending the conclusory label [pirating] to such competitive behavior merely endorses a policy judgment which the [Constitution] do[es] not leave [Congress] free to make."¹⁷⁴

The CIAA is not like asking speakers to buy paper and ink. A better analogy would be a tax on the means of speech, such as paper, ink, and newspapers. Such tax burdens on press or speech raise serious First Amendment concerns. For example, in *Grosjean v. American Press Co.*,¹⁷⁵ the First Amendment barred Louisiana's tax on publications whose circulation exceeded 20,000 copies per week.¹⁷⁶ The First Amendment also barred a Minnesota tax levied on the type of ink and paper used in newspapers. The state tax was not constitutional merely because it excepted each year's first \$100,000 worth of supplies. This opinion, *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*,¹⁷⁷ propounded three First Amendment maxims. First, proof of evil legislative intent is not a prerequisite to concluding that a tax violates the First Amendment. Second, exclusive taxation of the press is dangerous because it can operate to censor critical comment. Third, taxing only large newspapers resembles a penalty, raising the possibility of abuse.¹⁷⁸ A similar type of discrimination killed a tax that Arkansas imposed on general interest magazines while exempting religious, professional, trade and sports periodicals; *Arkansas Writers' Project, Inc. v. Ragland*¹⁷⁹ turned both on the tax's limitation to a very few speakers and the tax's content discrimination.¹⁸⁰

True, some of the Court's concerns in the newspaper tax

(Fed. Cir. 1998) (relying on statutory provision that "patents shall have the attributes of personal property," 35 U.S.C. § 261).

¹⁷³ See *Abrams*, *supra* note 138, at 578.

¹⁷⁴ Justice O'Connor wrote: "Appending the conclusory label 'unscrupulous' to such competitive behavior merely endorses a policy judgment which the patent laws do not leave the States free to make." *Bonito Boats*, 489 U.S. at 164.

¹⁷⁵ 297 U.S. 233 (1936).

¹⁷⁶ See *id.* This case description follows Justice O'Connor's opinion in *Leathers v. Medlock*, 499 U.S. 439, 444 (1991) (holding that despite the First Amendment, Arkansas may extend its generally applicable sales tax to cover cable television or to both cable television and satellite broadcast services without taxing print media). I do not claim that *Leathers* is consistent with the other "tax on speech" cases.

¹⁷⁷ 460 U.S. 575 (1983).

¹⁷⁸ See *Leathers*, 499 U.S. at 445-46.

¹⁷⁹ 481 U.S. 221 (1987).

¹⁸⁰ See *Leathers*, 499 U.S. at 446.

cases do not seem relevant to the CIAA. The CIAA does not burden so few speakers that political opposition to the tax is unlikely¹⁸¹ (if one ignores collective action problems as the Court routinely seems to do).¹⁸² Nor does the CIAA single out the press or target specific viewpoints.¹⁸³ The CIAA does, however, discriminate on the basis of the *content* of speech — thus requiring “heightened scrutiny.”¹⁸⁴

The newspaper tax cases reach any substantial financial burden on speakers, for example, New York State’s “Son of Sam” Law.¹⁸⁵ The “Son of Sam” law bound any entity that contracted with any criminal to publish a work “with respect to the reenactment of such crime” or “the expression of such accused or convicted person’s thoughts, feelings, opinions or emotions regarding such crime”¹⁸⁶ The contracting entity was required to place the author’s payments in an escrow fund available to reimburse the author’s victims.¹⁸⁷ The Court struck down the statute. “A statute is presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of their speech.”¹⁸⁸ To survive, such a statute must be both necessary to serve a compelling state interest and narrowly tailored to achieve this compelling purpose.¹⁸⁹

Even if, *arguendo*, the CIAA is “content neutral,” i.e., intended to serve a purpose unrelated to the content of the regulated speech,¹⁹⁰ the statute must be narrowly tailored to serve a significant government interest.¹⁹¹ In this context, “narrow tailoring,” while not requiring the least intrusive alternative, disallows “burden[ing] substantially more speech than is necessary to further the

¹⁸¹ Cf. *Leathers*, 499 U.S. at 447 (“A tax is also suspect if it targets a small group of speakers.”).

¹⁸² Public choice theorists point out that “consumers of information” are even more likely than other consumers to be “dismal failures in preventing government” action against their diffuse interests. See Daniel A. Farber, *Free Speech Without Romance: Public Choice and the First Amendment*, 105 HARV. L. REV. 554, 560 (1991).

¹⁸³ Cf. *Leathers*, 499 U.S. at 447 (targeting a small group of speakers is constitutionally suspect).

¹⁸⁴ *Id.*

¹⁸⁵ See *Simon & Schuster v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 108 (1991) (citing N.Y. EXEC LAW. § 632-a(1) (McKinney 1982 and Supp. 1991)).

¹⁸⁶ *Id.* at 109 (quoting N.Y. EXEC LAW. § 632-a (McKinney 1982 and Supp. 1991)).

¹⁸⁷ See *id.* at 108-11 (citing N.Y. EXEC LAW. § 632-a(1) (McKinney 1982)).

¹⁸⁸ *Id.* at 115 (citing *Leathers*, 499 U.S. at 447, and relying upon *Arkansas Writers’ Project, Inc. v. Ragland*, 481 U.S. 221, 230 (1987)).

¹⁸⁹ See *id.* at 118.

¹⁹⁰ This is the definition of “content neutral” supplied in *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (upholding a New York City regulation of noise at a park band shell).

¹⁹¹ *Id.* at 796.

government's legitimate interests."¹⁹² If, *arguendo*, viewed as a content neutral time, place, and manner restriction, the statute must also "leave open ample alternative channels of communication."¹⁹³ The CIAA is unconstitutional under even the least demanding of these tests.

The tax analogy, however, does not capture the full First Amendment problem with the CIAA. The government does not refuse some taxpayers permission to pay a tax. Here the government is affirmatively acting to give private people, qualified only by the expenditure of substantial resources to create or maintain a database, unbridled discretion to deny critical speech resources to potential speakers.¹⁹⁴ The best analogy is allowing a government official unfettered discretion to deny permits required for First Amendment activity such as public demonstrations or pamphleteering. Statutes creating such systems are so constitutionally suspect that they merit facial challenge, especially if repeated short-term permissions are involved.¹⁹⁵ Absent other constitutional permission, such as the Intellectual Property Clause,¹⁹⁶ such statutes are unconstitutional, *PERIOD*.¹⁹⁷ So is the CIAA.¹⁹⁸

"Ah!," someone objects, "What about 'state action'?" If a private entity discriminates between possible buyers of information,

¹⁹² *Id.* at 798-99.

¹⁹³ *Id.* at 802.

¹⁹⁴ The CIAA includes the minor proviso that the database holder not violate the anti-trust laws. *See* Collections of Information Antipiracy Act, H.R. 2281, 105th Cong. § 502 (1998) (written to amend 17 U.S.C. by adding § 1305(d)). This minor limitation should not save the CIAA from unconstitutionality. *Accord* Forsyth County, Ga. v. Nationalist Movement, 505 U.S. 123, 136-37 (1992) (holding that a cap on parade fee does not save a statute allowing a public official to vary parade permit fees based on his estimate of the cost of keeping public order at each event). The CIAA, furthermore, puts on the defendant the speech-chilling burden of proving an antitrust violation.

¹⁹⁵ *See, e.g., Forsyth*, 505 U.S. at 136-37 (holding that an ordinance allowing official unclear discretion to set parade fee based on estimate of cost of keeping public order is unconstitutional even though fee is capped); *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 755, 759-60 (1988) (holding that a city ordinance giving official unfettered discretion to grant or deny annual permits to place newspaper vending machines, a/k/a news racks, on public property may be challenged facially without waiting to apply for and be denied a permit; ordinance held unconstitutional).

¹⁹⁶ The Framers of the Constitution "intended copyright itself to be the engine of free expression," at least according to *Harper & Row Publishers v. Nation Enters.*, 471 U.S. 539, 558 (1985). As discussed *supra*, the Court has, so far, not acknowledged any basic conflict between copyright and the First Amendment prohibition on laws abridging freedom of speech and press. *See supra* Section I.C.

¹⁹⁷ *See City of Lakewood*, 486 U.S. at 763.

¹⁹⁸ Uniform state action would also be unconstitutional since the First Amendment has been incorporated by the Fourteenth Amendment to bind the states. *See Schneider v. State*, 308 U.S. 147, 160 (1939). For the argument that uniform state action to bypass a limit on the Intellectual Property Clause is also unconstitutional, see Pollack, *Unconstitutional Incontestability*, *supra* note 14, at 300-26 (arguing for a type of dormant Intellectual Property Clause).

this is not 'state action.' Private actors can discriminate all they want; freedom of contract includes the freedom not to contract with someone — unless the government passes a contrary statute, such as the civil rights laws.”

If this objection stands, the CIAA is still subject to searching scrutiny under the “Son of Sam” model. Hopefully, potential (or expected) discrimination by newly empowered private actors will support a decision that the passage of the CIAA is a constitutional violation. Whether discriminatory enforcement of the CIAA is a separate constitutional violation is a fascinating, still open, question. I shall briefly address state action from two different starting points.

The first starting point is *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*,¹⁹⁹ a case challenging the constitutionality of a special intellectual property right granted by Congress. In the Amateur Sports Act, Congress gave the United States Olympic Committee (“USOC”) strong rights in the word “OLYMPIC.”²⁰⁰ Standard trademarks, which exist in federal statute, state statute, and state common law, allow a mark holder to stop another entity from using the mark only if the use is likely to cause confusion or deception in the market place.²⁰¹ The Amateur Sports Act, however, went further by allowing the USOC to stop non-confusing commercial and promotional uses of “OLYMPIC.”²⁰² San Francisco Arts & Athletics, Inc. (“SFAA”) requested USOC’s permission to run a “Gay Olympic Games;” USOC refused. When SFAA tried to proceed without permission, USOC sued.²⁰³

The Court ruled for USOC.²⁰⁴ The Court held that Congress could “reasonably” decide that the commercial and promotional value of “OLYMPIC” was the product of the USOC’s efforts.²⁰⁵ The Court saw no First Amendment problem. It reached this con-

¹⁹⁹ 483 U.S. 522 (1987); see also Pollack, *Time to Dilute*, *supra* note 14, at 527, 540-41 (discussing this case).

²⁰⁰ See Amateur Sports Act, 36 U.S.C. § 380 (1978).

²⁰¹ See, e.g., DONALD S. CHISUM & MICHAEL A. JACOBS, UNDERSTANDING INTELLECTUAL PROPERTY LAW § 5F[1] (1997).

²⁰² *San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 483 U.S. 522, 526 (1987). The Amateur Sports Act is like a dilution statute. A federal dilution statute, the Federal Dilution Act of 1995, was signed into law by President Clinton on January 16, 1996, and codified at 15 U.S.C. § 1125(c). About half the states adopted dilution statutes before the federal statute was enacted. See Julie A. Garcia, *Trademark Dilution: Eliminating Confusion*, 85 TRADEMARK REP. 489, 493-97 (1995). I have already written against dilution statutes. See Pollack, *Time to Dilute*, *supra* note 14.

²⁰³ *San Francisco Arts & Athletics*, 483 U.S. at 525-26.

²⁰⁴ *Id.* at 528.

²⁰⁵ *Id.* at 532-33.

clusion by declaring (I believe counter-factually) that (a) adequate substitute words existed, and (b) the limitations reached little except “commercial speech,” then low on the First Amendment hierarchy.²⁰⁶ The Court, therefore, used the relatively forgiving test of whether “the incidental restrictions on First Amendment freedoms are greater than necessary to further a substantial government interest.”²⁰⁷ SFAA also argued that USOC improperly discriminated between organizations requesting permission to use the word “OLYMPIC.”²⁰⁸ The Court rejected this argument on the ground that USOC was not a government actor.²⁰⁹ Justices O’Connor, Blackmun, Brennan, and Marshall would have found USOC a government actor.²¹⁰ The opinions, however, dealt with the extent to which the government controlled USOC and the governmental nature of USOC’s activities. None of the Justices addressed the legislature’s creation of USOC’s ability to discriminate.²¹¹

What does *San Francisco Arts & Athletics* foreshadow about a possible challenge to the CIAA? Looking at the government’s action in passing the statute, the Court insisted that SFAA’s “message” was not blocked.²¹² The CIAA, however, provides the right to block use of facts, not just expression. *San Francisco Arts & Athletics*, therefore, does not make the CIAA constitutionally acceptable.

My second starting point is the issue not fully discussed in *San Francisco Arts & Athletics*: the “state action” status of right-holders’ ability to discriminate (an ability created by government action and enforceable only through the government’s court system). The Court has consistently refused to deal with the “state authorization”

²⁰⁶ *Id.* at 536. *But see* 44 *Liquormart v. Rhode Island*, 517 U.S. 484 (1996) (striking as unconstitutional a state ban on advertising liquor prices; the ban was allegedly intended to promote temperance). The meaning of 44 *Liquormart* is hidden by the number of opinions issued. Per Justice Stevens (joined by Kennedy & Ginsburg, JJ.), not all commercial speech restrictions warrant the same level of scrutiny; “complete speech bans, unlike content-neutral restrictions on the time, place, or manner of expression are particularly dangerous because they all but foreclose alternative means of disseminating certain information.” *Id.* at 501 (internal citation omitted); *see also* Kathleen M. Sullivan, *Cheap Spirits, Cigarettes, and Free Speech: The Implications of 44 Liquormart*, 1996 SUP. CT. REV. 123, 126 (“Justices fragmented messily,” but case moves away from commercial speech as a separate, disfavored speech category).

²⁰⁷ *San Francisco Arts & Athletics*, 483 U.S. 522, 536 (1987) (citing *United States v. O’Brien*, 391 U.S. 367, 377 (1968)).

²⁰⁸ *See id.* at 542.

²⁰⁹ *See id.* at 543-48.

²¹⁰ *See id.* at 548 (O’Connor, J., concurring in part and dissenting in part, joined by Blackmun, J.); *id.* (Brennan, J., dissenting, joined by Marshall, J.).

²¹¹ Justices Brennan and Marshall also saw a First Amendment problem because of the amount of non-commercial speech blocked. *Id.* (Brennan, J., dissenting, joined by Marshall, J.).

²¹² *Id.* at 536.

problem of the “state action” doctrine, to use G. Sidney Buchanan’s terminology.²¹³ Can the state play constitutional ostrich by burying its head in the sand after enacting a statute that encourages “private” entities to enforce discrimination in government-run courts?

The archetypical state authorization case is *Shelley v. Kramer*,²¹⁴ which held unconstitutional a Missouri court’s enforcement of a covenant not to sell real property to African-Americans. The legal entitlement supporting the covenant was the common law, not a statute.²¹⁵ In 1967, the Court found discriminatory state action in an amendment to the California constitution. The negated amendment forbade California from interfering with owners’ discretion to sell, lease, or rent real property, i.e., the amendment wiped out anti-housing discrimination statutes.²¹⁶ The amendment did not force discrimination, but was “designed to make private discrimination legally possible.”²¹⁷ The Court looked at the practical effect the amendment would have on California’s housing patterns.²¹⁸ After 1967, however, *Kramer* basically vanished from the Court’s decisions until *Edmonson v. Leesville Concrete Co.*²¹⁹ in 1991 — after *San Francisco Arts & Athletics*.

Edmonson used a new three part test to decide that a “private” litigant was a “state actor” when asserting racially biased peremptory jury challenges.²²⁰ *Edmonson* cited *Kramer* to support the importance of “whether the injury caused is aggravated in a unique way by the incidents of governmental authority.”²²¹ The Court also inquired about “the extent to which the actor relies on governmental assistance and benefits” and “whether the actor is performing a traditional governmental function.”²²² Summarizing briefly a point that deserves its own article, the Court’s discussion in *Edmonson* is opaque on why jury selection is significantly different from

²¹³ See G. Sidney Buchanan, *A Conceptual History of the State Action Doctrine: The Search for Governmental Responsibility [Part II of III]*, 34 Hous. L. Rev. 665, 763-66 (1997).

²¹⁴ 334 U.S. 1 (1948).

²¹⁵ *Id.*; Buchanan, *supra* note 213, at 704-707 (analyzing case). *Shelley* was followed by a similar case involving land in the District of Columbia, *Hurd v. Hodge*, 334 U.S. 24 (1948), and one which denied money damages for breach of a racial covenant, *Barrows v. Jackson*, 346 U.S. 249 (1953). See also Buchanan, *supra* note 213, at 696-733, 756-75 (providing the history and analysis of state authorization cases).

²¹⁶ See *Reitman v. Mulkey*, 387 U.S. 369 (1967).

²¹⁷ *Id.* at 375.

²¹⁸ *Id.* at 376-77.

²¹⁹ 500 U.S. 614 (1991); see also Buchanan, *supra* note 213, at 723-28 (discussing Supreme Court’s non-use of state authorization model during 1970s and 1980s).

²²⁰ See *Edmonson*, 500 U.S. at 616. *Georgia v. McCollum*, 505 U.S. 42 (1992), extended *Edmonson* to peremptory challenges in a criminal case.

²²¹ *Edmonson*, 500 U.S. at 622.

²²² *Id.* at 621 (citations omitted).

the “private use of state-sanctioned private remedies or *procedures*” which *Edmonson* declares do not by themselves “rise . . . to the level of state action.”²²³

I suspect judicial discomfort with the indeterminate public/private separation.²²⁴ The suspicion reminds me of Boyle’s strong argument that “every dispute about property rights in information resolves itself into a dispute about whether the issue ‘is’ in the public or the private sphere.”²²⁵

The state action issue is even murkier because the Court has found state action in judicial provision of remedies for First Amendment related torts, beginning with defamation in *New York Times v. Sullivan*.²²⁶ More recently, however, the Court held that the First Amendment does not prohibit a plaintiff from recovering damages under a theory of promissory estoppel when a newspaper brakes its promise of confidentiality.²²⁷ The Court did find state action,²²⁸ but declared that the state action consisted merely of the First Amendment-neutral enforcement of generally applicable laws that incidentally affected the press.²²⁹ Justice White’s majority opinion rests on the undiscussed refusal to distinguish a contract limiting the press’s ability to publish information relevant to an election from the operation of contract in general. As Blackmun points out, however, the Court made such a distinction in *Hustler Magazine v. Falwell*.²³⁰ In *Hustler* a state’s generally applicable tort rules on intentional infliction of emotional distress were not allowed to ground damages for printing information of public interest absent a showing of untruth and actual malice. As Justice Souter points out, furthermore, contract should not provide a greater First Amendment shield than does tort; the silenced speaker does not have the ability to waive the First Amendment rights of his potential listeners.²³¹ Judges, furthermore, have the

²²³ *Id.* at 622 (emphasis added). *Accord id.* at 632 (O’Connor, J., dissenting) (stating that the majority’s finding of state action “is based on little more than that the challenge occurs in the course of a trial.”).

²²⁴ See generally, Duncan Kennedy, *The Stages of the Decline of the Public/Private Distinction*, 130 U. PA. L. REV. 1349 (1982) (arguing that the “liberal” dichotomies, including public/private distinction, have been collapsing since the beginning of the century).

²²⁵ Boyle, *supra* note 110, at 1435.

²²⁶ 376 U.S. 254 (1964); see also *Time, Inc. v. Hill*, 385 U.S. 374 (1967) (state right of privacy statute); *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988) (intentional infliction of emotional distress).

²²⁷ See *Cohen v. Cowles Media Co.*, 501 U.S. 663, 665 (1991).

²²⁸ See *id.* at 668 (relying on *New York Times v. Sullivan* and its progeny).

²²⁹ See *id.* at 669.

²³⁰ 485 U.S. 46 (1988), construed in *Cohen*, 501 U.S. at 674-76 (Blackmun, J., dissenting, joined by Marshall & Souter, JJ.).

²³¹ See *Cohen*, 501 U.S. at 677-78 (Souter, J., dissenting, joined by Marshall, Blackmun & O’Connor, JJ.); see also Alan E. Garfield, *Promises of Silence: Contract Law and Freedom of*

option of refusing to enforce specific contracts that violate public policy. I see no justifiable reason for the Court's dissimilar treatment of similar state action issues in *San Francisco Arts & Athletics, Cowen*, and *Hustler*. I can only point out that the CIAA raises large First Amendment concerns.

To recap, the CIAA codifies a strong private property right in information. This right is totally novel in common and statutory law. This right disrupts the market place of ideas which is historically central to First Amendment and democratic concerns. Standard capitalistic behavior by the holders of the new right must be expected to burden (i) persons who disagree with the right holders,²³² (ii) persons who perform constitutionally favored scientific and artistic activities, and (iii) the poor.

Congress should take full discredit for placing such power in private hands. Discrimination by rights holders should be state action. Will the Court agree? I hope we do not have to find out.

II. PROS AND CONS — STAKES IN THE EVERYDAY WORLD²³³

A. *Need for Certainty*

To help obtain investors for allegedly underfunded databases, legislation needs to be certain, both in coverage and enforceability. Even though the scholarly community is not unanimous on the unconstitutionality of the CIAA,²³⁴ the voices²³⁵ yelling "unconstitu-

Speech, 83 CORNELL L. REV. 261 (1998) (arguing for close judicial scrutiny of contracts to refrain from sharing information); Susan M. Gilles, *Promises Betrayed: Breach of Confidence As A Remedy For Invasions of Privacy*, 43 BUFF. L. REV. 1 (1995) (arguing in favor of protecting privacy through tort remedies for breach of confidence because some plaintiffs are not sufficiently shielded by actions for breach of contract or breach of fiduciary duty, but acknowledging First Amendment problems).

