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Op Ed — IMHBCO (In My Humble But Correct Opinion)

Database Legislation — Separating Myth From Fact

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If the library profession fails to mount an effective opposition to H.R. 3261 (the Database Information Collections Misappropriation Act, the text of which can be found at <http://www.theorator.com/bills108/hr3261.html>), it will be in part because, in typical fashion, we have managed to waste most of our energy getting all worked up over all the wrong things. There may be good reasons to oppose H.R. 3261, but they are not the reasons on which the library profession is focusing its practiced rage. Let's look at the three worst — and, unfortunately, most common — arguments against the database legislation.

Myth #1: H.R. 3261 allows database vendors to take information out of the public domain. This is one of the most popular concerns brought up by those who oppose H.R. 3261 — mainly, I think, because it makes a good sound bite. The idea of taking content out of the public domain is patently objectionable and sure to evoke an instant response in anyone with reasonable concerns about public access to information. The problem is, the idea that H.R. 3261 would actually reduce the amount of information in the public domain is rubbish. This legislation will have no effect whatsoever on the public domain. To test this proposition, read the proposed legislation and then try the following thought experiment: A ten-volume encyclopedia of American history, originally published in 1885, has passed into the public domain. I scan the text, put it into electronic format, and publish it as a searchable database, which is given all the protections of H.R. 3261. Has the amount of information in the public domain decreased? Tempting as it might be to think so, it actually has not. In fact, all of the information in those ten volumes is still just as available for public use as it was before I published my database. It may be true that you have to pay to use the searchable

database I created, and it is true that you would not be allowed to copy a “quantitatively substantial” portion of my database and republish it commercially as if it were your own work. But the information itself remains in the public domain. If you want to replicate the work that I did (by scanning the same ten volumes yourself and publishing their content as a competing database, even an identical one) you are perfectly free to do so. That is what “public domain” means. If my database had taken the content out of the public domain, you would not have the legal right to republish the same information.

Myth #2: H.R. 3261 allows database vendors to copyright facts. This proposition is more than just untrue; it's ridiculous, bordering on demagogic. Again, try a thought experiment: suppose I publish a database that includes the fact that Albany is the capital of New York. Under H.R. 3261, would I hold a copyright on that fact? Of course not. If I did, then I would have an exclusive right to publish the fact that Albany is the capital of New York. If H.R. 3261 does not give me such an exclusive right over the facts contained in my database, then it does not give me copyright over them. Facts have never been copyrightable under US law, and they would remain uncopyrightable under H.R. 3261. Interestingly, some of those who oppose H.R. 3261 actually do recognize this, and so use the phrase “copyright-like protection” instead of “copyright” (others are less careful). Either way, the argument makes no sense. For a protection to be, in any meaningful sense, “copyright-like,” it would have to give the database owner some exclusive rights over the facts themselves. H.R. 3261 clearly would not do so.

Myth #3: H.R. 3261 challenges traditional notions of fair use. This is often asserted in the library literature on database protection, but the assertion is rarely defended or explained. In

fact, Section 3 of H.R. 3261 explicitly says that the restriction only applies to the copying of “quantitatively substantial” parts of the protected database (which seems quite parallel to the traditional Substantiality test in the fair-use doctrine) and the bill as currently written includes broad and explicit exemptions for non-profits and educational organizations, exemptions far more liberal than those found in copyright law. H.R. 3261 would still permit the copying of quantitatively insubstantial portions of a protected database's content by commercial entities as well, in very much the same way that traditional fair use allows insubstantial and incidental copying from print resources, and the subsequent use of such portions would be governed by copyright law. The assertion that H.R. 3261 “challenges traditional notions of fair use,” while not as silly as the arguments that it would take information out of the public domain or that it would allow the copyrighting of facts, is a shaky one at best.

Why do we, as a profession, make arguments like these, arguments that are so patently wrong and so easy to refute? In part, I think, it's because of the general human tendency to avoid examining too closely and critically any proposition that supports one's partisan interests. If we tell each other often enough and loudly enough that H.R. 3261 represents a genuine threat to the public domain and the free flow of information in our society, and if we accuse enough dissenters of being enemies to the idea of free access to information, eventually most of us will stop thinking about the issue and just go along with the crowd. The problem then comes when people outside of our group take our arguments apart easily and publicly, making us look like fools. If we really want to be effective in defending and promoting the interests of our patrons, we need to take care in the arguments we make and the stances we assume. Sometimes arguments that sound right and make us feel good and seem to promote all the right causes are not, despite all their attractions, worth making. Employing such arguments may be therapeutic for us emotionally, and may occasionally have what seem like beneficial effects in the short run. In the long run, they will come back to haunt us.