²³² What would law professors do if both WESTLAW and LEXIS curtailed low-cost access for professors opposing the CIAA? Such negative-publicity inducing action is unlikely, but the two services could more easily raise prices to all law professors.

²³³ This practical Part II is a mere sketch. For fuller treatment see cited sources and testimony on the May House Act at <<http://www.house.gov/judiciary/41118.htm>>; <<http://www.house.gov/judiciary/41121.htm>>. Several other practical objections have been raised against the CIAA. See, e.g., H.R. REP. NO. 105-525 at 26-27 (1998) (dissenting views of Rep. Lofgren) (providing that the May House Act allows proprietary claims over some of the databases that make up the Internet and some other types of communications networks); 144 CONG. REC. E1053 (daily ed. June 5, 1998) (Letter from Rep. Bliley, Chairman, House Commerce Comm., to Rep. Hyde, Chairman, House Judiciary Comm. (May 19, 1998)) (placed on Record by Rep. Hyde) (advising that the CIAA will interfere with online commerce and upset disclosure provisions set by the SEC).

²³⁴ Professor Jane Ginsburg testified that the May House Act version of the CIAA, see *supra* notes 5-13 and accompanying text, was constitutional and well balanced, see *Feb. 1998 Hearings*, *supra* note 32. But see *Ginsburg*, *supra* note 45 (stating that the earlier, copyright-modeled database protection bill, H.R. 3531, would be overprotection without more allowance for fair use).

²³⁵ The Copyright Clause and First Amendment issues are raised in the COPYRIGHT OFFICE REPORT, *supra* note 31, at 107-11 (concluding that a constitutional statute could be

tional!" turn the CIAA into a target. Any reasonably competent defense attorney should find an argument that the CIAA is unconstitutional by looking either in the legislative history or the law review literature. If all defense attorneys miss all these arguments, someone can be counted on to try to raise unconstitutionality by an *amicus* brief or through a cooperative defendant. Someone might even instigate a declaratory judgment action the minute the CIAA is signed by President Clinton.

Enacting a "commerce-inducing" statute of uncertain constitutionality is a bad idea *for practical reasons*; such a statute delays the commercially required certainty until such time as the United States Supreme Court deigns to review the questionable statute.

B. Economics

1. Databases Are Not In Danger

Sponsors characterize the CIAA as a necessary measure to protect American companies²³⁶ from bankruptcy due to post-*Feist* pirates and the European Community Database Directive.²³⁷ These

drafted). *But see, e.g.*, H.R. REP. NO. 105-525, at 24 (1998) (dissenting views of Rep. Lofgren) ("I am convinced that the Copyright Clause and the First Amendment do not countenance the type of protection that the proponents of this bill would seek to bestow."); Letter from Marci A. Hamilton, Professor of Law, *Benjamin N. Cardozo School of Law*, to Rep. Coble, Chair, Subcommittee on Courts and Intellectual Property, House Committee on Judiciary (Feb. 9, 1998) (on file with CARDOZO ARTS & ENT. L.J.) (raising constitutional concerns briefly); James Boyle, *A Politics of Intellectual Property: Environmentalism for the Net?*, 47 *Duke L.J.* 87, 101 (1997) (describing earlier WIPO *sui generis* database proposal as "probably unconstitutional"); *Dun & Bradstreet Letter on Proposed Database Treaty* (visited Nov. 20, 1998) <<http://www.public-domain.org/database/db.html>> (Letter from Jean Cantrell, Director - Government and Industry Affairs, *Dun & Bradstreet*, to Carmen Guzman Lowrey, Associate Commissioner for Governmental and International Affairs, *U.S. Patent & Trademark Office* (Nov. 22, 1996)) (written as comment on earlier WIPO treaty suggestions) (stating that constitutionality of *sui generis* protection of databases is unsettled) [hereinafter *Dun & Bradstreet Letter*]. At least one eminent scholar considers the Intellectual Property clause sufficient to render the CIAA unconstitutional. *See* Patry, *supra* note 45. Another respected commentator raised similar concerns about the Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998) (to be codified at scattered sections of title 17, U.S. Code). Before the Digital Millennium Copyright Act's passage, Julie Cohen suggested, though without analysis, that, while "a reach," an "affirmative" First Amendment "right of access to information" raised constitutional concerns about a statutory bar to bypassing technological gatekeepers. *See* Julie E. Cohen, *Intellectual Privacy and Censorship of the Internet*, 8 *SETON HALL CONST. L.J.* 693, 701 (1998).

²³⁶ Representative Coble is using the common ploy of casting a source of money as some type of "romantic entrepreneur" (a replacement for the "romantic author" who is often said to morally deserve property rights in his expression). *See* Boyle, *supra* note 110, at 1422 (noting that persons arguing that "insider trading" should be decriminalized do so by borrowing romantic author rhetoric from copyright and transforming the insider into a type of romantic entrepreneur who should be allowed a minor monopoly on information as incentive for further wealth enhancing market behavior). Investors, however, are sources of money, not of the sweat which is sometimes argued to carry a natural property right.

²³⁷ *See, e.g.*, 144 *CONG. REC.* H3400 (daily ed. May 19, 1998) (remarks of Rep. Coble

arguments ignore unchallenged facts, even though the Companion Bill includes a supporting list of alleged “findings.”²³⁸ The

before vote on May House Act) (“I will be doggone if I am going to stand in the path of small businesses and perhaps encourage their bankruptcy ultimately in the fear of a prospective unforeseen circumstance [injury to science].”); *Feb. 1998 Hearings, supra* note 32, at 2 (opening remarks of Rep. Coble) (referring to EC Directive, *supra* note 62, as one of the reasons to pass the May House Act). *See also* 144 CONG. REC. S7959 (daily ed. July 10, 1998) (remarks of Senator Grams, introducing Companion Bill, S. 2291) (“Many American jobs depend on a healthy, vibrant U.S. database industry.”; “Although database producers do have means other than a new Federal law to seek protection, none has proven adequate”; “The European Union has begun implementing a new directive protecting databases This law clearly is designed to disadvantage database owners not located in an EU country.”); 144 CONG. REC. H7102 (daily ed. Aug. 4, 1998) (remarks of Rep. Slaughter in favor of House version of the Digital Millennium Copyright Act) (praising bill because it helps “combat the devastating losses to American companies that are being caused by the international piracy of copyrighted works”).

²³⁸ Section Two of the Companion Bill reads:

Congress finds that—

- (1) the United States workforce is increasingly engaged in the creation, processing, distribution, and maintenance of information in interstate and foreign commerce;
- (2) comprehensive, trustworthy collections of information are increasingly a fundamental component of scientific, educational, and social progress;
- (3) the United States public benefits from having ready access to reliable, up-to-date collections of information concerning virtually all the endeavors of mankind;
- (4) the production of accurate, trustworthy collections of information requires the investment of substantial amounts of human, technical, and financial resources to compile, sort, organize, maintain, verify, and distribute;
- (5) the wholesale, unauthorized copying, and dissemination of another person’s information product constitutes market-destructive free riding on the investment of the information compiler;
- (6) advances in digital technology render informational products increasingly vulnerable to database piracy as unauthorized copies may be made and transmitted around the world in a few seconds;
- (7) current Federal and State laws, including laws governing copyright, contract, and misappropriation, do not adequately protect investments against this free riding;
- (8) as a result of the decision of the United States Supreme Court in *Feist Publications, Inc. v. Rural Telephone Services Co.*, 499 [U.S.] 340 (1991), and certain decisions of the inferior courts of the United States, the copyright law affords members of the United States business community, both individuals and entities who create and distribute compilations of data, little or no protection against piracy;
- (9) legislation is needed to ensure that legitimate access to discrete data is not impaired while also encouraging persons to identify, collect, verify, and add value to such information and make it available for study, enjoyment, and use;
- (10) the piecemeal, inconsistent protection for databases provided by State misappropriation and contract laws inadequately protects the investment of database compilers from destructive acts of free riding;
- (11) the continuing development of digital technology has enabled even the smallest information provider to transact business on a national scale, rendering uniformity essential to the continued growth of interstate commerce;
- (12) technology safeguards do not adequately deter database piracy, because such safeguards are not foolproof, add to the cost and difficulty of accessing and delivering information, and provide no recourse once the safeguards have been circumvented;

CIAA, therefore, lacks a rational basis — in logic. I am not asserting the counter-factual proposition that the Court consistently enforces rationality when purporting to engage in rational-basis review.

The “American” database industry is booming, even according to the economic expert hired by supporters of the CIAA.²³⁹ The expert dared go no further than to urge opponents to “consider how fast the industry might have grown with statutory protection.”²⁴⁰ According to another proponent of the May House Act, “The United States produces by far the majority of the world’s databases.”²⁴¹ The Copyright Office finessed the absence of any evidence of market failure by declaring that Congress has often acted to legislate market conduct without empirical evidence.²⁴² Ummm — how many mothers would be reassured by a son’s argument that it’s safe for him to drink and still drive the gang home from the unchaperoned beer blast because he and his friends always do it and they’ve never landed in the hospital yet? What happened to “if its not broke, don’t fix it?”²⁴³

(13) the United States should set the world standard for database protection, and make the utmost effort to ensure the uniform, international protection of these valuable information products;

(14) database piracy, if left unchecked by Congress, will so reduce the incentive to produce these products that the quality or existence will be significantly threatened or eliminated; and

(15) new legislation is needed to protect the substantial investments involved in the production and dissemination of collections of information in interstate commerce.

Collections of Information Antipiracy Act, S. 2291, 105th Cong. § 2 (1998) (“findings”).

²³⁹ “The database industry has grown rapidly, driven by new technologies. Since 1979, the number of databases on the market has grown nearly 10-fold.” *Oct. 1997 Hearings, supra* note 62, at 2 (statement of Laura D’Andrea Tyson and Edward F. Sherry, paid consultants for the Information Industry Ass’n).

²⁴⁰ *Id.*

²⁴¹ *Feb. 1998 Hearings, supra* note 32, at 2 (statement of Robert E. Abner, Senior V.P. and General Counsel of the NASDAQ Stock Market, speaking on behalf of the Information Industrial Ass’n). One opponent of the May House Act testified that the United States has sixty-five to seventy-five percent of the world market for databases. *See Oct. 1997 Hearings, supra* note 62, at 3 (statement of Professor J.H. Reichman, *Vanderbilt University*). According to Senator Grams, sponsor of the Companion Bill, “America produces and uses some sixty-five percent of the world’s databases.” 144 CONG. REC. S7960 (daily ed. July 10, 1998).

²⁴² *See Oct. 1997 Hearings, supra* note 62, at 3 (statement of Hon. Marybeth Peters, Register, U.S. Copyright Office). *See* Steven Breyer, *The Uneasy Case for Copyright*, 84 HARV. L. REV. 281, 351 (1970) (complaining of Congress’ tendency to extend intellectual property rights without sufficient evidence of economic need for the extensions). *Cf.* H.R. REP. NO. 105-551, pt. 2 (from Commerce Committee on H.R. 2281, Digital Millennium Copyright Act of 1998) (delaying rulemaking on prohibitions against circumventing technological gatekeepers to digital copyrightable materials, “to allow the development of a sufficient record” so that the rule making may “focus on distinct, verifiable and measurable impacts”) (visited July 29, 1998) <ftp://ftp.loc.gov/pub/thomas/cp105/hr551.txt>.

²⁴³ *See* Jane C. Ginsburg, *Four Reasons and A Paradox: The Manifest Superiority of Copyright Over Sui Generis Protection of Computer Software*, 94 COLUM. L. REV. 2559, 2572 (1994) (“[T]he computer software industry is currently thriving”; “[a] well known ungrammatical adage

*Feist*²⁴⁴ was decided seven years ago, but the sky has yet to fall on the database industry.²⁴⁵ On the contrary, between 1991 and 1997, (i) the number of databases increased from 7637 to 10338, i.e., thirty-five percent, and (ii) the number of files in databases increased from 4 billion to 11.2 billion, i.e., 180%.²⁴⁶ These figures cannot be dismissed as some type of temporary anomaly. Economists are deeply split over whether the absence of legal protection for intellectual property would generate under-production or over-production of information products.²⁴⁷

The concept of an "American" company, furthermore, is an outdated myth; large companies based in the United States are just as multinational as large companies based outside the United States. "American" companies buy work and product wherever they get the best prices.²⁴⁸ When a resident of the United States buys a car from an "American" car company, he is acting in international commerce.²⁴⁹ Buying from a "small" or "family-owned" "American" company does not necessarily change the international

warns against repairing that which, even if imperfect, nonetheless works reasonably well."), responding to Samuelson et. al., *supra* note 75 (calling for *sui generis* protection because computer programs are machines made of text).

²⁴⁴ *Feist Publications Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991).

²⁴⁵ The "poster boy" of the CIAA's supporters is the quite-charming Paul Warren, Executive Publisher of Warren Publishing Inc. See, e.g., 144 CONG. REC. H3403 (daily ed. May 19, 1998) (statements of Rep. Norton) (campaigning for passage of the May House Act to, *inter alia*, protect firms like Warren Publishing from "pirates"). Mr. Warren testified for the May House Act, see *Oct. 1997 Hearings, supra* note 62, and spoke (quite well) at the Patent & Trademark Office ("PTO") Conference on Database Protection and H.R. 2652 held in Washington, D.C. on April 28, 1998 [hereinafter PTO Database Conference]. See 56 PAT. TRADEMARK & COPYRIGHT J. (BNA) 41 (May 14, 1998); Malla Pollack, handwritten notes taken at PTO Database Conference April 28, 1998 (on file with CARDOZO ARTS & ENT. L.J.) [hereinafter Pollack Notes]. Mr. Warren claimed to have spent over \$500,000 in attorney's fees on his so-far unsuccessful attempt to obtain a copyright-based judgment against a party who made commercial use of information obtained from a Warren Publishing Co. product, the *Television & Cable Factbook* ("Factbook"). See Pollack Notes, *supra*. The latest reported opinion in the case is *Warren Publ'g v. Microdos Data Corp.*, 115 F.3d 1509 (11th Cir. 1997) (*en banc*) (vacating injunction against Microdos). Neither Mr. Warren's Conference statement nor his testimony, however, explicated (i) why his publishing company's attorneys did not notice the problems with protecting fact works earlier, (ii) that Microdos' allegedly infringing product added value to the *Factbook*, see *Warren Publ'g*, 115 F.3d at 1511-13 (describing both products), (iii) how much of the "sweat" involved in the *Factbook* was sweated inside the United States, (iv) how much of the *Factbook* was obtained by Warren at nominal cost from the FCC, (v) the profit Warren Publishing extracted from the *Factbook* before and after the alleged infringement, or (vi) if the competition prodded Warren Publishing into lowering the price or adding features to its *Factbook*. See Pollack Notes, *supra*; *Oct. 1997 Hearings, supra* note 62.

²⁴⁶ See *Feb. 1998 Hearings, supra* note 32, at 4 (statement of Jonathan Band, Online Banking Ass'n, opposing May House Act).

²⁴⁷ See Boyle, *supra* note 235, at 98 (collecting economic authorities).

²⁴⁸ See, e.g., REICH, *supra* note 1, at 8-9, 81-168 (arguing that the United States needs to concentrate on getting skilled work performed inside the United States; subsidizing companies with headquarters in the United States largely subsidizes workers outside the United States, especially when the work is unskilled).

²⁴⁹ See, e.g., *id.* at 113 (example of Pontiac Le Mans).

nature of a transaction;²⁵⁰ hardly surprising, small companies also need to be profitable.

The movement of jobs and wealth from “American” companies into the non-American part of the global-village, furthermore, is not limited to heavy industry or low technology.²⁵¹ The “copyright industries” are not immune.²⁵² Much of the “sweat” involved in databases is low-level data processing and data entry. Such jobs are sent around the world by “American” publishers such as R.R. Donnelley and McGraw-Hill.²⁵³ When scanning technology becomes better, this sweat will evaporate.²⁵⁴

The database industry’s testimony is ominously silent on important facts which are uniquely within its ability to provide. Presumably, silence means that these facts do not support the CIAA. Missing are post-*Feist* figures on (i) price increases to American users, (ii) profits garnered by the database providers, (iii) how many persons outside the United States work for the database providers, (iv) how many jobs inside the United States have been moved outside the United States, (v) the relative growth of jobs inside versus outside the United States, and (vi) the extent to which revenue earned from customers outside the United States flows into the United States.

This silence is consistent with the seeming lack of information the “copyright industries” provided Congress to support the Digital Millennium Copyright Act (“DMCA”).²⁵⁵ In the Senate pre-vote pro-DMCA speeches, sponsors waived figures provided by a report paid for by the International Intellectual Property Alliance (“IIPA”).²⁵⁶ The IIPA is an organization of business associations

²⁵⁰ See, e.g., *id.* at 121 (example of family-owned Swan Optical Co., Long Island City, N.Y.).

²⁵¹ Research and development by American companies has been growing faster outside United States borders than inside those borders. See, e.g., *id.* at 122-25, 123 n.8.

²⁵² Walt Disney built a studio outside of London; MTV started European production. *Id.* at 165.

²⁵³ See REICH, *supra* note 1, at 210-11.

²⁵⁴ The House Report reads as if scanning technology already is this good, but only for extracting data from another entity’s database. See H.R. REP. NO. 105-525 (1998), at 8 (“In cyberspace, new technology represents a threat as well as an opportunity Copying large quantities of materials from another’s collection, and using it in a competing information product . . . is easier than ever. . . . Scanning permits non-electronic collections to be digitalized . . .”).

²⁵⁵ The Digital Millennium Copyright Act of 1998, S. 2037, 105th Cong. (1998). The DMCA, which was signed into law on October 28, 1998, is discussed *infra* Part II.B.3.

²⁵⁶ See 144 CONG. REC. S4884 (daily ed. May 14, 1998) (remarks of Senator Hatch); STEPHEN E. SIWEK & GALE MOSTELLER, INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE, COPYRIGHT INDUSTRIES IN THE U.S. ECONOMY: THE 1998 REPORT (1998) [hereinafter IIPA REPORT].

whose member firms make money from intellectual property.²⁵⁷ The IIPA Report is silent on (i) price increases to American consumers, (ii) profits extracted, (iii) how many persons outside the United States work for the “American” copyright industries, (iv) how many jobs inside the United States have been moved outside the United States, (v) the relative growth of jobs inside versus outside the United States, and (vi) the extent to which revenue earned from customers outside the United States flows into the United States.

The IIPA Report seems purposely misleading on the extent to which sales outside the United States help the United States. The main body of the report contains a chart showing “Estimated Foreign Sales/Exports for Selected Industries in 1997” which is based in part on Table Nine in the Report’s appendix.²⁵⁸ Table Nine is “1991-1996 Estimated Revenues Generated by Foreign *Sales* of Selected U.S. Core Copyright Industries.”²⁵⁹ Other charts provide “Foreign Sales” for the “Copyright Industries” from 1990 through 1996 and “Estimated Revenues Generated by Foreign Sales of Selected U.S. Core Copyright Industries.”²⁶⁰

Foreign sales are not sufficient reason to grant protection that will raise prices to American consumers. Exports are goods that move from inside the United States to outside the United States. Presumably someone living in the United States had some involvement and earned some money from any export. Foreign sales, however, are merely items sold outside the United States. Foreign sales do not necessarily mean any additional jobs *inside* the United States or any additional money *inside* the United States.

The IIPA Report implicitly admits this sleight of hand. The section discussing “U.S. Copyright Material in World Markets” begins, “Large numbers of products that embody American creativity are sold throughout the world each year.”²⁶¹ The accompanying footnote states: “Whether copyrighted products sold abroad are

²⁵⁷ IIPA is a coalition of associations representing U.S. copyright-based industries in bilateral and multilateral efforts to open up foreign markets closed by piracy and other market access barriers. IIPA’s member associations are: the Ass’n of American Publishers (AAP), AFMA (formerly the American Film Marketing Ass’n), the Business Software Alliance (BSA), the Interactive Digital Software Ass’n (IDSA), the Motion Picture Association of America (MPAA), the National Music Publishers’ Ass’n (NMPA) and the Recording Industry Ass’n of America (RIAA).

IIPA Press Release “EMBARGOED for release at 12:00 p.m. Thursday, May 7, 1998” at 3 (on file with CARDOZO ARTS & ENT. L.J.).

²⁵⁸ IIPA REPORT, *supra* note 256, at 3 (Chart 6).

²⁵⁹ *Id.* at 18 (emphasis added).

²⁶⁰ *Id.* at 3, 13 (Charts 5, 15).

²⁶¹ *Id.* at 13.

manufactured in the United States or overseas, the creative component emanates from the U.S., where it was nurtured by American copyright laws and their effective enforcement.”²⁶² The Report continues:

For example, a single master version of a copyrighted work, valued at a few hundred dollars in U.S. export statistics, may be shipped from the United States to another country. From that master version, however, copies or exhibition rights may generate millions of dollars in sales or licensing fees. . . . These sales and the royalties they generate are a significant source of revenue for U.S. companies.²⁶³

Silence supports the conclusion that these foreign sales did not generate additional jobs or cash flow inside the United States.²⁶⁴

The CIAA, furthermore, lacks any provision supporting any “American X” over any “non-American X.”²⁶⁵ Prior experience counsels that such a limitation (which I do *not* support) would make the CIAA’s current champions run for cover. The big “American” car manufacturers dropped a proposed statute to protect industrial designs when the American automobile workers’ unions demanded that the replacement car parts protected by the suggested act be manufactured in the United States.²⁶⁶

More fundamentally, the “trickle down” theory is incorrect; government does not help everyone when it helps large businesses. Multiple sources affirm that prosperity does not so easily trickle down.²⁶⁷ Multiple sources affirm that in the United States the rich

²⁶² *Id.* at 13 n.14.

²⁶³ *Id.* at 13.

²⁶⁴ The confusion (or slight of hand) continues in the House speeches before the vote on the August version of the DMCA. *See, e.g.*, 144 CONG. REC. H7099 (daily ed. Aug. 4, 1998) (remarks of Rep. Berman) (“Make no mistake, American intellectual property and the almost unsurpassed contribution it makes to our balance of trade is at risk around the world. Piracy costs American creators \$15 billion in sales [W]e must enact this legislation to fight overseas piracy and the toll it takes in export revenues and American jobs.”).

²⁶⁵ *Cf.* Technology Transfer Commercialization Act of 1998, H.R. 2544, 105th Cong. § 3 (1998) (allowing licensing of federally owned inventions; such license shall “normally” only be granted if “any products embodying the invention or produced through the use of the invention will be manufactured substantially in the United States.”), *reprinted in* 56 PAT. TRADEMARK & COPYRIGHT J. (BNA) 314 (July 16, 1998). House Bill 2544 passed the House on July 14, 1998. When the Senate adjourned for the summer, the bill was before the Senate Committee on Commerce, Science, and Transportation. *See* 144 CONG. REC. S8239 (daily ed. July 15, 1998).

²⁶⁶ *See Design Innovation & Technology Act of 1991, H.R. 1790: Hearing before the Subcomm. on Intellectual Property and Judicial Admin., House Comm. on the Judiciary*, 102d Cong. (1992).

²⁶⁷ *See, e.g.*, Halim Moris, *The World Bank and Human Rights: Indispensable Partnership or Mismatched Alliance?*, 4 ILSA J. INT’L & COMP. L. 173, 196 (1997) (stating that many countries achieve reasonably satisfactory economic growth rates without the majority of their populations attaining reasonably satisfactory standards of living); John W. Lee et al., *Capitalizing and Depreciating Cyclical Aircraft Maintenance Costs: More Trouble than it’s Worth?*, 17

are getting richer and the poor are getting poorer.²⁶⁸ Multiple sources also affirm that companies are perfectly willing to demand protection from the United States government and then send the resulting jobs outside the United States.²⁶⁹

2. Users Are In Danger

Expanding digitalization of databases threatens users with monopoly by database producers; it does not threaten database companies with ruin. Most database producers are either in niche markets that cannot support competitors or in sole receipt of single-source data.²⁷⁰ Even supporters of the CIAA recommended that the statute include various protections for users. The expert hired by the Information Industry Association suggested (i) no protection for databases created by government backed monopolists; (ii) either statutory language ensuring access to databases by the scientific and educational communities, or direct government subsidies to enable such users to afford database access; (iii) clear statutory language ensuring that scientists' and researchers' temporary electronic "working copies" (RAM) could be used lawfully without further fees; and that (iv) database producers be required to place copies of no-longer-protected databases in an archive where the old databases would be available for free public use.²⁷¹

VA. TAX REV. 161, 165 n.12 (1997) ("[T]he trickle down experiments of the 1978 and 1981 tax cuts failed . . . — any trickle down was from the top 1% to the top 5% or so of families.").

²⁶⁸ See, e.g., Lee et al., *supra* note 267, at 208-24; RICHARD J. HERRNSTEIN & CHARLES MURRAY, *THE BELL CURVE* 93 (Free Press ed. 1996) (providing a table demonstrating growing difference between engineers' and manufacturing employees' salaries from 1930 through 1986; based on data from the U.S. Bureau of the Census); MICKEY KAUS, *THE END OF EQUALITY* vii (2d ed. 1995) (stating that current United States "trend [is] toward rising inequality of income and wealth"); Marjorie E. Kornhauser, *The Rhetoric of the Anti-Progressive Income Tax Movement: A Typical Male Reaction*, 86 MICH. L. REV. 465, 481 (1987) ("The gap between rich and poor is widening."); see also William J. Curran, *After 100 Years: A Disquieting Discourse of Poverty and Wealth*, 35 N.Y.L. SCH. L. REV. 1031, 1034 ("[P]overty flourishes . . . [P]overty increased during the 1980's, the nation's longest sustained post-war period of economic expansion."); Leonard J. Long, *Optimum Poverty, Character, and the Non-Relevance of Poverty Law*, 47 RUTGERS L. REV. 693, 699 (1995) (noting that "35.7 million, or 14.2% of the American people, lived below the official level of poverty in 1991.").

²⁶⁹ See, e.g., REICH, *supra* note 1, at 115, 126 (fork lift manufacturer; Chrysler; in the 1990s Chrysler cars "contained the highest percentage of foreign-made parts" of the major manufacturers, yet in 1979 Chrysler had obtained monetary aid from Congress in a battle against alleged unfair competition from foreign competitors).

²⁷⁰ See, e.g., NATIONAL RESEARCH COUNCIL, *BITS OF POWER: ISSUES IN GLOBAL ACCESS TO SCIENTIFIC DATA* 139 (1997) [hereinafter *BITS OF POWER*] (this book is freely available online at National Academy Press' Web site, www.nap.edu); Reichman & Samuelson, *supra* note 45, at 70-72. The only study that did not find strong monopoly dangers was the one commissioned by the Information Industry Ass'n for presentation at the *Oct. 1997 Hearings*. See *Oct. 1997 Hearings*, *supra* note 62, at 14 (statement of Professor J.H. Reichman, Vanderbilt University).

²⁷¹ See *Oct. 1997 Hearings*, *supra* note 62, at 6-7, 9, 25, 28-29 (statement of Laura

The CIAA, however, does not include most of these suggested protections. The CIAA refuses protection to one set of government supported "monopolists," telephone companies, for telephone directories.²⁷² But the communications statutes already do the same thing.²⁷³ The CIAA's only other "protection" against database producers is the allowance of antitrust as a defense.²⁷⁴ An antitrust defense is certainly an improvement over making database protection an exception to the antitrust statutes, but hardly sufficient to protect the public, especially in light of the chilling effect of requiring a potential defendant to raise and prove such a complex matter.

Legislative history will not help. First, legislative history is under attack by the judiciary.²⁷⁵ Second, no definitive statement exists in the legislative history.²⁷⁶

Database producers' recent actions are not reassuring. Representatives of the industry rebuffed suggestions that the CIAA exempt non-profit scientific research.²⁷⁷ Database producers have been increasing prices sharply.²⁷⁸ Contracts commonly include harsh restrictions on use of extracted materials.²⁷⁹ Digitalization allows database producers to engage in unlimited self-help by both excluding unwanted users completely and by charging for each individual bit of data accessed or printed.²⁸⁰ Some CD-ROM distribu-

D'Andrea Tyson and Edward F. Sherry, paid consultants for the Information Industry Ass'n).

²⁷² See Collections of Information Antipiracy Act, H.R. 2281, 105th Cong. § 502 (1998) (written to amend 17 U.S.C. by adding § 1305(f)).

²⁷³ See 47 U.S.C. § 222(f)(3) (Supp. II 1996).

²⁷⁴ See H.R. 2281 § 502 (written to amend 17 U.S.C. by adding § 1305(d)).

²⁷⁵ See, e.g., SCALIA, *supra* note 39, at 23-25, 29-37; *infra* note 368 (discussing cases).

²⁷⁶ The report is full of useless generalities. See, e.g., H.R. REP. NO. 105-525 (1998), at 6 ("This bill . . . maintain[s] continued access to information contained in such collections for public interest purposes such as education, science and research."); *id.* at 8 (describing the May House Act as a "balanced statutory solution"). No sponsor of the May House Act made any helpful comments during introduction or floor discussion of the May House Act. The hearings are, as usual, full of conflicting testimony by persons who are not spokespersons for the House of Representatives.

²⁷⁷ See Oct. 1997 Hearings, *supra* note 62, at 10-11 (statement of Professor J.H. Reichman, *Vanderbilt University*) (remarking that database producers refused because they consider scientists and educators "target markets").

²⁷⁸ See, e.g., Reichman & Samuelson, *supra* note 45, at 71 n.90.

²⁷⁹ See, e.g., *id.* at 109; COPYRIGHT OFFICE REPORT, *supra* note 31, at 23-26.

²⁸⁰ See, e.g., Reichman & Samuelson, *supra* note 45, at 109. Even a noted high-protectionist agrees that the rhetoric of "users' rights" is fueled by copyright-holders' actions "to charge for every conceivable digital use of copyrighted works." Jane C. Ginsburg, *Authors and Users in Copyright*, 45 J. COPYRIGHT SOC'Y 1, 4 (1997). See also Patry, *supra* note 99, at 909-10 ("United States copyright (and information technology law) . . . is being shaped largely by powerful distributors and their lobbyists with the dual goals of extending a monopoly (in order to extract high prices from the public) while simultaneously depriving authors of as much money as possible (though they push authors forward, puppet-like, as the intended beneficiaries)."); Jessica Litman, *Reforming Information Law in Copyright's Im-*

tors refuse to sell their products or market separate updates, but instead license use of a CD-ROM whose data vanishes. The user who does not license an update may be surprised that his partially out-dated CD-ROM (unlike his old books), has disappearing ink.²⁸¹

3. Other Over Protections for Database Providers

By itself, the recently enacted Digital Millennium Copyright Act²⁸² gives online database providers more protection than they need. If proposed UCC Article 2B on licensing intangibles becomes law, the playing field will tilt even further in favor of providers.

While the DMCA does not directly address databases or “collections of information,” some of its provisions add to the market power of database providers. First, the DMCA sets the stage for ratification of the WIPO Copyright Treaty.²⁸³ The WIPO Treaty

age, 22 U. DAYTON L. REV. 587, 602-11 (1997) (discussing how digital technology and distribution by Internet allow distributors to charge each time a work is accessed even though similar uses of paper copies would be both unbilled and not infringing). Electronic publishers have announced intentions to “tag” each use both to insure billing and to detect infringement. See *Oct. 1997 Hearings*, *supra* note 62, at 4 (statement of Professor J.H. Reichman, *Vanderbilt University*).

²⁸¹ See, e.g., Michael Higgins, *Disappearing Data: The CD-ROM May Self-destruct If You Don't Check the Expiration Date*, 84 A.B.A. J. 30 (Aug. 1998) (discussing legal publishers including Matthew Bender and West Group).

²⁸² Pub. L. No. 105-304, 112 Stat. 2860 (1998). This article discusses only selected portions of the DMCA. The DMCA followed a convoluted path through Congress. On May 14, 1998, the Senate passed one version of The Digital Millennium Copyright Act of 1998, S. 2037. See 144 CONG. REC. S4884-4900 (daily ed. May 14, 1998), *reprinted in*, 56 PAT. TRADEMARK & COPYRIGHT J. (BNA) 68 (May 21, 1998). Two committees of the House of Representatives reported different versions of the bill. Compare H. R. REP. NO. 105-551, pt. 1 (report of Subcommittee on Courts and Intellectual Property of the House Committee on the Judiciary), with pt. 2 (report of House Committee on Commerce). A compromise passed the House on August 4, 1998. See Digital Millennium Copyright Act, H.R. 2281, 105th Cong. (1998) (visited October 14, 1998) <<http://thomas.loc.gov/cgi-bin/bdquery/z?d105:HR02281:@@X>>. A conference committee consisting of Reps. Hyde, Coble, Goodlatte, Conyers, Berman, Bliley, Tauzin, and Dingell, and of Sens. Hatch, Thurmond, and Leahy, reported out a still different version. See H.R. REP. NO. 105-796 (1998) (visited October 12, 1998) <<ftp://ftp.loc.gov/pub/thomas/cp105/hr796.txt>>. The conference committee's version passed the Senate on October 8, 1998, and the House on October 12, 1998. It was signed by President Clinton on October 28, 1998. See Digital Millennium Copyright Act, H.R. 2281, 105th Cong. (1998) (visited December 1, 1998) <<http://thomas.loc.gov/cgi-bin/bdquery/z?d105:HR02281:@@X>>.

²⁸³ WIPO Copyright Treaty, adopted by the World Intellectual Property Organization Diplomatic Conference On Certain Copyright and Neighboring Rights Questions on December 20, 1996 at Geneva, Switzerland (CRNR/DC/94) [hereinafter WIPO Treaty]. See WIPO Copyright Treaty, Dec. 20, 1996, 36 I.L.M. 65 (1997) (visited April 23, 1998) <<http://www.wipo.org/eng/diplconf/distrib/94dc.htm>>. The WIPO Treaty does not empower Congress to override First Amendment limits. Compare *Boos v. Barry*, 485 U.S. 312, 315, 322 (1988) (holding that a D.C. local law barring display near a foreign embassy of any sign that tends to bring that foreign government into “public odium” or “public disrepute” violates the First Amendment despite the United States's duty under Vienna Convention on Diplomatic Relations to protect diplomats' dignity interests), with *Missouri v. Holland*, 252 U.S. 416 (1920) (holding that the Treaty Power gives federal government power to

strengthens protections given copyright holders against the world by adding an “exclusive right of authorizing any communication to the public of their works, by wire or wireless means,”²⁸⁴ by requiring member states to protect authors from “circumvention of effective technological measures” used by authors to prevent unauthorized use of their works,²⁸⁵ and by requiring member states to protect authors from (i) persons removing digital rights management information, and (ii) persons who “distribute” or “communicate” copies of works “knowing” that electronic rights management information has been removed.²⁸⁶ The WIPO Treaty specifies that computer programs are protected literary works.²⁸⁷ “Compilations of Data (Databases)” which are “intellectual creations” because of “the selection or arrangement of their content” are also declared to be protected works.²⁸⁸ The additional protection required by the WIPO Treaty is especially virulent if “collections of information” under United States statute includes collections of separate works of authorship, as does the CIAA. But even if database providers cannot get such double protection, digital databases are usually useless without access to specially tailored computer programs which enable searches. The computer programs necessary to search a database are clearly covered by the WIPO Treaty.

The DMCA²⁸⁹ severely limits anyone’s ability to access material protected by technological gatekeepers.²⁹⁰ Congress disguised the

protect migratory birds even though a similar federal statute, that was not related to a treaty, had been held unconstitutional by a federal district court). Ratification of the related treaties are separate actions of the Senate. Intellectual property treaties are usually not presented to the Senate for ratification until after implementing legislation has been enacted. See 144 CONG. REC. S4893 (daily ed. May 14, 1998) (remarks of Senator Biden, explaining procedure), *reprinted in*, 56 PAT. TRADEMARK & COPYRIGHT J. (BNA) 97 (May 21, 1998).

²⁸⁴ WIPO Treaty, *supra* note 283, art. 8.

²⁸⁵ *Id.* art. 11.

²⁸⁶ *Id.* art. 12.

²⁸⁷ *Id.* art. 4.

²⁸⁸ *Id.* art. 5. The protection does not, however, “extend to the data or material itself.” *Id.*

²⁸⁹ In order to publish this article before the 106th Congress votes on a database protection bill, this article took the text of the DMCA from the Library of Congress Internet site, *Thomas*. See *Enrolled Bill H.R. 2281* (visited Dec. 4, 1998) <[²⁹⁰ While not completely clear, the DMCA seems to cover both technological protection measures that prevent access to the material \(for example, encryption and access codes\), and distinct technological protection measures that limit the usefulness of the material after it has been accessed. The second type of protection includes \(i\) copy protection, or “date bombs,” which cause material to self destruct, \(ii\) use limitation \(material is not fully functional without separately obtained add-on or code sequence\), and \(iii\) downloadable executables \(e.g., Java applets and ActiveX scripts which are downloaded from a server with the downloaded content, but are flushed from RAM at the end of the session; they do not](http://thomas.loc.gov/cgi-bin/query/D?c105:4:./temp/~c105RjvJwU::>. Therefore, typographical errors are possible.</p></div><div data-bbox=)

extent of the limitation by delaying the inception of separate liability for the act of circumvention.²⁹¹ A close read of the statute, however, shows that, at most, only individual computer jockeys benefit from the delay. As of the DMCA's enactment:

(2) No person shall manufacture, import, offer to the public, provide, or otherwise traffic in any technology, product, service, device, component, or part thereof, that—

(A) is primarily designed or produced for the purpose of circumventing a technological measure that effectively controls access to a work protected under this title;

(B) has only limited commercially significant purpose or use other than to circumvent a technological measure that effectively controls access to a work protected under this title; or

(C) is marketed by that person or another acting in concert with that person with that person's knowledge for use in circumventing a technological measure that effectively controls access to a work protected under this title.²⁹²

stay on the user's computer to be reused). See Eric Schlachter, *The Intellectual Property Renaissance in Cyberspace: Why Copyright Law Could Be Unimportant on the Internet*, 12 BERKELEY TECH. L.J. 15, 38-48 (1997) (describing technological protections).

In less technical terms, "digital objects" are units of information that are encrypted or "wrapped" inside a software "envelope." Access to the digital object is controlled by following the conditions (such as payment of a fee) encrypted into the envelope. If unwrapped material can be used by the viewer without further technological control, the digital object is "in the clear." "Proprietary viewers" control use of the object after unwrapping. See I. TROTTER HARDY, U.S. COPYRIGHT OFFICE, PROJECT LOOKING FORWARD: SKETCHING THE FUTURE OF COPYRIGHT IN A NETWORKED WORLD 13-14 (Final Report May 1998), available at (visited Dec. 2, 1998) <<http://lcweb.loc.gov/copyright/reports>>. The term "technological protection measure" is not defined in the DMCA. Representative Stearns hoped that the courts would use the Commerce Committee's Report to explicate the "types of technological protection measures" intended. See 144 CONG. REC. H7101 (daily ed. August 4, 1998) (remarks of Rep. Stearns, House Commerce Comm.). But see *infra* note 368 (courts often ignore legislative history).

²⁹¹ See WIPO Copyright and Performances and Phonograms Treaties Implementation Act of 1998, Pub. L. No. 105-304, § 103, 112 Stat. __ (to be codified at 17 U.S.C. § 1201(a)(1)(A)) ("The prohibition contained in the preceding sentence shall take effect at the end of the 2-year period beginning on the date of the enactment of this chapter."). During the two years, a rule making on the record will be held to determine if any narrowly defined classes of works should be exempted from subsection 1201(a)(1)(A). See *id.* (to be codified at 17 U.S.C. § 1201(a)(1)(B)-(D)). Any resulting exemptions will last only three years unless reinstated by later rule makings on the record. See *id.* Any exemption created by the rule making will be ineffective as a defense against any other part of the DMCA except section 1201(a)(1)(A). See *id.* (to be codified at 17 U.S.C. § 1201(a)(1)(E)).

²⁹² § 103, 112 Stat. __ (to be codified at 17 U.S.C. § 1201(a)(2)). The DMCA contains another slightly narrower, but seemingly largely overlapping prohibition:

(1) No person shall manufacture, import, offer to the public, provide, or otherwise traffic in any technology, product, service, device, component, or part thereof, that—

(A) is primarily designed or produced for the purpose of circumventing protection afforded by a technological measure that effectively protects a right of a copyright owner under this title in a work or a portion thereof;

(B) has only limited commercially significant purpose or use other than to

This provision is almost equivalent to banning the act of circumvention. First, this provision prevents the public from obtaining “black boxes.” Since most persons cannot break encryption (or circumvent other technological gatekeepers) by themselves, no black boxes equals little (if any) circumvention. Even a computer jockey might become liable if he needs to build equipment to enable his own circumvention. He is not allowed to “manufacture . . . any technology, . . . device, component, or part thereof” that is “primarily . . . produced” for circumvention.²⁹³

The provision, however, goes much further. No one can “provide” a “service” that “is primarily designed” to “circumvent” technological protection. The bar is not limited to for-profit activities. A computer genius who, as a personal favor, helps a friend obtain a copy has provided a service in violation of the DMCA. Nor is the section limited to copyrightable works.²⁹⁴ The May and August

circumvent protection afforded by a technological measure that effectively protects a right of a copyright owner under this title in a work or a portion thereof; or

(C) is marketed by that person or another acting in concert with that person with that person’s knowledge for use in circumventing protection afforded by a technological measure that effectively protects a right of a copyright owner under this title in a work or a portion thereof.

Id. (to be codified at 17 U.S.C. § 1201(b)(1)). Section 1201(b)(1) is narrower because it reaches only copyrightable works. *But see infra* note 294 (section 1201(b)(1) may cover gray market goods).

These slightly disparate prohibitions have slightly different associated definitions.

(3) As used in this subsection—

(A) to ‘circumvent a technological measure’ means to descramble a scrambled work, to decrypt an encrypted work, or otherwise to avoid, bypass, remove, deactivate, or impair a technological measure, without the authority of the copyright owner; and

(B) a technological measure ‘effectively controls access to a work’ if the measure, in the ordinary course of its operation, requires the application of information, or a process or a treatment, with the authority of the copyright owner, to gain access to the work.

Id. (to be codified at 17 U.S.C. § 1201(a)(3)) (supplying definitions for new section 1201(a)(2)). Compare definition for use with section 1201(b)(1):

(2) As used in this subsection—

(A) to ‘circumvent protection afforded by a technological measure’ means avoiding, bypassing, removing, deactivating, or otherwise impairing a technological measure; and

(B) a technological measure ‘effectively protects a right of a copyright owner under this title’ if the measure, in the ordinary course of its operation, prevents, restricts, or otherwise limits the exercise of a right of a copyright owner under this title.

Id. (to be codified at 17 U.S.C. § 1201(b)(2)).

²⁹³ § 103, 112 Stat. __ (to be codified at 17 U.S.C. § 1201 (a)(2)(A)).

²⁹⁴ Because of the words “a right of a copyright holder,” one can read section 1201(b)(1), quoted *supra* note 292, as only covering copyrighted works and perhaps as even allowing fair use. The Committee Report did not explain the need for both section 1201(a)(2) and section 1201(b)(1). The use of “a right of a copyright holder” in place of “a work protected under this title,” *id.* (to be codified at 17 U.S.C. § 1201 (a)(2)), may be an attempt to reach gray market goods or extraterritorial activity. Gray market goods are

House Acts, the Companion Bill, and the Balanced Bill would all place databases inside “this title,” Title 17 of the United States Code. Furthermore, no exemption allows provision of the service to enable fair use.²⁹⁵ This technological gatekeeper provision seems more than sufficient to scare off would-be database “pirates.”²⁹⁶

The DMCA also outlaws now common devices to prevent consumers from copying audio-visual programs (such as cable TV programs and rented movie cassettes).²⁹⁷ Starting eighteen months after enactment of the DMCA, manufacturers, importers, and dealers in consumer electronics (such as video cassette recorders) are restricted from providing machines that do not support one of two specific types of copy-blocking technology: four-line color stripe control technology and automatic gain control copy control technology.²⁹⁸ Starting immediately, removing this control technology

protected by the first sale doctrine because 17 U.S.C. section 109(a) includes the phrase “under this title.” See *Quality King Distrib. v. L’Anza Research Int’l*, 118 S. Ct. 1125, 1130 (1998) (holding that the first sale doctrine covers goods imported without consent of copyright holder). A provision rephrasing section 109(a) was included in House Bill 2281 as passed by the House in August, see *Collections of Information Antipiracy Act*, H.R. 2281, 105th Cong. § 417 (1998), but it did not survive the House-Senate conference.

²⁹⁵ Congress was fully aware that it was killing fair use on line. See H.R. REP. NO. 105-551, pt. 2 at 16-18 (1998).

²⁹⁶ See Reichman & Samuelson, *supra* note 45, at 109 (“If . . . decrypting a coded transmission is necessary to extract part of a database for noncommercial scientific purposes, and the act of decryption itself constitutes a tort, researchers are unlikely to explore the possible availability of judge made public interest exceptions to the exclusive rights conferred by the new regime.”) (footnotes omitted).

²⁹⁷ The Congressional reaction to audio copying technology was much milder: a royalty pool from manufacturers and importers of equipment and minor limitation on available technology. See 17 U.S.C. §§ 1001-1010 (1994). That milder action, furthermore, was subjected to considerable public discussion, including hearings and written reports. For details, query <<http://www.thomas.loc.gov>> and ask for the legislative histories of H.R. 3204 and S. 1623 in 102d Congress.

²⁹⁸ (k) Certain Analog Devices and Certain Technological Measures.—

(1) Certain analog devices.—

(A) Effective 18 months after the date of the enactment of this chapter, no person shall manufacture, import, offer to the public, provide or otherwise traffic in any—

(i) VHS format analog video cassette recorder unless such recorder conforms to the automatic gain control copy control technology;

(ii) 8mm format analog video cassette camcorder unless such camcorder conforms to the automatic gain control technology;

(iii) Beta format analog video cassette recorder, unless such recorder conforms to the automatic gain control copy control technology, except that this requirement shall not apply until there are 1,000 Beta format analog video cassette recorders sold in the United States in any one calendar year after the date of the enactment of this chapter;

(iv) 8mm format analog video cassette recorder that is not an analog video cassette camcorder, unless such recorder conforms to the automatic gain control copy control technology, except that

from existing equipment is illegal.²⁹⁹ Broadcast television seems to be the only home video-entertainment provider that is not allowed to encode its offerings.³⁰⁰

The impact of this technology limitation is staggering — especially as the provision was “smuggled” into the bill. Without public warning, section 1201(k) appeared only when the bill emerged from the Senate-House Conference Committee. Section 1201(k) has no precursor in the legislative history. It was not foreshadowed

this requirement shall not apply until there are 20,000 such recorders sold in the United States in any one calendar year after the date of the enactment of this chapter; or

(v) analog video cassette recorder that records using an NTSC format video input and that is not otherwise covered under clauses (i) through (iv), unless such device conforms to the automatic gain control copy control technology. . . .

Manufacturers that have not previously manufactured or sold a VHS format analog video cassette recorder, or an 8mm format analog cassette recorder, shall be required to conform to the four-line colorstripe copy control technology in the initial model of any such recorder manufactured after the date of the enactment of this chapter, and thereafter to continue conforming to the four-line color stripe copy control technology.

§ 103, 112 Stat. — (to be codified at 17 U.S.C. § 1201(k)). Resale of unaltered used machines is not regulated. *Id.* (to be codified at 17 U.S.C. § 1201(k)(3)(C)).

²⁹⁹ (B) Effective on the date of the enactment of this chapter, no person shall manufacture, import, offer to the public, provide or otherwise traffic in—

(i) any VHS format analog video cassette recorder or any 8mm format analog video cassette recorder if the design of the model of such recorder has been modified after such date of enactment so that a model of recorder that previously conformed to the automatic gain control copy control technology no longer conforms to such technology; or

(ii) any VHS format analog video cassette recorder, or any 8mm format analog video cassette recorder that is not an 8mm analog video cassette camcorder, if the design of the model of such recorder has been modified after such date of enactment so that a model of recorder that previously conformed to the four-line colorstripe copy control technology no longer conforms to such technology.

Id. (to be codified at 17 U.S.C. § 1201(k)(1)(B)).

³⁰⁰ (2) Certain encoding restrictions.— No person shall apply the automatic gain control copy control technology or colorstripe copy control technology to prevent or limit consumer copying except such copying—

(A) of a single transmission, or specified group of transmissions, of live events or of audiovisual works for which a member of the public has exercised choice in selecting the transmissions, including the content of the transmissions or the time of receipt of such transmissions, or both, and as to which such member is charged a separate fee for each such transmission or specified group of transmissions;

(B) from a copy of a transmission of a live event or an audiovisual work if such transmission is provided by a channel or service where payment is made by a member of the public for such channel or service in the form of a subscription fee that entitles the member of the public to receive all of the programming contained in such channel or service;

(C) from a physical medium containing one or more prerecorded audiovisual works; or

(D) from a copy of a transmission described in subparagraph (A) or from a copy made from a physical medium described in subparagraph (C).

Id. (to be codified at 17 U.S.C. § 1201(k)(2)).

in any earlier versions of the DMCA. It was not discussed at any of the hearings. It was not discussed in any prior report. It was not discussed on the floor of Congress. Only the most inside of insiders seem to have been consulted.

Yet the new limitation affects a vast (and growing) number of consumers and businesses.³⁰¹ Ninety-eight million U.S. households have television of some kind (including cable and satellite). Approximately seventy percent of TV households in the United States, over sixty-five million, are served by cable.³⁰² Over nine-and-a-half million U.S. households have direct-to-home TV ("DTH," commonly called satellite TV).³⁰³ The National Cable Television Association ("NCTA") reports gaining two million American households from 1996 to 1997 while broadcast lost 839,000³⁰⁴ households. Both cable and DTH claim to be growth industries.³⁰⁵

³⁰¹ Besides the obvious negative impact on broadcast television, the legislation insures staggering business growth for the owner of the intellectual property rights in the chosen technology, Macrovision. Somehow Macrovision knew to write a letter to the Chairman of the Conference Committee promising to licence the technology to others. See H.R. REP. No. 105-796 at 53-54 (1998). Even before the DMCA endorsement, Macrovision had announced record net earnings seemingly based on use of its control technology by, *inter alia*, Columbia TriStar Home Video UK, BSkyB, Paramount Home Video, DreamWorks, and Trimark Pictures. See *Macrovision Press Releases* (visited Oct. 19, 1998) <http://www.macrovision.com/press_rel.html>.

³⁰² The National Cable Association's spring 1998 report provides a Nielsen figure of 65,864,090 and a Paul Kagan Associates claim of 65,030,000. See *The Cable Center* (visited Oct. 18, 1998) <<http://www.cablecenter.org/Main/LIBRARY?QandA.cfm>>; see also *Cable Industry Overview — The History of Cable* (visited Oct. 19, 1998) <<http://www.ncta.com/history.html>> (claiming that seven of 10 television households have cable). For a definition of direct-to-home television, see <http://www.skyreport.com/dth_glos.htm>.

³⁰³ *Sky Report.com*, produced by the Satellite Industry Association, shows 9,613,990 U.S. households subscribing to some form of DTH TV in August, 1998. A year earlier, the figure was only 7,468,051. See *Sky Report.com* (visited Oct. 18, 1998) <http://www.skyreport.com/dth_us.htm>.

³⁰⁴ The NCTA's Web site provides the figure. See *NCTA Cable Television Industry Overview, "as of April 1998"* (visited Oct. 18, 1998) <http://www.ncta.com/overview98_4html>.

³⁰⁵ According to the NCTA, "the future is on cable." *NCTA Future* (visited Oct. 19, 1998) <<http://www.ncta.com/future.html>>. NCTA's April 1998 self-description asserts rapid growth in viewership, operator investment, and advertising revenue. See *Cable Television Industry Overview, "as of April 1998"* (visited Oct. 18, 1998) <http://www.ncta.com/overview98_4html>. According to Dish Network, "satellite television has been the most successful consumer electronics product rollout ever." *Dish Network* (visited Oct. 19, 1998) <<http://www.dishnetwork.com/profile/press/press/press96.htm>>. Dish Network's EchoStar® expects accelerated growth following its January 1998 announcement of guaranteed access to local broadcasting in major markets containing over 40% of the U.S. population. See *id.* U.S. Satellite Broadcasting asserts that "[t]he introduction of the 18" digital satellite system was the most successful launch in consumer electronics history. It sold more quickly than the VCR." *USSB* (visited Oct. 19, 1998) <<http://www.ussb.com/company.html>>. DIRECTTV® reports acquisition of over one million subscribers per year and that 1998 new subscriber acquisition is up almost 30% over 1997; it claims to reach one of every 25 television households in the United States. See *DIRECTTV* (visited Oct. 19, 1998) <<http://www.directtv.com?news/4million.html>>. One 1997 forecast projected 13.6 million DTH households in the United States by the year 2001, and 17 million by 2006. See Mike Mills, *News Corp. Makes \$1 Billion Bid to Enter U.S. Satellite TV Market*, WASH. POST, Feb. 25, 1997, at D1.

Neither suggests imminent market failure.³⁰⁶

This “surprise” technology-limiting legislation protects one group that would be benefitted by the CIAA, but has chosen not to publicly comment on that legislation: operators of cable or satellite TV systems. Some, if not all, of these systems could meet the broad definition of “collection of information” in the CIAA.³⁰⁷ Many cable stations provide old programs, movies and series made for TV. Copyright lasts a finite time. If people cannot obtain machinery that is capable of copying your programming, you can extend the “copyright” monopoly indefinitely — despite the Constitution’s “limited times” provision.³⁰⁸

Congress knows that the DMCA is a major anti-user change in United States policy.

Discussion on the House floor before the first DMCA³⁰⁹ vote acknowledged that the bar on circumventing technological protection measures limits fair use. Representative Bliley, Chair of the House Committee on Commerce, warned his colleagues to “make no mistake about the scope” of the proposed DMCA, which he described as a “tremendously powerful new right to control access to information” being “grant[ed] to information owners for the very first time.”³¹⁰ Representative Coble went on record as being against any bill that

³⁰⁶ In an April 1998 press release, the Satellite Industry Association (“SIA”) reported “that the commercial satellite industry generated \$51.2 billion in revenue in 1997, an increase of 14 percent from 1996. Of the \$51.2 billion in revenue, the U.S. satellite industry accounted for \$23.1 billion or roughly 45 percent of worldwide revenue.” *SIA* (visited Oct. 18, 1998) <<http://www.sia.org/news/apr15-98.htm>>. Of this amount, “[s]atellite services generated a total of \$19.2 billion in revenue, an increase of 22% from 1996, with \$6 billion in revenue from transponder leasing by satellite operators, and \$13.2 billion from rental or subscription satellite services.” *Id.*

³⁰⁷ “Collection of Information” and “Information” are defined to include groupings of “works of authorship,” such as recorded TV programs. *See* Collections of Information Antipiracy Act, H.R. 2281, § 502 (1998) (written to amend 17 U.S.C. by adding § 1301).

³⁰⁸ “The Congress shall have the power To promote the progress of Science and useful Arts, by securing for *limited Times* to Authors and Inventors the exclusive Right to their respective Writings and Discoveries” U.S. CONST. art. I, § 8, cl. 8 (emphasis added). The 105th Congress did send the President a bill to extend copyright protection another 20 years. *See* The Sonny Bono Copyright Term Extension Act, S. 505, 105th Cong. (1998). Senate Bill 505 was signed by President Clinton on October 27, 1998. *See* Pub. L. No. 105-298, 112 Stat. 2827 (1998). The Hon. Mrs. Sonny Bono wanted Congress to extend the copyright term to forever minus one day. *See* 144 CONG. REC. H9952 (daily ed. Oct. 7, 1998), *reprinted in* 56 PAT. TRADEMARK & COPYRIGHT J. (BNA) 740 (1998).

³⁰⁹ The first version of the DMCA that passed the House was somewhat different from the version that emerged from conference committee. It did, however, include a slightly delayed bar on circumventing technological gatekeepers and an immediate bar on providing machinery or services to circumvent technological gatekeepers. *See* Digital Millennium Copyright Act, H.R. 2281, 105th Cong. tit. I, § 103 (1998).

³¹⁰ 144 CONG. REC. H7093-94 (daily ed. Aug. 4, 1998) (remarks of Rep. Bliley, Chair, House Committee on Commerce).

would permit circumvention [of technological gatekeepers] in the fi[r]st instance for purposes of fair use. . . . [Such a bill] would grant to users a right never before allowed — free access to copyrighted works in order to make a fair use. I believe that is unwise policy and tilts the balance away from the protection of works in a free market economy toward the free provision of works to anyone claiming to make a fair use.³¹¹

Representative Dingell praised the then-proposed DMCA as providing a proper balance between economic protection and fair use. He did, however, side with Representative Bliley on the historical importance of fair use:

As copyrighted works are afforded more protection, they will be encrypted in ‘digital wrappers’ that make them impenetrable to anyone other than those who are willing to pay the going rate. While that may sound like the American way, it is not. United States copyright law historically has carved out important exceptions to the rights of copyright owners to have exclusive control over the use of their property.

The most notable exception is ‘fair use’.³¹²

The DMCA’s legal bar against trying to bypass technological gatekeepers is itself unnecessary — if you believe the federal government’s position on encryption. When defending export limits and domestic limitations on privacy, the federal government paints currently available encryption technology as so strong that even the government’s own experts cannot defeat private encoding.³¹³ If encryption is so strong, no government action is necessary to protect content providers. The government merely needs to refrain from outlawing content providers’ use of technological gatekeepers.³¹⁴

In addition to butchering fair use, the DMCA provides extraordinary protection against the removal of “copyright management information” or the use of any copy of a work from which

³¹¹ 144 CONG. REC. H7098 (daily ed. Aug. 4, 1998) (Letter from Rep. Coble, to Reps. Boucher & Campbell (June 16, 1998)) (placed on Record by Rep. Boucher).

³¹² 144 CONG. REC. H7099 (daily ed. Aug. 4, 1998) (remarks of Rep. Dingell).

³¹³ See generally A. Michael Froomkin, *The Metaphor is the Key: Cryptography, the Clipper Chip, and the Constitution*, 143 U. PA. L. REV. 70 (1995) (describing government attempts to limit access to strong encryption; arguing against such limitations); Joel C. Mandelman, *Lest We Walk Into the Well: Guarding the Keys — Encrypting the Constitution: To Speak, Search & Seize in Cyberspace*, 8 ALB. L.J. SCI. & TECH. 227 (1998) (describing recent cases on government attempts to limit encryption; arguing in favor of such limitations).

³¹⁴ See generally Joel R. Reidenberg, *Lex Informatica: The Formulation of Information Policy Rules Through Technology*, 76 TEX. L. REV. 553 (1998) (explaining that technical specifications are the most effective way to control cyberspace).

such information has been removed. Under the new section 1202 of Title 17:

(b) Removal or Alteration of Copyright Management Information. — No person shall, without the authority of the copyright owner or the law—

(1) intentionally remove or alter any copyright management information . . .

(3) distribute, import for distribution, or publicly perform works, copies of works, or phonorecords, knowing that copyright management information has been removed or altered without authority of the copyright owner or the law, knowing, or with respect to civil remedies under section 1203, having reasonable grounds to know, that it will induce, enable, facilitate, or conceal an infringement of any right under this title.³¹⁵

I hope that “authority of . . . the law” prevents educators from being liable if they photocopy something for classroom use without inserting a copyright notice on the photocopied section. Even if no actual damages can be proven, the plaintiff may be entitled to stiff statutory damages. The court has discretion to remit statutory damages only for “innocent infringers.” To be an “innocent infringer” one must both not be “aware,” and also have “no reason to believe,” that the act constituted a violation.³¹⁶ Does being an educator automatically give you some reason to believe that a copy lacking a copyright notice might violate the law?³¹⁷ If the educator is unlucky enough to work for a school that attempts to earn a profit for someone else, the educator may incur criminal penalties merely for passing out in class some photocopy lacking a copyright notice.³¹⁸ I also wonder if this provision requires an educator to pass on the “authorized for educational use only” legend on downloads from WESTLAW and LEXIS even if the educator has edited out everything but the public domain words of a court opinion. Copyright management information includes “terms and conditions for use of the work.”³¹⁹

Additionally, the DMCA’s so-called “safe harbor” for online

³¹⁵ WIPO Copyright and Performances and Phonograms Treaties Implementation Act of 1998, Pub. L. No. 105-304, § 103, 112 Stat. __ (to be codified at 17 U.S.C. § 1202(b)).

³¹⁶ *Id.* (to be codified at 17 U.S.C. § 1203(c)(5)).

³¹⁷ None of the congressional reports clarify “authority . . . of law.” *See* S. REP. NO. 105-190 (1998) (visited June 14, 1998) <ftp://ftp.loc.gov/pub/thomas/cp105/sr190.txt>; H. R. REP. NO. 105-551, pt. 1 (1998); H. R. REP. NO. 105-551, pt. 2 (1998); H. R. REP. NO. 105-796 (1998).

³¹⁸ *See* § 103, 112 Stat. __ (to be codified at 17 U.S.C. § 1204).

³¹⁹ *Id.* (to be codified at 17 U.S.C. § 1202(c)(6)).

service providers (OSPs) and Internet service providers (ISPs) makes matters much worse for the general public.³²⁰ The safe harbor provision is a strong incentive for OSPs and ISPs to censor their users at the mere request of allegedly aggrieved right holders.³²¹ To negate their own possible liability, OSPs and ISPs are required to take down content when notified by the allegedly aggrieved right holder. No court is involved. No process is provided to the censored speaker before this restraint on his or her speech. Senator Ashcroft did insist that a provision be incorporated that requires the OSP or ISP to notify the speaker and (sometimes, eventually) replace the removed material unless the right holder asks a court for an order (the right holder does not have to *receive* a court order, just request one).³²²

In summary, under the DMCA, anyone who loads material onto a digital network can be silenced by an allegedly aggrieved right holder without any process before a neutral decision-

³²⁰ See Online Copyright Infringement Liability Limitation Act, Pub. L. No. 105-304, tit. II, 112 Stat. __ (1998). The under-protection of the general public is not surprising under public choice theory; the provision represents a congressionally brokered compromise between ISPs and OSPs on one side and copyright holders on the other side. See 144 CONG. REC. S4885 (daily ed. May 14, 1998) (remarks of Sen. Hatch) ("Title II for example, reflects 3 months of negotiations between the major copyright owners and the major OSPs and ISPs, which I encouraged and in which I participated . . ."), reprinted in 56 PAT. TRADEMARK & COPYRIGHT J. (BNA) 89 (May 21, 1998); S. REP. NO. 105-190, at 6; see also 144 CONG. REC. H7095 (daily ed. Aug. 4, 1998) (remarks of Rep. Goodlatte) (taking credit for leading negotiations between "members of the content community and members of the service provider community"; referring to these two groups as "the parties" while separately referencing "consumers and Internet users throughout the Nation."). The Senate Judiciary Committee merely "heard from," presumably outside the major negotiation session, "representatives of libraries, archives and educational institutions . . . and consumers." S. REP. NO. 105-190, at 7. The entities listed as "supporting" the DMCA do not include consumers, librarians, or any representative of the public domain. *Id.* at 8. Even before the DMCA, OSPs and ISPs often acted as copyright police for distributors. See, e.g., Litman, *supra* note 280, at 606.

³²¹ While not completely clear, 17 U.S.C. § 512 (as created by Title II of the final version of the DMCA) seems to encourage removal of only copyrightable material. Only liability for infringement of copyright is limited. See Online Copyright Infringement Liability Limitation Act, Pub. L. No. 105-304, tit. II, § 202, 112 Stat. __ (1998) (to be codified at 17 U.S.C. §§ 512(a), (b)(1), (c)(1), (d)(1)). The CIAA is intended for Title 17 (the copyright title of the U.S.C.), but the CIAA does not define its own violation as "infringement." Title II of the DMCA may be cited as the "Online Copyright Infringement Liability Act," but the heading of created § 512 of Title 17 is merely "Limitations on liability relating to material online." The final version of the DMCA contains "copyright" in several sections where the earlier Senate version had used "infringement" or "infringing" without any modifier. See *id.* (to be codified at §§ 512(a), (c)(1), (c)(1)(C), (e)(1)). The notification requesting that an ISP or OSP remove material may be authorized by someone representing "an exclusive right that is allegedly infringed," but the notification must identify "the copyrighted work" or "multiple copyrighted works" claimed to be infringed. *Id.* (to be codified at 17 U.S.C. § 512(c)(3)(ii)).

³²² 144 CONG. REC. S4888 (daily ed. May 14, 1998) (remarks of Senator Ashcroft), reprinted in 56 PAT. TRADEMARK & COPYRIGHT J. (BNA) 92 (May 21, 1998); see also § 202, 112 Stat. __ (to be codified at 17 U.S.C. § 512(g)).

maker.³²³ Right holders who incorrectly get ISPs or OSPs to remove someone else's speech from the Internet are immune from the censored speaker's wrath unless they have "knowingly materially misrepresent[ed]."³²⁴ The power imbalance and pro-censorship slant of the DMCA is obvious.

Proposed UCC Article 2B³²⁵ would further exacerbate database providers' unbalanced market power. The spring 1998 draft (i) allows parties to contract out of pro-public domain federal or state information policies, (ii) allows licensors to use electronic self-help when they decide a contract has been breached; and (iii) passes restrictions down-line to later users who are not in privity to the original licensor.³²⁶ Unsurprisingly, some of the strongest pro-

³²³ *But see* Johnson v. United States, 117 S. Ct. 1544, 1549 (1997) (holding that the lack of an impartial judge is a constitutional deprivation that goes to structure of trial and, therefore, is not subject to harmless error exception).

³²⁴ § 202, 112 Stat. __ (to be codified at 17 U.S.C. § 512(f)).

³²⁵ To follow the drafting process visit <<http://www.law.2BGuide.com>>. Article 2B is still a moving target. My discussion and the versions of forthcoming articles cited in this section were written in response to spring 1998 drafts of 2B. The Drafting Committee promises that a "stable" draft of 2B will be ready for consideration by the American Law Institute in December 1999 and proposes that the National Conference of Commissioners on Uniform State Laws ("NCCUSL") will vote on 2B in July 1999. *See* Memorandum from Connie Ring, Chair, Drafting Committee for Proposed UCC Article 2B, to NCCUSL Commissioners 1 (July 1, 1998) (visited July 14, 1998) <<http://www.law.upenn.edu/bll/ulc/ucceb/uccebppl.htm>>. One hopeful sign is that at the NCCUSL annual meeting on July 24-31, 1998, a sense-of-the-house motion was passed to modify proposed 2B-110 as follows (strikeouts and italics are in original):

Section 2B-110. ~~UNCONSCIONABLE~~ IMPERMISSIBLE CONTRACT OR TERM.

(a) If a court as a matter of law finds the contract or any term of the contract to have been unconscionable *or contrary to public policies relating to innovation, competition, and free expression* at the time it was made, the court may refuse to enforce the contract, or it may enforce the contract without the ~~unconscionable~~ impermissible term, or it may so limit the application of any ~~unconscionable~~ impermissible term as to avoid any unconscionable *or otherwise impermissible* result.

(b) When it is claimed or appears to the court that the contract or any term thereof may be unconscionable *or impermissible under this section* the parties shall be afforded a reasonable opportunity to present evidence as to *it's the contract's or term's commercial setting, purpose and effect and the extent to which the contract or term resulted from the actual informed affirmative negotiations of the parties* to aid the court in making the determination.

Because this is a sense-of-the-house motion, the drafting committee has great flexibility in dealing with the proposed subject matter. *See* Carol A. Kunze, *Brief Report on the NCCUSL Annual Meeting July 24-31, 1998*, in THE 2B GUIDE, Aug. 2, 1998, at 1 (visited Aug. 4, 1998) <<http://www.softwareindustry.org/issues/guide/nmtgrpt8.html>>. To follow the drafting process of the related Electronic Transaction Act, visit <<http://www.web.com./legaled/ETAforum>>.

³²⁶ *See* Rochelle C. Dreyfuss, *Do You Want to Know A Trade Secret?: Licensing under Article 2B of the Uniform Commercial Code*, 87 CAL. L. REV. (forthcoming 1999); *see also* Lemley, *supra* note 3 (manuscript at 10 n.23, 11 n.30 and accompanying text); *id.* (manuscript at 11 ("[A] software vendor with a good lawyer can quite easily enforce *virtually whatever terms it likes* simply by putting them 'conspicuously' in a multi-page document the user cannot see (much less agree to) until after buying, installing, and beginning to run the software."); licensees, however, can not similarly enforce their chosen terms)). The text of proposed Article 2B is still in flux, but has throughout supported increased power for licensors. *See*,

ponents of 2B are actively lobbying for the CIAA.³²⁷

The American public needs protection from the database industry, not vice versa.

4. The European Community Database Directive

The European Community Database Directive³²⁸ is insufficient reason to pass the CIAA. This Directive requires member states to provide by January 1, 1998:

[A] right for the maker of a database which shows that there has been qualitatively and/or quantitatively a substantial investment in either the obtaining, verification or presentation of the contents to prevent extraction and/or re-utilization of the whole or of a substantial part evaluated qualitatively and/or quantitatively, of the contents of that database.³²⁹

Non-members of the European Union can obtain similar protection for their nationals' databases inside the EU by enacting reciprocal, equivalent legislation.³³⁰ A senior spokesperson for the European Union was totally non-committal as to whether the terms of the CIAA met the reciprocity requirement.³³¹ The Register of

e.g., Letter from Gail Hillebrand, spokesperson for Consumers Union, non-profit publisher of Consumer Reports magazine, to Uniform Law Commissioner 1 (June 24, 1998) (visited Aug. 6, 1998) <<http://www.softwareindustry.org/issues/guide/docs/keyobjc0.html>> ("The unbalanced nature of the Article 2B leaves us no choice but to oppose it."); Memorandum from Todd J. Paglia, to the American Law Institute (March 10, 1998) (visited July 3, 1998) <<http://www.cptech.org/ucc/ali3-10.html>> (providing a consumer advocate argument that UCC 2B is strongly biased towards software industry/publishers and against consumers); David A. Rice, *Digital Information as Property and Product: UCC Article 2B*, 22 U. DAYTON L. REV. 621 (1997) (discussing the earlier draft's destruction of the copyright first sale doctrine). Opponents of UCC 2B point out that technology can be used to impose limitations on later users. Suppliers who require such security can, therefore, obtain such security for the material they distribute without changing default contract rules. For example, technology can enable "super distribution" where one individual "buys" access to a digital object and passes that object on to other interested users. If the original supplier has inserted a "proprietary viewer" into the digital object, everyone on the distribution chain will be constrained from using the digital object without obeying the supplier's payment requirements. See HARDY, *supra* note 290, at 75-77. "Digital water marking" can also be used to prevent copying by any person in the chain of distribution without any distortion easily visible to the human eye. For example, DigiMarc's watermarks work with AdobePrintshop, CorelDRAW and Corel PHOTO-PAINT. See *id.* at 80-82 & nn.48, 50.

³²⁷ See McManis, *supra* note 3, at 5.

³²⁸ EC Directive, *supra* note 62. The meaning, history, and implementation status of the Directive is beyond the scope of this article. See generally Reichman & Samuelson, *supra* note 45 (discussing history and meaning of Directive). The EC Directive may also have been partially prompted by the incorrect assumption that databases would be sold, not leased. See, Powell, *supra* note 62, at 1225.

³²⁹ EC Directive, *supra* note 62, art. 7, 16.

³³⁰ See *id.* art. 11; see also Robert Bond, *European Union Database Law and the Information Society 6* (visited April 24, 1998) <<http://www.hobsonaudley.co.uk/databas.htm>>.

³³¹ See Pollack Notes, *supra* note 245 (statement of Dr. Jog Reinbothe, European Commission, Brussels).

the United States Copyright Office was also unsure if the CIAA would trigger reciprocity.³³² The reciprocity provision of the EC Directive, furthermore, may be unenforceable pursuant to international law.³³³ "American" producers of databases can, moreover, obtain protection inside the European Union by supplying their databases through European affiliates or offices.³³⁴ The EC Directive may not last.³³⁵ Finally, nothing in the EC Directive removes existing protections. "American" database producers, at most, will be unable to increase their profits in the European market. Not raking in even more money does not equal "losing money." Most of the money raked in, furthermore, would come from American customers.³³⁶

Ominously, none of the testimony in favor of the CIAA mentions *any* instance of copying of data by an EC database producer from an American database producer, or vice versa. No one provided *any* example of any data equally available from competing EC and American database producers. Silence implies the absence of any large cross-border copying or competition problem. No lesser a player than Dun & Bradstreet Corporation made a similar point in a comment to the U.S. Patent & Trademark Office against the proposed WIPO treaty creating *sui generis* protection for databases.

[Dun & Bradstreet] knows of no commercially significant piracy of US-owned databases currently ongoing Indeed, when asked at the 12 November [1996] briefing to identify concrete examples of the problems to which the treaty was to be a solution, even Chairman Liedes had to resort to a hypothetical ex-

³³² See Oct. 1997 Hearings, *supra* note 62, at 6 ("The choice of a misappropriation model creates uncertainty as to whether such a law in the United States will trigger reciprocity for U.S. databases from the countries of the European Union.") (testimony of Marybeth Peters, Register, U.S. Copyright Office). American database producers unsuccessfully lobbied the EC against the reciprocity provision (preferring "national treatment") because they recognized that *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991), would bar a clearly equivalent United States statute. See Powell, *supra* note 62, at 1245-46.

³³³ See Oct. 1997 Hearings, *supra* note 62, at 16 (statement of Professor J.H. Reichman, Vanderbilt University).

³³⁴ See EC Directive, *supra* note 62, art. 11(1,2); see also Powell, *supra* note 62, at 1246.

³³⁵ The EC Directive requires the Commission to submit a report every three years on whether right holders have been stifling competition or the EC Directive has had other negative consequences. See EC Directive, *supra* note 62, art. 16(3); see also Charles Von Simson, *Feist or Famine: American Database Copyright as an Economic Model for the European Union*, 20 BROOK. J. L. & TECH. 729, 767-68 (1995) (concluding that if EC adopted the proposed EC Directive and American databases remained with post-*Feist* thin copyright protection, the American databases would win by market competition).

³³⁶ See Patry, *supra* note 99, at 926 (arguing that since the United States is the largest market for American works, most of the extra royalties earned by increasing the copyright period would come from American consumers, relying on written testimony by Marybeth Peters, Register of Copyrights).

ample involving soil temperature data.³³⁷

5. Economic Basics

The sole remaining support for the CIAA is the bromide disfavoring “reaping where one has not sown” — an insufficient moral or practical guide. Other authors have already amply deflated this platitude and demonstrated that it is rarely followed.³³⁸ The fake maxim is almost ludicrous when applied to intellectual property where “goods” are non-rival and every entrant builds on the work of multiple predecessors.³³⁹ Absent the limited protections of copyright and patent, the United States promotes the progress of science and useful arts by encouraging later entrants to compete with market segment pioneers. Under both market efficiency doctrines and the dictates of the Intellectual Property Clause, the correct question is how small a right we can give to investors while still encouraging the optimum production of databases.³⁴⁰ In misappropriation cases, the plaintiff generally cannot show that competition did more than lower prices; even in *International News Service v. Associated Press*,³⁴¹ the plaintiff did not show that its business was in danger of failing.³⁴² Anyway, why should database producers be especially privileged? Isn't most of the publicly-beneficial harvest sown by (due to the work of) the persons who USE the data in the databases?

We should be wary of confusing what a market participant would like with what it needs³⁴³ — which is often a little flexibility

³³⁷ *Dun & Bradstreet Letter*, *supra* note 235.

³³⁸ “An obligation to pay for benefits received does not apply to all uses of others' efforts or property. It could not.” Wendy J. Gordon, *On Owning Information: Intellectual Property and the Restitutory Impulse*, 78 VA. L. REV. 149, 168 (1992).

³³⁹ See generally *id.* (making philosophical and economic argument that reap/sow logic should be limited to “malcompetitive copying”). Confusing “value” with “property” is an “ancient error” rebutted in the law review literature as early as 1935. See Wendy J. Gordon & Sam Postbrief, *On Commodifying Intangibles*, 10 YALE J.L. & HUMAN. 135, 138 (1998) (citing Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 814-17 (1935)); see also *International News Serv. v. Associated Press*, 248 U.S. 215, 246 (1918) (Holmes, J., dissenting in part and concurring in part) (“Property, a creation of the law, does not arise from value, although exchangeable — a matter of fact.”).

³⁴⁰ See U.S. CONST. art. 1, § 8, cl. 8; Dreyfuss, *supra* note 326 (manuscript at 12 & n.43 (arguing that because each creator needs only so much economic motivation to create, society does not need to allow the creator to control all utilizations of that creator's work)); Lemley, *supra* note 3 (manuscript at 14 n.39 and accompanying text); *id.* (manuscript at 14 (“[T]he goal of intellectual property is only to provide the ‘optimal incentive,’ not the largest incentive possible.”)).

³⁴¹ 248 U.S. 215 (1918), discussed *supra* section I.D.

³⁴² See Abrams, *supra* note 138, at 579.

³⁴³ See Wiley, *supra* note 85, at 301 (explaining that the industry whining for protection is “as credible as those [remarks] my dean would receive if she asked all faculty whether they needed raises”).

in making use of new possibilities. Many database providers are against the CIAA, for example, the National Academy Press ("NAP").³⁴⁴ NAP loads its books onto the Internet where all comers have free, full-text access.³⁴⁵ NAP's give-away has not driven it into bankruptcy. Instead, sales have increased.³⁴⁶ Many readers must agree with me that a hard copy has advantages; you can highlight a hard copy in five different colors, store it on a shelf for years, loan it to a friend, carry it safely on the subway, and read it in the park.

Sometimes the "economic problem" is that market actors fail to be creative when reacting to new competitive conditions. Television broadcast signals, for example, are easily stolen by viewers who have not paid viewing fees to broadcasters. The industry booms by marketing the thieves' attention to advertisers³⁴⁷— not by asking Congress to allow broadcasters to conduct warrantless searches aimed at catching persons hiding pirate television sets in their living rooms.³⁴⁸ This analogy is too generous to online distributors. The Internet enables distributors to easily locate infringers by running automatic searches via "web crawlers."³⁴⁹ Recent United States economic history, furthermore, demonstrates that industries flourish *without* copyright entitlements, for example, video

³⁴⁴ See *Oct. 1997 Hearings, supra* note 62 (statement of Dr. William A. Wulf, Pres., Nat'l Academy of Engineering and Vice Chairman, Nat'l Research Council). Other database producers who are against the CIAA include Dun & Bradstreet, see *Oct. 1997 Hearings, supra* note 62, at 14 (statement of Professor J.H. Reichman, *Vanderbilt University*); Ass'n of American Universities, American Council on Education, National Ass'n of State Universities and Land-Grant Colleges, see *Feb. 1998 Hearings, supra* note 32 (testimony of Dr. Debra Stewart); Online Banking Ass'n., see *id.* (testimony of Jonathan Band); Information Technology Ass'n of America, see *id.* (testimony of Tim D. Casey).

³⁴⁵ See www.nap.edu (noted on NAP invoices).

³⁴⁶ See Pollack Notes, *supra* note 245 (remarks of Paul F. Uhlir at PTO Database Conference). Many other entities publish on the Internet despite problematic revenue collection. See Jessica Litman, *The Exclusive Right to Read*, 13 CARDOZO ARTS & ENT. L. J. 29, 48 n.86 (1994).

³⁴⁷ This example is based on Tom G. Palmer, *Intellectual Property: A Non-Posnerian Law and Economics Approach*, 12 HAMLINE L. REV. 261, 288 (1989).

³⁴⁸ The broadcast industry in the United States, furthermore, began on yet another economic basis. During World War I, military spending generated an industry building radio transmitters and receivers. The military market plummeted at the end of the war. The first radio broadcast stations were opened by electronics manufacturers to create a private market for radio sets. By 1922, the United States had 400 radio stations, but none selling air time to sponsors. See ERIK BARNOUW, *THE SPONSOR: NOTES ON A MODERN POTENTATE* 9-12 (1978). The first proposal for paid broadcasting time was not for the current version of advertising. In February, AT&T announced plans to open a nationwide chain of "toll broadcasting" stations for "radiotelephone." Anyone could come to a station and pay for the ability to address anyone choosing to listen. See *id.* at 14-15. This service metamorphasized over the next four years into sponsored series with very restrained mention of the sponsors' identities. See *id.* at 15-21.

³⁴⁹ See Litman, *supra* note 280, at 606; see also Schlachter, *supra* note 290, at 43-44 (discussing technological methods for locating Internet infringers and inserting hidden markers that can be used as court proof of copying).

rentals, fashion design, and food design.³⁵⁰

Online database providers have sources of income other than raw data. Database providers do not provide only data. They provide search software. Even the expert hired by the database industry to testify in favor of the CIAA admitted that much of a database's production cost and marketable value depend on the software, as opposed to the content.³⁵¹ People who could get the unmassaged data inexpensively from the government still choose to pay to get the "same" data from the value-added marketer with the user-friendly software.³⁵² For instance, WESTLAW and LEXIS are widely used even though cases are available for free on the Internet. This is because WESTLAW and LEXIS provide highly sophisticated search software which cut search time and help locate elusive cases which are directly on point. They are also more likely to have the correct text. *Feist*³⁵³ did not remove search software from copyright or patent protection nor did it destroy the value of a vendor's reputation.³⁵⁴

C. *The Progress of Science and Useful Arts*

The scientific community says in chorus that the CIAA will disrupt research.³⁵⁵ The experts here are the scientists, not the

³⁵⁰ See, e.g., Litman, *supra* note 346, at 44-48.

³⁵¹ See *Oct. 1997 Hearings*, *supra* note 62, at 14, 16 (statement of Laura D'Andrea Tyson and Edward F. Sherry, paid consultants for the Information Industry Ass'n).

³⁵² See COPYRIGHT OFFICE REPORT, *supra* note 31, at 105 n.268. The House Report illogically bases the need to provide protection for databases partly on the ability of "[e]lectronic collections . . . [to] enable [users] to retrieve from th[e] haystack of information the factual needles that they need to solve a particular economic, research, or educational problem." H.R. REP. NO. 105-525 (1998), at 6.

³⁵³ *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991).

³⁵⁴ See Pollack Notes, *supra* note 245 (remarks of Jennifer Krueger, Assistant Director for Electronic Resources of the Science, Industry and Business Library, New York Public Library) (stating that she will only buy from reputable sources because she needs assurance that the data will be accurate).

³⁵⁵ The CIAA is opposed by the International Council of Scientific Unions, see *A Summary of Database Protection Activities* (visited June 17, 1998) <<http://www.cms.udel.edu/~feris/data/summary.html>>, the National Research Council, see *Oct. 1997 Hearings*, *supra* note 62 (statement of Dr. William A. Wulf, Pres., Nat'l Academy of Engineering and Vice Chairman, Nat'l Research Council), and the American Ass'n for the Advancement of Science, see Letter from Richard S. Nicholson to Rep. Gingrich (April 20, 1998) (distributed at PTO Database Conference, on file with CARDOZO ARTS & ENT. L.J.). When the United States suggested database protection as part of a WIPO treaty in 1996, "the overwhelming majority" of comments submitted to the PTO were negative. Opponents included "members of the scientific, library and educational communities, as well as individual members of the public and at least one major database producer." The only comments in favor were from entities in the publishing and database industries. See COPYRIGHT OFFICE REPORT, *supra* note 31, at 55. The PTO's Notice for Public Comment in the Federal Register in November of 1996 prompted six submissions in favor of *sui generis* protection for databases and 900 fully or partially opposed. See *Oct. 1997 Hearings*, *supra* note 62, at 5 (statement of Dr. William A. Wulf, Pres., Nat'l Academy of Engineering and Vice Chairman, Nat'l Research Council).

Congresspersons.

Fundamental scientific research requires unintimidated access to masses of data. Scientific research is not like looking for the name of the last case construing a particular statutory provision or the median annual income of persons who buy beer in six packs. These discrete items surface when a well-formulated query is addressed to a well-formulated database. The researcher writes down the answer or prints off the case and exits the expensive online research service.

Contrast the procedure you need to follow if your problem is outside the standard conceptual boxes. For example, you want to get Congress to take the public domain seriously, to treat it as an endangered national treasure. You cannot so easily formulate a query that will address this need. (You may not even recognize a piece of the elusive answer the first time you view it.) You need to browse through masses of material on multiple, possibly unrelated topics looking for a theme that no one else has noticed — a theme playing very softly in the background of thousands of cases, law review articles, and historical documents.

This browsing is like fundamental scientific research, the search for an unnoticed pattern.³⁵⁶ Browsing is fenced off when a researcher is intimidated by the need to contract for, and pay for, each tidbit of data, or risk a lawsuit that would disrupt work and perhaps lead to stiff financial penalties or even criminal liability. We should not take the risk of losing unanticipated insights. We cannot know which of the intimidated browsers would otherwise find the thread leading through a complex maze to a cure for Alzheimer's disease.

The only contrary voice in the scientific community is Dr. Robert Ledley, a highly credentialed engineer and medical doctor who invented the body CT scan.³⁵⁷ Dr. Ledley opened his remarks at the PTO Database Conference with the interesting statement that he was not an attorney and had not discussed the text of the CIAA with an attorney, but that *he did not think that the CIAA prevented free use of databases for scientific research.*³⁵⁸ Dr. Ledley would be well advised to consult an attorney. The CIAA extends liability to “[a]ny

³⁵⁶ THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* 15 (2d ed. 1970); see also Reichman & Samuelson, *supra* note 45, at 121 (“Basic science needs abundant, unrestricted flows of both raw and elaborated data at prices it can afford. Indeed, the evidence suggests that ‘efficient’ use of data is a concept antithetical to the norms and practices of basic science.”) (footnote omitted).

³⁵⁷ See Pollack Notes, *supra* note 245; PTO Staff, Biographical Notes for PTO Database Conference (on file with CARDOZO ARTS & ENT. L.J.).

³⁵⁸ See Pollack Notes, *supra* note 245.

person who extracts, or uses in commerce”³⁵⁹ Looking at how “in commerce” has been interpreted in the Lanham Act, I read “extracts, or uses in commerce” in proposed section 1302 to include research.³⁶⁰

The August House Act does insert a pro-science exception, subsection 1303(d):

(d) NONPROFIT EDUCATIONAL, SCIENTIFIC, OR RESEARCH USES-

Notwithstanding section 1302, no person shall be restricted from extracting or using information for nonprofit educational, scientific, or research purposes in a manner that does not harm directly the actual market for the product or service referred to in section 1302.³⁶¹

Subsection 1303(d), unfortunately for Dr. Ledley, is vanishingly narrow; a camel could as easily pass through the eye of a needle as a scientist could perform his research within 1303(d).³⁶² Scientific databases are used largely by scientists and educators. Who else wants, for example, a list of all silicon-based compounds with a molecular weight higher than 42 atomic units? A scientist who uses a scientific database for free is, therefore, hurting the database’s market.³⁶³

³⁵⁹ Collections of Information Antipiracy Act, H.R. 2281, 105th Cong. § 502 (1998) (written to amend 17 U.S.C. by adding § 1302).

³⁶⁰ See *supra* text accompanying notes 161-66. The copyright fair use analysis of scientific journals copied by scientists is not clear, but even that pro-science allowance seems endangered. Compare *American Geophysical Union v. Texaco, Inc.*, 60 F.3d 913 (2d Cir. 1995) (holding against strong dissent that copying by commercial researchers is not fair use), with *Williams & Wilkins v. United States*, 487 F.2d 1345 (Ct. Cl. 1973) (holding against strong dissent that copying by government-funded researchers is fair use), *aff’d by an equally divided court*, 420 U.S. 375 (1975). But see William Patry, *American Geophysical Union v. Texaco, Inc.: Copyright and Corporate Photocopying*, 61 *BROOK. L. REV.* 429, 450 (1995) (arguing that *Texaco* was not “an authoritative opinion that all corporate photocopying of scientific, technical and medical journals was not fair use . . .”).

³⁶¹ H.R. 2281 § 502 (written to amend 17 U.S.C. by adding § 1303(d)). The version in the May House Act read:

(d) NONPROFIT EDUCATIONAL, SCIENTIFIC, OR RESEARCH USES- Nothing in this chapter shall restrict any person from extracting or using information for nonprofit educational, scientific, or research purposes in a manner that does not harm the actual or potential market for the product or service referred to in section 1202.

Collections of Information Antipiracy Act, H.R. 2652, 105th Cong. § 2 (1998) (written to amend 17 U.S.C. by adding § 1203(d)).

³⁶² “It is easier for a camel to go through the eye of a needle, than for a rich man to enter the kingdom of heaven.” *Mark 10:25* (King James).

³⁶³ The House Report on subsection (d) is a masterpiece of refusal to acknowledge reality:

Subsection (d) seeks to alleviate the concerns expressed by members of the research, scientific, and university communities . . . [by] permitting the extraction or use of information for such purposes [as research] as long as doing so does not harm the market for the original product or service. *Ordinarily such*

Limiting the illusory loophole to “nonprofit” is icing on the glacier. As governments cut budgets by privatizing as much as possible, more and more technically “for profit” organizations are likely to be involved in promoting the progress of science and the useful arts. Federal technology transfer policies, furthermore, raise problems in both locating and justifying the for-profit/not-for-profit boundary.³⁶⁴ I want the cure for Alzheimer’s; I would not be surprised if some step towards the cure is located by an ex-chemistry professor who starts an R&D firm after some state university’s budget is cut.

Perhaps Dr. Ledley had been reassured that the legislative history would clarify that “extracts, or uses” does not include “scientific research”? At the PTO’s one day conference on the then-pending May House Act, I heard several pro-public-access persons reassured by staff members that the legislative history would make sure the bill was not read to have some disturbing outcome.³⁶⁵

The House Report, however, does not support Dr. Ledley’s reading of the legislation. The Report discusses the “in commerce” limitation as

[allowing] the use of information for purely private purposes [] without *a nexus to commerce such as dissemination to others* . . . 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.³⁶⁶

I am not sure to what extent a scientist could “use” a collection of information without “extracting” any of its contents. Neither “extraction” nor “use” are defined terms.³⁶⁷ But, ignoring this prob-

use 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.

H.R. REP. NO. 105-525 (1998), at 14 (emphasis added).

³⁶⁴ See, e.g., Rebecca S. Eisenberg, *Public Research and Private Development: Patents and Technology Transfer in Government-Sponsored Research*, 82 VA. L. REV. 1663 (1996) (discussing changes in both policies and rationales since 1980). The 1998 Omnibus Budget Act, Pub. L. No. 105-277, 112 Stat. ___, orders the Office of Management and Budget to require federal agencies to make underlying data from federally funded research available under the Freedom of Information Act. See Alec Zaccaroli, *Provision in Spending Law Opens Access to Data Underlying Federally Funded Studies*, 67 U.S.L.W. (BNA) 2280-82 (Nov. 11, 1998).

³⁶⁵ See Pollack Notes, *supra* note 245.

³⁶⁶ H.R. REP. NO. 105-525, at 11 (emphasis added).

³⁶⁷ See Collections of Information Antipiracy Act, H.R. 2652, 105th Cong. § 2 (1998) (written to amend 17 U.S.C. by adding § 1201); H.R. REP. NO. 105-525.

lem, even allowed “use” for “research” is limited to “noncommercial internal” research. Someone not used to legal drafting might argue that “noncommercial internal” only modifies “study,” leaving unlimited “research, or analysis.” But the narrower reading seems impossible because the paragraph has already declared that mere “dissemination to others” is a “nexus to commerce.” Nor am I sure that the courts would consider the language of the Report when construing the text of the CIAA.³⁶⁸

The American Medical Association (“AMA”), arguably part of the scientific community, is in favor of the CIAA. The AMA wants to be able to extract money from persons who use its databases of

³⁶⁸ The Court can no longer be counted on to even look at legislative history materials when construing statutes. *Accord* National Endowment for the Arts v. Finley, 118 S. Ct. 2168, 2182 (1998) (“[L]egislative history has no valid claim upon our attention at all.”) (Scalia, J., concurring only in the judgment, joined by Thomas, J.). In 1995, a unanimous Court, speaking through Justice O’Connor, defined “uses” in the phrase “during and in relation to any crime of violence or drug trafficking crime . . . uses or carries a firearm.” *Bailey v. United States*, 516 U.S. 137, 138 (1995) (quoting 18 U.S.C. § 924(c)(1)). The Court started with the “language of the statute” giving the word its “ordinary and natural meaning.” *Id.* at 144-45. The Court then looked at the word’s “placement and purpose in the statutory scheme.” *Id.* at 145. But this activity involved defining “uses” to allow a separate meaning for “carries,” not a discussion of Congress’ intent when enacting the legislation. *Id.* at 145-46. Next, the Court looked at the rest of the statutory scheme, by which the Court meant looking at other portions of section 924 that contained some prohibition against “using” firearms. *Id.* at 146. Finally, the Court looked at the history of amendments to the statute. *Id.* at 147-48. Mixed into the opinion are references to the various every day usages of “uses.” The Court never reads reports, heeds hearings, or consults the Congressional Record. When the same statutory clause recently returned to the Court for clarification of “carries,” legislative history played a very minor role. *See* *Muscarello v. Cleveland*, 118 S. Ct. 1911 (1998). The majority looked at the plain language, cited several dictionaries, mentioned non-legal sentences employing the word, and looked at unclear statements by congresspersons during the statute’s enactment. *Id.* at 1914-19 (Breyer, J., joined by Stevens, O’Connor, Kennedy & Thomas, JJ.). The dissent wished to use the rule of lenity to choose a less comprehensive meaning for “carries,” but it also cited dictionaries, presented non-legal sources using “carries,” and looked at legislative history. *Id.* at 1920-25 (Ginsburg, J., dissenting, joined by Rehnquist, C.J., Scalia & Souter, JJ.). The same day, the Court construed “operating” a polluting facility. *See* *United States v. Bestfoods*, 118 S. Ct. 1876 (1998). The unanimous opinion by Justice Souter did not discuss legislative history, *id.*, even though the parties’ briefs had, *see* Brief for Bestfoods, 1998 WL 7169, at *26-27; Reply Brief of United States, 1998 WL 120282, at *10-11 & n.6. Even the doctrine that espouses the rejection of “absurd” results is in jeopardy. *Compare, e.g.*, *Clinton v. City of N.Y.*, 118 S. Ct. 2091, 2098 (1998) (reading “individual” to exclude all but natural persons from invoking the expedited review procedures of the Line Item Veto Act “would produce an absurd and unjust result which Congress could not have intended”) (citation and internal quotations omitted), *with id.* at 2111 (“It may be unlikely that this is what Congress actually had in mind; but it is what Congress said, it is not so absurd as to be an obvious mistake, and it is therefore the law.”) (Scalia, J., dissenting).

In sum, legislative history cannot be relied upon to protect anyone’s interests; if Congress wants to except scientific “uses” or limit fees charged to scientific users, the statute needs to say so in plain language. Professor J.H. Reichman distributed suggested language at the PTO Database Conference. *See* J.H. Reichman, *Proposed Exceptions and Limitations Favoring Education, Science, and Research for Mark-Up of HR 2652* (on file with CARDOZO ARTS & ENT. L.J.) (suggesting language limiting fees chargeable to favored users or for government funded information). Professor Reichman’s suggestions are not included in the CIAA.

medical doctors and billing codes.³⁶⁹ I strongly suspect that the AMA has sufficient incentives to keep these databases up-to-date without additional income streams. If it does not, the Balanced Bill would provide protection. The CIAA, on the contrary, provides protection of the AMA's databases regardless of whether the AMA has sufficient self-interested reasons to continue supplying the databases to the public without further charges.

The scientific community has empirical reasons for doubting that science, as currently practiced, would survive the CIAA unchilled. The American scientific community has been nurtured by low-cost, government supplied data and the habit of sharing freely with other investigators.³⁷⁰ Budgets do not include generous funding for database use.³⁷¹ Projects often require information from many sources in many countries.³⁷² The privatization of the Landsat database was a disaster.³⁷³ For the full argument, with ample factual details, Congress should consult the recent study from the National Research Counsel.³⁷⁴

Personally, I would rather chance the fiscal health of the AMA than the productivity of the as-yet-unknown scientist who will make the next unanticipated breakthrough that leads (unexpectedly) to the cure for Alzheimer's disease. I think that most constituents of most Congresspersons would agree.

D. "Civil Society" or "Haves v. Have-Nots"?

Basics, basics, basics: what type of world do you want for yourself and your children?

Do you, like Thomas Jefferson, want a little revolution every

³⁶⁹ See *Feb. 1998 Hearings*, *supra* note 32 (testimony of Richard Corlin, M.D., Speaker of the House of Delegates, AMA). The AMA's testimony is oddly silent about a recent case where the AMA's billing code database was held copyrightable, but the AMA was denied relief because of copyright misuse. See *Practice Management Info. v. American Med. Ass'n*, 121 F.3d 516 (9th Cir. 1997), *amended* 133 F.3d 1140 (1998), *cert. denied*, 118 S. Ct. 2367, *reh'g denied*, 119 S. Ct. 285 (1998). I am currently writing an article on the constitutional issues in the case.

³⁷⁰ See, e.g., Reichman & Samuelson, *supra* note 45, at 114.

³⁷¹ See, e.g., BITS OF POWER, *supra* note 270, at 61-62; Reichman & Samuelson, *supra* note 45, at 119.

³⁷² See BITS OF POWER, *supra* note 270, at 48, 58-59, 110.

³⁷³ Landsat is a group of remote sensing satellites. The project began with U.S. government funds. In 1985, a single private company was awarded over \$250 million for taking over the project. Due to privatization, prices per image rose from \$400 to \$4,400. In the early 1990s, the project was returned to government control and prices dropped to \$425 per image, though only for some users. See, e.g., BITS OF POWER, *supra* note 270, at 121-23; Reichman & Samuelson, *supra* note 45, at 122.

³⁷⁴ See BITS OF POWER, *supra* note 270.

ten years.³⁷⁵

For society to work without a revolution, people need to think that society works; people need to believe that they are part of the “group.” Those “on top” cannot pay, locate, or control enough police to force a “lower class” into “acceptable” behavior. Most of us, presumably, would prefer not to live in a society with such a police force.³⁷⁶ Okay, we want society to work by itself. To get everyone else’s cooperation, we need more than “justice”; we also need everyone to *believe* that the system dispenses justice — that the system includes them.³⁷⁷ We need to motivate the citizens of the United States to ratify by action the social contract they did not help draft.³⁷⁸

The CIAA moves in the wrong direction. The CIAA further marginalizes the less well-to-do by raising the cost of something

³⁷⁵ I hold it that a little revolution now and then is a good thing, & as necessary in the political world as storms in the physical . . . God forbid we should ever be 20 years without such a rebellion . . . And what country can preserve its liberties if their rulers are not warned from time to time that their people preserve the spirit of resistance?

James E. Falkowski, *Secessionary Self-Determination: A Jeffersonian Perspective*, 9 B.U. INT’L L.J. 209, 214 (1991) (quoting Letter from Thomas Jefferson, to James Madison (Jan. 30, 1787); Letter from Thomas Jefferson to William Stephens Smith (Nov. 13, 1787)).

³⁷⁶ See, e.g., KAUS, *supra* note 268, at 5, 107, 161.

³⁷⁷ Benjamin Franklin remarked at the end of the Constitutional Convention: “Much of the strength and efficiency of any government, in procuring and securing happiness to the people, depends on opinion—on the general opinion of the goodness of the government as well as of the wisdom and integrity of its governors.” ARTHUR T. PRESCOTT, *DRAFTING THE FEDERAL CONSTITUTION* 785 (1968). See generally, ELIZABETH ANDERSON, *VALUE IN ETHICS AND ECONOMICS* 158-67 (1993) (arguing that “voice” is important for civil interaction, not just the take-it-or-leave-it alternative of the market sphere). Franklin’s belief has been verified by “modern” empirical investigation. See, e.g., MARGARET LEVI, *CONSENT, DISSENT, AND PATRIOTISM* 200-19 (1997) (arguing that her studies of military service in many countries over several centuries reflect that consent to government demands involves not only rational maximization of personal benefits but also rests on beliefs both that the government is fair and that other members of society are doing their fair share; list of other modern empirical work supporting the same conclusion).

³⁷⁸ The Founders are long dead and were not representative of this country’s current electorate. See, e.g., Mary E. Becker, *The Politics of Women’s Wrongs and the Bill of “Rights”: A Bicentennial Perspective*, 59 U. CHI. L. REV. 453, 455 (1992) (“Given that women were excluded from the process that produced the Bill of Rights and that few women occupy high government positions today, we should question the legitimacy of our purported democracy.”); Sanford Levinson, *Pledging Faith in the Civil Religion: Or, Would You Sign the Constitution?*, 29 WM. & MARY L. REV. 113, 143-44 (1987) (stating that his Constitution is “fluid”; commits its signors to “a process of becoming, and to taking responsibility for constructing the political vision”; “less a series of propositional utterances . . . than a commitment to taking political conversation seriously”); Randall Kennedy, *Afro-American Faith in the Civil Religion: Or, Yes, I Would Sign the Constitution*, 29 WM. & MARY L. REV. 163, 165 (1987) (arguing that in American history, most Afro-Americans have chosen to support the Constitution based on “a normative judgment about the evolving character of this elusive thing we call ‘the Constitution.’ At the center of that judgment is a vision of the Constitution as promise.”). But see *id.* at 166-67 (acknowledging with respect the alternative decision by alienated Afro-Americans; “I have no Constitution and no country”).

that has always been considered “free”: information.³⁷⁹ When a library buys a book, the book can be used for years by many readers in turn. When a library buys a copy of today’s newspaper, numerous patrons can read it for the one price. When a library subscribes to an online database, the database supplier can charge separately for every access, print out, and download. The library also needs to buy, maintain, and update computer hardware and software to access the database. The library, inevitably, ends up severely rationing what it supplies to patrons. The CIAA gives database providers even more leverage to raise prices. Higher prices mean less access per patron at public libraries. Library associations are against the CIAA.³⁸⁰

Yes, home access to the Internet is growing, but the households connected have higher-than-average annual incomes.³⁸¹ A large number of Americans still lack telephones, let alone modems.³⁸² Few people have unlimited disposable incomes. Raising the price of information risks lowering the purchase of information, hence lowering the acquisition of information. America as a whole needs its citizens to acquire more information, not less.

One shared activity still remains in the United States. Rich and poor, increasingly, lead separate lives. They no longer live together, work together, go to school together, serve in the army together, or marry each other.³⁸³ The Constitution, however, still mandates one vote per person.³⁸⁴ To make society work without decennial revolutions, we need to foster voting — informed voting.

³⁷⁹ Information, of course, is not completely free now and would not be completely free with or without a database protection statute. Scientific users agree that organizing data involves costs that users must help to allay; the problem is to prevent providers from acting in standard capitalistic fashion by maximizing the rents charged to users without concern for the long term costs to society. See, e.g., *BITS OF POWER*, *supra* note 270, at 124-26 (discussing pricing models).

³⁸⁰ The CIAA is opposed by the American Ass’n of Law Libraries, the American Library Ass’n, the Ass’n of Research Libraries, the Medical Library Ass’n, and the Special Libraries Ass’n. See *Oct. 1997 Hearings*, *supra* note 62 (testimony of James G. Neal, Director of the Milton S. Eisenhower Library, *Johns Hopkins University*).

³⁸¹ SUNSTEIN, *supra* note 123, at 191-92; R. GEORGE WRIGHT, *SELLING WORDS: FREE SPEECH IN A COMMERCIAL CULTURE* 128 (1997) (“Net technologies are still available mainly to the economically affluent, despite their diminishing cost and the increasing number of terminals in public schools and libraries.”). *But see* HARDY, *supra* note 290, at 60 (“Already today companies have announced plans to offer access [to the Internet] for \$5 a month — access through ordinary television sets, requiring no additional equipment beyond a simple adapter and keyboard.”).

³⁸² SUNSTEIN, *supra* note 123, at 192.

³⁸³ See, e.g., HERRNSTEIN & MURRAY, *supra* note 268, at 127-266, 509-26; KAUS, *supra* note 268, at 25-57, 78-102; REICH, *supra* note 1, at 196-207, 282-300.

³⁸⁴ See, e.g., *Reynolds v. Sims*, 377 U.S. 533, 568 (1964) (“[A]n individual’s right to vote for state legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with votes of citizens living in other parts of the State.”). “The affluent are going to have to learn to live comfortably with people who may not use the

Raising the price of information is counter productive.³⁸⁵ Remember Madison's axiom: "[a] popular government without popular information []or the means of acquiring it is but a prologue to a farce or a tragedy or perhaps both."³⁸⁶

III. A BALANCED, CONSTITUTIONAL BILL

A. *Suggested Statutory Approach*

Any protection may have unintended negative results.³⁸⁷ Any over protection unnecessarily chills speech. Minimalism is appropriate.³⁸⁸

We do not want lawsuits; we want publicly available databases. The remedy, therefore, should be monetary relief high enough to discourage free riding, but low enough to encourage settlements. To encourage contract, we need to insist that users are advised of the existence and limits of legal protection. To encourage contract we want the amount of damages to be easy to calculate in advance.³⁸⁹

Since we want to protect databases menaced by market failure,

same parks and schools as they do, but who, given the right set of circumstances, might outvote them." KAUS, *supra* note 268, at 163.

³⁸⁵ Michael J. Sandel argues that the gap between rich and poor in the U.S.A. is evil, because it erodes the practical and moral ability of the less well-to-do to act as informed citizens. See, e.g., Michael J. Sandel, *Keynote Address: Democracy's Discontent: America in Search of a Public Philosophy*, 85 GEO. L.J. 2073, 2083 (1997). As Sandel reminds us, the Founders discussed economic choices in terms of their probable effects on "civic virtue," on Americans' abilities to join in self-government. *Id.* at 2075-76. A related issue is whether the drive to protect copyright holders on the Internet will prevent the Internet from being the first interactive public forum accessible by a large percentage of the public. See, e.g., Litman, *supra* note 280, at 610-11; SUNSTEIN, *supra* note 123, at 191-93 (discussing possible provision of free access to the Internet). See also H.R. REP. NO. 105-551 pt. 2 at 33 ("The growth and development of the Internet has already had a significant positive impact on the access of . . . the public at large to informational resources that help them . . . become more active and informed citizens."); Robert Cannon, *The Legislative History of Senator Exon's Communications Decency Act*, 49 FED. COMM. L.J. 51, 70 (1996) (opposition to the Communications Decency Act was an example of its own argument—the Internet allows rapid, informed discussion between public and representatives about pending issues). But see Rosemary J. Coombe, *Left Out on the Information Highway*, 75 OR. L. REV. 237 (1996) (arguing that high protection of "intellectual property" in the electric, global economy, subordinates not only American have-nots, but also non-European cultures, and non-monetary values of many societies — including those of the United States).

³⁸⁶ MADISON, *supra* note 105; see also Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1210 (1991) ("An uneducated populace cannot be a truly sovereign populace."; pointing out that the Bill of Rights included three associations that educated citizens in their rights and duties, the church, the militia, and the jury).

³⁸⁷ See, e.g., BITS OF POWER, *supra* note 270, at 154 (suggesting diminished research and diminished technological development).

³⁸⁸ See H.R. REP. NO. 105-525 (1998), at 8 (praising the CIAA as "a minimalist approach").

³⁸⁹ See Litman, *supra* note 280, at 611-12 (providing that copyright fair use analysis is too case specific to satisfy First Amendment concerns; the possibility of liability creates undesirable self censorship).

the bill should be written to cover only databases at risk of market failure.³⁹⁰ The burden of showing probable market failure should be on the database-plaintiff. First, the database-plaintiff has easiest access to the central facts. Second, the database-plaintiff is requesting an extraordinary quasi-property right. Third, the First Amendment counsels against the chilling effect of burdening defendants.³⁹¹

Since the alleged problem is *Feist's*³⁹² declaration that sweat works are not copyrightable, the bill should only cover uncopyrightable material.

Since the Intellectual Property Clause bars eternal rights, rights should end in the real world — not just in theory. The CIAA gives a fifteen-year right. A “new” term starts when additional sweat is added. “Maintenance” may provide sufficient sweat; according to the Committee Report “maintenance” includes not just updating, but also “ongoing verification of the information collected.”³⁹³ “Ongoing” implies that single acts of verifying different specific facts can somehow be metamorphasized into “ongoing verification” of a *set* of facts. While the “old” database becomes unprotected after fifteen years, the “old” database may not be available for use. If the only database the public can access is the updated one which is protected by the “new” term, the CIAA provides eternal rights.³⁹⁴ The solution is simple: make availability of the no-longer-protected database a prerequisite for relief. Similarly, since unreasonably high prices and refusal of access to all comers are feared side effects of overprotection, conditions for relief should include the existence of reasonable prices and equal access.

Contract is another problem. The CIAA allows database producers to use market leverage to contract out of protection limits.³⁹⁵ True, the CIAA gives some entitlements to “owners” of

³⁹⁰ See H.R. REP. NO. 105-525, at 8 (“The House Act is aimed at actual or threatened market injury from misappropriation of collections of information. The goal is to stimulate the creation of more collections, as well as increased dissemination to the public, and to encourage more competition among producers.”).

³⁹¹ *Accord* *New York Times v. Sullivan*, 376 U.S. 254, 279-80 (1964) (holding that the Constitution requires that plaintiff government official must carry a high burden in libel case).

³⁹² *Feist Publications v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991). See *supra* note 62 (listing legislative history references to *Feist*).

³⁹³ H.R. REP. NO. 105-525, at 11.

³⁹⁴ See *Oct. 1997 Hearings*, *supra* note 62, at 28 (statement of Laura D’Andrea Tyson and Edward F. Sherry, paid consultants for the Information Industry Ass’n) (“This approach would of course require that once protection for an old version of a database ended, users could still get copies of it.”).

³⁹⁵ Compare Collections of Information Antipiracy Act, H.R. 2281 § 502 (1998) (written to amend 17 U.S.C. by adding §§ 1305(a), (e)), with E.C. Directive, *supra* note 62, art. 15 (denying rights-holders power to expand their entitlement by contract). For a high-protec-

copies,³⁹⁶ but any database producer could neutralize such limits by “licensing access” instead of “selling copies.”³⁹⁷

“Freedom of contract” is another way of reinforcing power. The “base line” is not a natural state; the base line is the current imprint of past power.³⁹⁸ As to non-secret “facts,” the “natural” state is total absence of property rights — not unbridled property rights. “Freedom of contract” has often been the slogan of the powerful to continue their power. It was the basis for invalidating early minimum wage and maximum work hours legislation.³⁹⁹ It allowed southern employers to chain the newly “freed” slaves in wage-peonage at the end of Reconstruction.⁴⁰⁰ Because information is required for the market to function, “information” cannot lightly be demoted to just another commodity to be traded. People without adequate information cannot act as rational market

tionist discussion of the contract/property interface see Robert P. Merges, *The End of Friction?*, 12 BERKELEY TECH. L. F. 115 (1997). Merges recognizes that computer industry-wide contract practices may create rights which function as “property,” but suggests such rights are not troublesome because the ease of locating a contract-partner and negotiating on line reduce the chance of a party’s being forced to accept onerous terms. *Id.* at 121, 126-27. Merges’ discussion ignores his own recognition that the online market runs on take-it-or-leave-it contract offers, not negotiation. *Id.* at 116. At least as to databases, the market is dominated by sole-source or niche-dominating providers. See *supra* note 270 and accompanying text. Merges does recognize, however, that his market-centered approach should be limited if third parties would be harmed or if societally endorsed uses need subsidies. See Merges, *supra*, at 126, 134-36.

³⁹⁶ See H.R. 2281 § 502 (written to amend 17 U.S.C. by adding § 1303(f)).

³⁹⁷ Software is routinely licensed to neutralize the “first sale doctrine,” 17 U.S.C. § 109 (a) (1994). See, e.g., Rice, *supra* note 326, at 622-25. This practice is the impetus to add a section on licensing intangibles (proposed Article 2B) to the UCC. *Id.* The software industry has routinely inserted terms into shrinkwrap licenses (the precursor of Internet click-on licenses) that deny “licensees” the right to perform actions allowed by federal intellectual property laws (e.g., fair use); such licenses also misuse state trade secret law by first “binding” licensees not to disclose the licensed *res* (creating the fiction that the widely distributed software is a “secret” protectable by state trade secret laws) and then barring reverse engineering (the practical time limit on state trade secret coverage). See e.g., Mark A. Lemley, *Intellectual Property and Shrinkwrap Licenses*, 68 S. CAL. L. REV. 1239, 1239-68 (1995) (arguing that contract should not be allowed to expand intellectual property rights).

³⁹⁸ See Boyle, *supra* note 235, at 104-05 (no natural base line for either intellectual property or fair use “rights”); Tomas Gray, *Proceedings of the Conference on Takings of Property and the Constitution*, 41 U. MIAMI L. REV. 49, 151-52 (1986) (describing a position shared with Cass R. Sunstein, “history, culture, and practices . . . provide the actual base line people operate from”; “No one can deal in legal argument or political argument without presupposing and constantly using an historical, cultural, and practical base line.”); Cass R. Sunstein, *Two Faces of Liberalism*, 41 U. MIAMI L. REV. 245, 245, 251 (1986) (agreeing). But see RICHARD A. EPSTEIN, *TAKINGS* 118, 346-49 (1985) (arguing that “a neutral baseline” is “furnished by the [common law] system of private property.” Past injustices are not sufficient reason for governmental redistribution of property.)

³⁹⁹ See, e.g., *Lochner v. New York*, 198 U.S. 45 (1905) (holding that the Contract Clause invalidates New York statute limiting work hours). About 200 economic regulations were invalidated by the U.S. Supreme Court between 1905 and the mid-1930s. See GEOFFREY R. STONE, ET AL., *CONSTITUTIONAL LAW* 739 (1986).

⁴⁰⁰ See ROBERT L. HAYMAN, JR., *THE SMART CULTURE: SOCIETY, INTELLIGENCE, AND LAW* 333, 337, 342, 344-45 (1998).

participants.⁴⁰¹

The First Amendment overbreadth doctrine also counsels shorter terms both for protection and for statutes of limitations. Criminal sanctions have a very chilling effect and do not help the plaintiff. The modified criminal penalties in Balanced Bill section 1407 are probably constitutional, but I would counsel substituting a provision that would make damages collectable from currently impecunious defendants for a long period of time. Such a provision is provided in the footnote to section 1407.

A database protection act is unnecessary. It is especially unnecessary now that the DMCA has been enacted. UCC 2B's creation would make a database statute even more redundant. But, if Congress feels impelled to act, I suggest the following constitutionally acceptable redraft ("the Balanced Bill"). Following standard markup conventions, suggested deletions from the August House Act are crossed out, and suggested additions are in italics. Explanations not made above are included in footnotes.

I invite more experienced statute drafters to polish my suggestions.

B. *Suggested Text: the Balanced Bill*

SECTION 501.⁴⁰² SHORT TITLE.

This Title may be cited as the 'Collections of Information ~~An~~
~~tipiracy~~ *Protection Act*'.

SECTION 502. ~~MISAPPROPRIATION~~ *PROTECTION OF COLLEC-* *TIONS OF INFORMATION.*

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

'CHAPTER 14 — ~~MISAPPROPRIATION~~ *PROTECTION OF COL-* *LECTIONS OF INFORMATION*

'Sec.

'1401. Definitions.

'1402. Prohibitions.

'1403. Permitted acts.

'1404. Exclusions.

'1405. Relationship to other laws.

⁴⁰¹ See Boyle, *supra* note 110, at 1420, 1443-57 (stating that economists sometimes treat information as a commodity and sometimes treat information as "part of the structure of the market: infinite, perfect, and circulating without let or hindrance"; economists, however, seem to have no more than an "intuitive" backing for when to use which "aspect" of information).

⁴⁰² For simplicity, I am using the numbering and internal references from the August House Act. However, I am transposing them to create a chapter 14 of Title 17 U.S. Code because the DMCA has already created chapters 12 and 13.

'1406. Civil remedies.

'1407. Criminal offenses and penalties.

'1408. Limitations on actions.

'Sec. 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 users may access them.

'(2) INFORMATION- The term 'information' means *individual, discrete facts, data*. *Information does not include works of authorship constitutionally capable of protection pursuant to copyright, or any other intangible material capable of being collected and organized in a systematic way.*

~~'(3) POTENTIAL MARKET- The term 'potential market' means any market that a person claiming protection under section 1402 has current and demonstrable plans to exploit or that is commonly exploited by persons offering similar products or services incorporating collections of information.~~⁴⁰³

~~'(4)-(3) COMMERCE-~~ The term 'commerce' means all commerce which may be lawfully regulated by the Congress.

'(4) OF SOCIETAL CONCERN⁴⁰⁴- *The term 'of societal concern' includes any activity of core First Amendment concern, any activity central to the progress of science or the useful arts (as that phrase is used in U.S. Const. art. I, § 8, cl. 8), and any activity targeted for special protection by the fair use provision of the Copyright Act, 17 U.S.C. § 107. In deciding if an activity is "of societal concern," the court shall not take into consideration whether the activity is being performed for profit or not for profit. The term 'of societal concern' shall be expanded by judicial decision as reasonably required by equitable considerations and changed circumstances.*

'(5) PRODUCT OR SERVICE- A product or service incorporating a collection of information does not include a product or service incorporating a collection of information gathered, organized, or maintained to address, route, forward, transmit,

⁴⁰³ Protecting a potential market gives database providers unnecessary windfalls from new uses, even new uses first recognized by other entities. As soon as anyone moves into a new use of a similar database, the database proprietor can claim that use as a "potential market" and foreclose price-lowering competition.

⁴⁰⁴ The special provisions for uses of societal concern parallel the concerns of the First Amendment in a manner similar to the fair use concept in copyright. See 17 U.S.C. § 107 (1994).

or store digital online communications or provide or receive access to connections for digital online communications.

'(6) AT RISK- A "collection of information" is "at risk" if, and only if, the entity claiming rights in that "collection of information" (the Proprietor) can prove, by clear and convincing evidence, that the "collection of information" could not have been created without a reasonable belief by investors that those investors had, and would continue to have, the legal right to prevent unauthorized use of the "collection of information" in the market for the "collection of information" which that entity currently alleges was harmed by the person (the User) who allegedly misappropriated all or part of the "collection of information." A "collection of information" is presumed not to be "at risk" if any one of the following is true:

(a) the "collection of information" was at any time gathered, organized, or maintained as a condition to grant or retention of any right, contract, or monopoly by a government entity (federal, state, local, or foreign);

(b) the "collection of information" was at any time gathered, organized, or maintained by a not-for-profit entity;

(c) the "collection of information" was at any time gathered, organized, or maintained pursuant to the requirements of a rule, regulation, or statute of a government entity (federal, state, local, or foreign); or

(d) the "collection of information" was at any time gathered, organized, or maintained by use of information input pursuant to any business purpose whose marketability or profitability is not directly harmed by the alleged misappropriation.⁴⁰⁵

The presumption created by each of a-d above is rebuttable only by clear and convincing evidence. The burden of rebutting the presumption created by each of a-d above rests on the party alleging misappropriation in violation of 17 U.S.C. § 1402.

'(7) REASONABLE RATE- A Proprietor of a collection of information

⁴⁰⁵ This provision looks for cross-subsidies between products. A stock exchange may have created a database to allow on-site trading. On-site trading, therefore, should be presumed to generate sufficient revenue to continue the database without charging persons using the database for other purposes, such as off-site trading. Gillette once gave away razors to encourage sale of its razor blades. See, e.g., Schlachter, *supra* note 290, at 23-24. Advertising-free radio stations were once supported by entities who earned revenue by selling radio sets. See Wilfrid C. Rumble, *The FCC's Reliance on Market Incentives to Provide Diverse Viewpoints on Issues of Public Importance Violates the First Amendment Right to Receive Critical Information*, 28 U.S.F. L. REV. 793, 810 (1994). Internet cross-subsidy possibilities include advertising, obtaining name recognition, sales of upgrades, sales of complementary technology, sales of physical goods, sales of services, obtaining personal information about users for sale to others, and obtaining data about support for off-net material. See Schlachter, *supra* note 290, at 24-30.

has made that collection of information available at a 'reasonable rate' if, and only if, that Proprietor offers to lease, sell, or rent extraction and use of large and small parts of that collection of information at a rate that allows no more than a [5%] rate of return on that Proprietor's investment in the part of that collection of information which the User wishes to use.⁴⁰⁶ Income from other actual and potential uses and extractions of the collection of information shall be taken into account when determining if a rate is reasonable. A rate shall not be considered unreasonable merely because a Proprietor allows lower rates for some uses or extractions which support activities of societal concern. The use that the User intends to make of the information may be taken into consideration in determining if a rate is reasonable. The burden of showing the reasonableness of any rate shall be born by the party alleging misappropriation in violation of 17 U.S.C. § 1402.

'(8) INSUBSTANTIAL PART - The insubstantiality of any part of a collection of information shall be measured quantitatively against the volume of the entire collection of information from the point of view of the User of such collection of information at the time of the alleged misappropriation.⁴⁰⁷

'Sec. 1402. Prohibition against misappropriation

~~'Any person who extracts, or uses in commerce, all or a substantial part, measured either quantitatively or qualitatively, 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 harm to the actual or potential 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 for sale or otherwise 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.~~

'(a) Any person (the User) who extracts, or uses in commerce, all or a quantitatively substantial part, of a collection of information which (i) is at risk at the time of such extraction or use, and (ii) which is gathered, organized, or maintained by another person (the Proprietor) through the ongoing investment of substantial monetary resources

⁴⁰⁶ "[W]hich the User wishes to use" prevents the database proprietor from bundling material or from resisting competitors who provide the value added service of allowing access to smaller groups of data.

⁴⁰⁷ The CIAA bars appropriation of any "qualitatively" substantial part of a database. First, this allows any plaintiff the argument that the defendant's desire for part x evidences that part x is "qualitatively" substantial. Second, the User needs clear warning of the limits of the database proprietor's right of exclusion; otherwise, speech is chilled unnecessarily.

shall be liable to the Proprietor for the remedies set forth in section 1406, provided that:

'(b) the Proprietor, at the time of the User's use or extraction, had offered to allow use of the collection of information at a reasonable rate and on a non-discriminatory basis to all persons who wished to make commercial or non-commercial use of any portion of such collection of information, including those persons who wished to directly compete with the Proprietor's use of the collection of information. This inquiry shall not be limited to persons who wished to use or extract information in the manner the Proprietor is currently alleging to be a violation of 17 U.S.C. § 1402.

'Sec. 1403. Permitted acts

'(a) **INDIVIDUAL ITEMS OF INFORMATION AND OTHER INSUBSTANTIAL PARTS-** Nothing in this chapter shall prevent the extraction or use 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 extraction or use of individual items or insubstantial parts of a collection of information so as to circumvent the prohibition contained in section 1402. *Twelve or less uses or extractions of insubstantial parts of the same collection of information by one neutral person within one calendar year shall not constitute a violation of section 1402. The immediately preceding sentence creates a safe harbor; it does not create a presumption that thirteen or more uses or extractions of insubstantial parts of the same collection of information within one calendar year constitute a violation of 17 U.S.C. § 1402.*

'(b) **GATHERING OR USE OF INFORMATION OBTAINED THROUGH OTHER MEANS-** Nothing in this chapter shall restrict any person from independently gathering information or using 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.

'(c) **USE OF INFORMATION FOR VERIFICATION-** Nothing in this chapter shall restrict any person from extracting *information from a collection of information* or using a collection of information ~~within any entity or organization,~~ for the *sole main* purpose of verifying the accuracy of information independently gathered, organized, or maintained by that person ~~provided that, Under no circumstances shall~~ the information se

used ~~be or~~ extracted from the original collection *shall not knowingly and willfully be* ~~and~~ made available to others in a manner that ~~harms the actual or potential market for the collection of information from which it is extracted or used~~ *violates 17 U.S.C. § 1402.*⁴⁰⁸

'(d) NONPROFIT EDUCATIONAL, SCIENTIFIC, OR RESEARCH USES- Notwithstanding section 1402, no person shall be restricted from extracting or using information for nonprofit educational, scientific, or research purposes in a manner that does not harm directly the actual market for the product or service referred to in section 1402.⁴⁰⁹

'(e) NEWS REPORTING.—Nothing in this chapter shall restrict any person from extracting or using information for the ~~sole~~ purpose of news reporting, including news gathering, dissemination, and comment, unless the information so extracted or used is time sensitive and has been gathered by a news reporting entity *for rapid dissemination to a particular market, has not yet been distributed to that market for a reason other than*

⁴⁰⁸ The August House Act places so much risk on a would-be-verifier that it practically destroys the exception. In the May House Act the provision reads:

(c) USE OF INFORMATION FOR VERIFICATION- Nothing in this chapter shall restrict any person from extracting information, or from using 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 extracted or used be made available to others in a manner that harms the actual or potential market for the collection of information from which it is extracted or used.

Collections of Information Antipiracy Act, H.R. 2652 § 2 (1998) (written to amend 17 U.S.C. by adding § 1203(c)). Subsection (c) in the Companion Bill uses slightly different language and, seemingly, creates an even smaller loophole than the May House Act's version. The May House Act allows verification by both "using" and "extracting" information from a protected database. The Companion Bill merely allows "using" information. Since neither "use" nor "extraction" are defined terms, I am not sure to what extent it is possible to "use" information without performing "extraction."

Nothing in this chapter shall restrict any person from using 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 extracted from the original collection and made available to others in a manner that harms the actual or potential market for the collection of information from which it is extracted or used.

Collections of Information Antipiracy Act, S. 2291 § 3 (1998) (written to amend 17 U.S.C. by adding § 1203(c)).

⁴⁰⁹ This August version is an improvement on the language of the May House Act and the Companion Bill, both of which cover actual and *potential* markets:

(d) NONPROFIT EDUCATIONAL, SCIENTIFIC, OR RESEARCH USES- Nothing in this chapter shall restrict any person from extracting or using information for nonprofit educational, scientific, or research purposes in a manner that does not harm the actual or potential market for the product or service referred to in section 1202.

H.R. 2652 § 2 (written to amend 17 U.S.C. by adding § 1203(d)); S. 2291 § 3 (written to amend 17 U.S.C. by adding § 1203(d)).

*intentional delay, and the extraction or use is part of a consistent pattern engaged in for the purpose of direct competition in the particular market for which the information was collected by the right holder.*⁴¹⁰

‘(f) ~~TRANSFER OF COPY-~~ Nothing in this chapter shall restrict the ~~owner~~ *possessor* 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 *provided that the transferee agrees to be bound (for the benefit of the original predecessor-in-interest) by any contractual limitations agreed to by the transferor when the transferor acquired the copy, and provided that the possessor reasonably believes that his or her possession is lawful. Nothing in this chapter, including the immediately preceding sentence, shall restrict the owner of a particular copy of all or part of a collection of information from selling or otherwise disposing of that copy provided that such seller reasonably believes that the copy being transferred was lawfully made.*⁴¹¹

‘Sec. 1404. Exclusions

‘(a) ~~GOVERNMENT COLLECTIONS OF INFORMATION-~~⁴¹²

‘(1) ~~EXCLUSION-~~ Protection under this chapter shall not

⁴¹⁰ The minor editing to this subsection prevents use of the statute by any entity trying to delay public availability of information. The Copyright Act has been used to hide information of public interest. *See, e.g.,* *New Era Publishers v. Henry Holt & Co.*, 873 F.2d 576 (2d Cir. 1989) (discussing L. Ron Hubbard, founder of Church of Scientology, preventing quotations from his unpublished writings from being included in critical biography); *Salinger v. Random House*, 811 F.2d 90 (2d Cir. 1987) (recluse author succeeds in preventing publication of excerpts from his unpublished letters to third persons, even though he intends never to have letters published). “Sole” unnecessarily chills use of the exception. The August House Act exception goes too far beyond *International News Service v. Associated Press* by removing language that assured that the right-claiming news reporting entity was protected only as to information it intended to disseminate but had not yet disseminated.

(e) ~~NEWS REPORTING-~~ Nothing in this chapter shall restrict any person from extracting or using information for the sole purpose of news reporting, including news gathering, dissemination, and comment, unless the information so extracted or used is time sensitive, has been gathered by a news reporting entity for distribution to a particular market, ~~and~~ has not yet been distributed to that market, and the extraction or use is part of a consistent pattern engaged in for the purpose of direct competition in that market.

H.R. 2652 § 2 (written to amend 17 U.S.C. by adding § 1203(d)). The Companion Bill section merely removes the “and” stricken out in this copy of the version from the May House Act.

⁴¹¹ Since a “possessor” can transfer, the additions compensate by preventing subversion of discriminatory pricing mechanisms; strict liability on transferring possessors (whose transferees harm the Proprietor’s market) would chill speech unnecessarily. Since possessors and owners may not have personal knowledge of whether a copy was made lawfully, burdening them with strict liability on the origin of their copies chills speech unnecessarily.

⁴¹² I have edited out the odd exceptions put in at the behest of special pleaders. Any database created by any government subsidized entity has been paid for (in some part) by the public. The public should not be charged again just because that government entity desires a new revenue source.

extend to collections of information gathered, organized, or maintained by or for a government entity, whether Federal, State, or local, including any employee or agent of such entity, or any person exclusively licensed by such entity, within the scope of the employment, agency, or license. Nothing in this subsection shall preclude protection under this chapter for information gathered, organized, or maintained by such an agent or licensee that is not within the scope of such agency or license, ~~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 disseminated—~~

~~'(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 1205(g) of this title; or~~

~~'(B) under the Commodity Exchange Act by a contract market, subject to section 1205(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.

'Sec. 1405. Relationship to other laws

'(a) OTHER RIGHTS NOT AFFECTED- Subject to subsections (b) *through (i)* and *sec. 1408(d)(3)*, 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,~~⁴¹³ *privacy, and access to public*

⁴¹³ A database proprietor should not be able to turn a marketed database into a trade secret by having all users contract not to disclose the material.

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 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, and access to public documents, and the law of contract~~ shall not be deemed to provide equivalent rights for purposes of this subsection *except that, pursuant to section 1408(d)(3), the notice required by section 1408(d)(2) waives any claim that someone committed any form of passing off by extracting or using part of a collection of information. The doctrine of misappropriation created by *International News Serv. v. Associated Press*, 248 U.S. 215 (1918), and its progeny does provide preempted equivalent rights.*⁴¹⁴

‘(c) RELATIONSHIP TO COPYRIGHT- *Subject to sections 1405(i) and 1408(d)(3), 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 the use of collections of information.~~

‘(e) ACCESS REQUIRED BY STATUTE - *Nothing in this chapter shall affect any federal or state statute providing a right to access information (including but not limited to those mentioned in sections (f) and (g) of this section), except that this chapter shall not prevent or*

⁴¹⁴ Section 1403(e) (“New Reporting”) mirrors *International News Serv. v. Associated Press*, 248 U.S. 215 (1918), discussed *supra* section I.D.

*limit the right to copy, use, transfer, or otherwise share any information acquired pursuant to any federal or state statute providing a right to access.*⁴¹⁵

'(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 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)), for the purpose of publishing telephone directories in any format.

'(g) SECURITIES AND COMMODITIES MARKET INFORMATION-

~~'(1) FEDERAL AGENCIES AND ACTS- Nothing in this Act 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 and 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 promulgated thereunder.~~

~~'(2) PROHIBITION- Notwithstanding any provision in subsection (a), (b), (c), (d), or (f) of section 1403, nothing in this chapter shall permit the extraction, use, 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. In addition, nothing in subsection (e) of section 1403 shall be construed to permit any person to extract or use 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 sub-~~

⁴¹⁵ One participant at the PTO Database Conference mentioned the existence of multiple statutes creating rights to access information in addition to the ones already mentioned in the CIAA. Pollack Notes, *supra* note 245.

stantial part of market information) provided on a real-time basis.

~~'(3) 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.~~

Nothing in this chapter shall affect—

'(1) the operation of the provisions of the Securities Exchange Act of 1934 (15 U.S.C. § 58a et seq.) or the Commodity Exchange Act (7 U.S.C. § 1 et seq.);

'(2) the public nature of information with respect to quotations for and transactions in securities that is collected, processed, distributed, or published pursuant to the requirements of the Securities Exchange Act of 1934;

'(3) the obligations of national securities exchanges, registered securities associations, or registered information processors under the Securities Exchange Act of 1934; or

'(4) the jurisdiction or authority of the Securities and Exchange Commission or the Commodity Futures Trading Commission.⁴¹⁶

⁴¹⁶ The August House Act section on market information is written to make sure that current suppliers of market information have as much of a monopoly as allowed by the existing statutes targeted at market trading. I have substituted the text (but not the heading) of the May House Act which allows the public to reuse market information to the extent allowed by the more targeted statutes. The Companion Bill is different from both.

(g) SECURITIES AND COMMODITIES MARKET INFORMATION-

(1) FEDERAL AGENCIES AND ACTS- Nothing in this Act shall affect—

(A) the operation of the provisions of the Securities Exchange Act of 1934 (15 U.S.C. § 58a et seq.) or the Commodity Exchange Act (7 U.S.C. § 1 et seq.), including the execution of the finding of Congress that it is in the public interest and appropriate for the protection of investors and the maintenance of fair and orderly markets to assure the availability to brokers, dealers, and investors of market information;

(B) the obligations and rights of self-regulatory organizations, members of such organizations, securities information processors, brokers, and dealers under the provisions of the Securities and Exchange Act of 1934 and the rules and regulations promulgated under such Act, including the obligations and rights of self-regulatory organizations to make market information available on fair and reasonable terms, and terms that are not unreasonably discriminatory; or

(C) the jurisdiction or authority of the Securities and Exchange Commission and the Commodity Futures Trading Commission.

(2) PROHIBITION- Notwithstanding section 1203, nothing in this chapter shall permit the extraction, use, 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 promulgated under such Acts may otherwise provide. Nothing in section 1203(e) shall be

(h) LICENSING AND CONTRACT: Subject to all other limitations of this Chapter, a Proprietor may contract to allow Users different rights of use and extraction at different reasonable rates, provided that any term(s) attempting to obtain rights beyond those provided by this Chapter for the Proprietor of a Collection of Information shall be (i) null and void as against public policy; (ii) a Proprietor's requesting any such term(s) shall be prima facie proof that the Proprietor has unclean hands for the purposes of any law suit, arbitration, mediation, or other dispute resolution related to the collection of information that the Proprietor attempted to guard pursuant to such clause.

(i) EFFECT ON THE DIGITAL MILLENNIUM COPYRIGHT ACT OF 1998

(1) No person who reasonably believes that he or she is acting lawfully pursuant to this chapter shall be liable for circumventing a technological protection measure in violation of Chapter 12 of Title 17.⁴¹⁷

(2) No person who reasonably believes that he or she is acting lawfully pursuant to this Chapter shall be liable for a violation of any section of Chapter 12 of Title 17 regarding "copyright management information" in connection with use or extraction of any part of a collection of information.⁴¹⁸

'Sec. 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

construed to permit any person to extract or use real time market information in a manner that constitutes a market substitute for a real time market data service (including the real time systematic updating of or display of a substantial part of market information) provided on a real time basis.

(3) DEFINITION- As used in this subsection, the term 'market information' means information relating to quotations for and transactions in securities or commodities that is collected, processed, distributed, or published—

(A) pursuant to the provisions of the Securities Exchange Act of 1934 (15 U.S.C. § 58(a) *et seq.*); or (B) by a contract market that is designated by the Commodity Futures Trading Commission under the Commodity Exchange Act (7 U.S.C. § 1 *et seq.*) and the rules and regulations under such Act."

Collections of Information Antipiracy Act, S. 2291 § 3 (1998) (written to amend 17 U.S.C. by adding § 1205(g)).

⁴¹⁷ This section prevents Proprietors from enlarging their rights with technological gatekeepers pursuant to § 1201(a) of the Senate and House versions of the DMCA which reach all works protected under "this title," i.e., Title 17, which will include the CIAA if it is enacted.

⁴¹⁸ This section prevents Proprietors from requiring users and extractors to make reference to the Proprietors in perpetuity, as might otherwise be required by section 1202 of Title 17.

State governmental entity may be brought in any court that has jurisdiction over claims against such entity.

'(b) ~~PRELIMINARY TEMPORARY AND PERMANENT INJUNCTIONS~~⁴¹⁹ 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, provided that~~

*(1) the court issuing the injunction has personal jurisdiction over the person sought to be enjoined;*⁴²⁰ and

(2) the court issuing the injunction takes full consideration of First Amendment principles against prior restraints and this Chapter's intent to protect activities, goods, and services of societal concern.

'(c) ~~IMPOUNDMENT~~⁴²¹- *Since the Constitution and public policy favor the widest possible transmission of information consistent with economic incentives to collect and organize information, a court shall order impoundment or destruction pursuant to this subsection only when no other alternative is sufficient to protect a party. The party requesting impoundment or destruction has the burden of showing by clear and convincing evidence that no other alternative is sufficient to protect that party's legally protected interests under this Chapter. Subject to the limitations of the first two sentences of this subsection, a*At any time while an action under this ~~section~~ Chapter 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 extracted or used in violation of section 1402, and of all masters, tapes, disks, diskettes, or other articles by means of which such copies may be reproduced. *If a party who has violated section 1402 is unable to pay damages pursuant to section (d) of this section, and subject to the limitations of the first two sentences of this subsection, t*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 col-

⁴¹⁹ Preliminary injunctions are under-litigated restraints on speech and should be disfavored. Permanent injunctions should be disfavored because society benefits by the use of information. Standard relief should, therefore, be damages.

⁴²⁰ The replaced language allowed procedural unfairness to defendants.

⁴²¹ The redrafting of this subsection recognizes that society favors *use* of information.

lection of information extracted or used in violation of section 1402, and of all masters, tapes, disks, diskettes, or other articles by means of which such copies may be reproduced.⁴²²

~~'(d) MONETARY RELIEF.⁴²³ When a violation of section 1302 has been established in any civil action arising under this section, the plaintiff shall be entitled to recover any damages sustained by the plaintiff and defendant's profits not taken into account in computing the 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.⁴²⁴ 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 such 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 where 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. The standard remedy for violation of this Chapter shall be monetary relief.~~

'(1) The monetary relief available under this Chapter shall be [10%] more than the usual cost of a license to extract or use the misappropriated information in the manner the information was extracted or used; except that

'(2) If the person who violated this Chapter did so while performing activities of societal concern, and the Proprietor does not offer a lower rate for the type of action of societal concern involved in the violation of this Chapter, the monetary relief shall be [5%] more than the usual cost of a license to extract or use the misappropriated information in the manner the information was extracted or used;

⁴²² Why overreach by taking someone's computer equipment in addition to wiping all illegal files?

⁴²³ The money remedy has been limited to prevent chilling speech unnecessarily and to encourage settlements.

⁴²⁴ The May House Act and the Companion Bill word the discussion of proof in slightly different language that seems substantively identical: "only; defendant must prove all elements of cost or deduction claims." Collections of Information Antipiracy Act, H.R. 2652 § 2 (1998) (written to amend 17 U.S.C. by adding § 1206 (d)); Collections of Information Antipiracy Act, S. 2291 § 3 (1998) (written to amend 17 U.S.C. by adding § 1206(d)).

*'(3) The court in its discretion may award reasonable costs and attorney's fees to the prevailing party (subject to subsection (4)) and shall award such costs and fees where 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 duties.'*⁴²⁵

*'(4) In any case where the Proprietor acted unreasonably either in bringing a suit or refusing to settle a suit under this Chapter, the court must award attorney's fees to the defendant; such fees must be granted even if the defendant is an unsuccessful party.'*⁴²⁶

'(e) REDUCTION OR REMISSION OF MONETARY RELIEF FOR NONPROFIT EDUCATIONAL, SCIENTIFIC, OR RESEARCH INSTITUTIONS- 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 acting within the scope of its mission, or*⁴²⁷ an employee or agent of a nonprofit educational, scientific, or research 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 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.

'Sec. 1407. Criminal offenses and penalties'⁴²⁸

⁴²⁵ Subsection 1406(d)(3) is essentially the same as section 1306(d) of the August House Act. *See* Collections of Information Antipiracy Act, H.R. 2281, § 502 (1998) (written to amend 17 U.S.C. by adding 1306(d)).

⁴²⁶ This provision will help insure that the Balanced Bill produces reasonable fees for use of databases, not lawsuits.

⁴²⁷ The institution, not just its employees and agents, should be protected.

⁴²⁸ Criminal penalties do not help the Proprietor. A more useful, though less common alternative, would be to delete criminal penalties and substitute a provision targeting impecunious offenders as follows:

(1) **GENERALLY-** In order to deter violations of this chapter by impecunious persons, notwithstanding other statutes,

(a) the statute of limitations for collection of a judgment imposing a monetary remedy for this chapter shall be thirty years, and

(b) a judgment imposing a monetary remedy for violation of this chapter shall not be dischargeable in bankruptcy.

(2) **INAPPLICABILITY-** This section shall not apply to a nonprofit educational, scientific, or research institution, library, or archives acting within the scope of its mission, or an employee or agent of a nonprofit educational, scientific, or

‘(a) VIOLATION-

‘(1) IN GENERAL- Any person who violates section 1402 willfully *and knowingly shall be punished as provided in subsection (b), if that person and —*

~~‘(A) does so for direct or indirect commercial advantage or financial gain; or⁴²⁹~~

~~‘(B) causes loss or damage aggregating \$10,000 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).⁴³⁰~~

‘(A) extracted or used the information for direct personal monetary gain by reselling, leasing, or renting the misappropriated information in commerce;

‘(B) did not reasonably believe that the extracted or used information was for an activity, product, or service of societal concern; and

‘(C) knew at the time of the extraction or use that some Proprietor had statutory rights in the collection of information pursuant to this Chapter. A prominent notice claiming rights under this Chapter shall raise a rebuttable presumption that the User knew that some Proprietor had statutory rights in the collection of information.⁴³¹

‘(2) INAPPLICABILITY- This section shall not apply to a *nonprofit educational, scientific, or research institution or archives acting within the scope of its mission or to⁴³² an em-*

research institution, library, or archives acting within the scope of his or her employment

⁴²⁹ “[I]ndirect commercial advantage or financial gain” cuts too wide a swath for criminal liability. Any use of a product without paying the usual fee creates some “commercial advantage or financial gain.”

⁴³⁰ Removed subsection 1407(a)(1)(B) is an over reaction to the student defendant in *United States v. LaMacchia*, 871 F. Supp. 535 (D. Mass. 1994), who was held not liable for criminal conspiracy with unknown persons when he posted copyrighted software on the Internet for others to download without charge. In response, section 506(a) of 17 U.S.C. was amended to provide criminal liability for anyone who “willfully” infringed a copyright either “for the purposes of commercial advantage or private financial gain,” or “by the reproduction of distribution, including by electronic means, during any 180 day period, or 1 or more copies or phonorecords of 1 or more copyrighted works, which have a total retail value of more than \$1,000.” Pub. L. No. 105-147, § 2(b), 111 Stat. 2678, 2678 (1997). A potential infringer is unlikely to know how much damage his action will cause the right holder. Again, the First Amendment cautions against chilling more speech than necessary.

⁴³¹ Since society is benefitted by the use of information, criminal liability should be very difficult to obtain. We do not want to scare people out of publicly beneficial uses. If someone errs in thinking a use is allowed, the database provider is made whole by a money remedy equivalent to a reasonable royalty with some addition to cover the risk of not locating infringers.

⁴³² The institution itself should be protected, not merely its employees or agents. See 144 CONG. REC. H7097 (daily ed. Aug. 4, 1998) (Letter from Rep. Coble, to Reps. Boucher

ployee or agent of a nonprofit educational, scientific, or research institution, library, or archives acting within the scope of his or her employment.

'(b) PENALTIES- An offense under subsection (a) shall be punishable by a fine of not more than ~~\$250,000~~ \$10,000 or imprisonment for not more than ~~5 years~~ six months, or both. A second or subsequent offense under subsection (a) shall be punishable by a fine of not more than ~~\$500,000~~ \$30,000 or imprisonment for not more than ~~10 years~~ two years, or both.

'Sec. 1408. Limitations on actions

*Notwithstanding any statutory provision conflicting with section 1408,*⁴³³

'(a) CRIMINAL PROCEEDINGS- No criminal proceeding shall be maintained under this chapter unless it is commenced within ~~three years~~ one year 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~~ one year after the cause of action arises or claim accrues. *This statute of limitations shall not be tolled or otherwise extended because the allegedly aggrieved party lacked knowledge (reasonably or for any other reason including concealment or fraud by the defendant) of the alleged violation.*⁴³⁴

'(c) ADDITIONAL LIMITATION- No criminal or civil action shall be maintained under this chapter for the extraction or use of all or a substantial part of a collection of information that occurs more than ~~15~~ five (5) years after the investment of resources that qualified the portion of the collection of information for protection under this chapter that is extracted or used. *The government in a criminal case and the plaintiff in a civil case have the burden of showing the date and substantiality of the investment of resources.*

'(d) ADDITIONAL LIMITATIONS

(1) As to collections of information that have been available publicly in any form for use or extraction of information for five (5)

& Campbell (June 16, 1998)) (placed on Record by Rep. Boucher) ("And we eliminated any possibility that nonprofit libraries and archives or educational institutions can be held criminally liable for any violation of sections 1201 or 1202, even when such violations are willful.").

⁴³³ The current statute of limitations for actions brought under Title 17 is three years for civil actions, see 17 U.S.C. § 507(b) (1994), and five years for criminal actions, see *id.* § 507(a), as amended by Pub. L. No. 105-147 § 2(c), 111 Stat. 2678 (1997).

⁴³⁴ Any uncertainty about the length of risk for use of information risks chilling legal speech unnecessarily.

years or longer, no action may be maintained under this chapter for the extraction or use of all or a substantial part of such collection of information unless the no-longer protected versions of the collection are readily available at reasonable rates and in easily usable condition. An older version is not readily available in easily usable condition if any required technology, including but not limited to software, hardware, and firmware, is not readily available at reasonable rates in easily useable condition.

'(2) No collection of information may be the basis for any civil or criminal action under this Chapter unless, at the time that the alleged violation of section 1402 occurred, the collection of information bore a prominent, clear, and plain-language notification:

'(A) giving name, address, and telephone number of its provider, and stating that its proprietor claims protection under this Chapter for the subsection of the collection of information that was allegedly used or extracted in violation of this Chapter;

'(B) stating whether the collection of information has been available for five or more years; and

'(C) if the collection of information has been available for five or more years, stating directions for locating the material required to be readily available pursuant to section 1408(d)(1).

'(D) A notification that some Proprietor claims "all rights" pursuant to Title 17 or this Chapter is not "clear" for purposes of subsection 1408(d). To be "clear," a notice must make a reasonable effort to warn the user of the activities claimed to be unlawful pursuant to this Chapter.⁴³⁵

'(3) Any notification purporting to conform to subsection 1408(d)(2), as to all material that any user reasonably believes to be covered by such notice, constitutes a waiver of protection pursuant to both (i) any theory of unfair competition (including but not limited to passing off and false advertising) and (ii) copyright.⁴³⁶

⁴³⁵ See generally Jessica Litman, *Revising Copyright Law for the Information Age*, 75 OR. L. REV. 19, 39-48 (1996) (suggesting that if we want the public to obey copyright statutes, we need to write them understandably and in accordance with common sense notions of morality).

⁴³⁶ First Amendment concerns and common sense caution that any alleged misappropriator should have clear warning that protection is claimed on the material at issue. The risk of deciding what subject matter is copyrightable should be born by the entity claiming the extraordinary protection of the new right, not the user. A proprietor should not be allowed to bypass this limitation by asserting that using the information constitutes express or implied passing off of the proprietor's materials as originating with the user.

SECTION 503. CONFORMING AMENDMENT.

The table of chapters for Title 17, United States Code, is amended by adding at the end the following:

'14. ~~Misappropriation~~ *Protection of Collections of Information* 1401'.

SECTION 504. CONFORMING AMENDMENTS TO TITLE 28, UNITED STATES CODE.

(a) DISTRICT COURT JURISDICTION- Section 1338 of Title 28, United States Code is amended—

(1) in the section heading by inserting '~~misappropriations~~ *protection of collections of information,*' after 'trade-marks,'; and

(2) 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 ~~misappropriation~~ *protection of 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.'

(b) CONFORMING AMENDMENT- The item relating to section 1438 in the table of sections for chapter 85 of title 28, United States Code, is amended by inserting '~~misappropriations~~ *protection of collections of information,*' after 'trade-marks,'.

(c) 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. 505. 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 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 502 of this Act, for the use of 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.

CONCLUSION

All parts of the Constitution should be taken seriously by the Congress as well as by the courts.⁴³⁷ The CIAA is not only unnecessary and unconstitutional; it is a daunting example of Congresspersons ignoring the obvious negative impact on the many in a stampede to curry favor with the few.⁴³⁸ I apologize — at least in part. I have no evidence that the House's failure is malicious, but lack of malice aggravates the problem. I could vote against a specific, venal representative. But how does a mere taxpayer change Congress' work methods? I look forward to the 106th Congress⁴³⁹ correcting the 105th's misstep and, in doing so, earning the country's appreciation.

⁴³⁷ See generally CASS SUNSTEIN, *THE PARTIAL CONSTITUTION* (1994) (arguing that Congress must enforce most constitutional values because the institutional competence of the courts is limited).

⁴³⁸ See William F. Patry, *Copyright and the Legislative Process: A Personal Perspective*, 14 CARDOZO ARTS & ENT. L. J. 139 (1996) (arguing that intellectual property legislation is controlled by industry lobbyists; description by former counsel to the House Subcommittee on Courts and Intellectual Property); see also Litman, *supra* note 346, at 53-54 ("The only way copyright laws get passed in this country is for all of the lawyers who represent the current stakeholders to get together and hash out all of the details among themselves"; "Congress is the public's copyright lawyer . . . [but] what Congress has done more often than not is delegate the job of coming up with legislation to interested private parties."); Stewart E. Sterk, *Rhetoric and Reality in Copyright Law*, 94 MICH. L. REV. 1197, 1244-48 (1996) (arguing that overprotection of "writings" is caused both by lobbying copyright industries and by the elite's desire to believe that success rewards actual merit).

⁴³⁹ William Patry assures the public that Senator Hatch (Chairman of the Senate Judiciary Committee which handles intellectual property matters) "genuinely wants to make good copyright policy," but is hampered by staff cuts. Patry, *supra* note 438, at 144.