September 5, 2003

The Honorable W. J. (Billy) Tauzin
U.S. House of Representatives
2183 Rayburn HOB
Washington, DC 20515-1803

Re: Database Bill Discussion Draft

Dear Chairman Tauzin:

The undersigned consumer, privacy and public-interest organizations write to you in response to the recent circulation of a "discussion draft" of a bill entitled the "Database and Collections of Information Misappropriation Act." While we recognize and applaud the industry and investment of companies that specialize in assembling information in useful forms and then making it commercially available to the public, we believe this proposal is deeply flawed and that it further strikes at the very heart of the public interest in an informed democracy.

The question of whether to create a new type of intellectual-property protection for collections of information has been before Congress a number of times, and on every previous occasion, a broad coalition of industry, public-interest and academic critics, as well as scientists and researchers and many other stakeholders, have pointed out flaws with such a proposal — not merely drafting flaws of the sort that might be fixed in negotiation or markup, but fundamental philosophical problems that lie at the heart of our democracy. This new "discussion draft" is no exception.

We live in a nation in which any individual can become educated, drawing upon publicly available information, to fulfill his or her fullest potential as a participant in democracy. The barriers to achieving that goal should be minimal. Information that falls outside the already-established categories of intellectual property is a shared resource, a public good, and one that is enriched rather than diminished by policies that increase rather than decrease everyone's access to it.

This approach to information, and its importance to the opportunities inherent in democracy, informed citizenship, and self-education stand in fundamental opposition to proposals like the "discussion draft" that create new intellectual property schemes to lock information up and ensure that every individual pays a toll for every fact he or she learns. Virtually all creative works — works that are protected for limited terms under copyright law — draw upon publicly available information of the sort that is widely available in libraries, in reference documents, and, increasingly, on the Internet itself. Indeed, this is an aspect of the Internet revolution that our policymakers should celebrate — whole new generations of Americans "look it up on 'the Net'" when they want to know more about any given topic.

The core principal of the Copyright Act is that mere information and ideas are not protectable. Further, under *Feist v. Rural Telephone*, only the *creative* expression and/or assembly of information is protectable. Indeed, neither the Framers of the Constitution, nor the Supreme Court in interpreting the Copyright Clause, has ever taken so broad a view of Congress' powers as to suggest that Congress can put a price tag, not just on copyrighted or patented works, but on every fact worth knowing. Thus, the mere

assembly or aggregation of data, when not compiled or assembled in a creative matter, is outside the scope of Congress to protect under its copyright power as that power has long been understood.

Certainly we recognize that the companies supporting database protection offer the public a valuable service in the ways that they organize data and make it available commercially. But it is precisely because the services that they offer -- professional editing, organizing, and supervision of new information on a minute-by-minute basis -- are so valuable that the perception of any general threat to these enterprises is at best, overblown. There will always be a significant role for these commercial services, even when researchers lawfully extract public information that has been assembled into these companies' commercial databases and re-use it elsewhere in creative or scholarly or scientific work.

Consider one obvious example: when a Western novelist researches in the Encyclopedia Britannica the history of the state of Utah for a new book, nothing in his or her publication of that book will diminish the value of Encyclopedia Britannica in the slightest, so long as the novelist did not infringe on the copyrighted particular expression of information in the Britannica article. And in the rare case in which some entity contracts with a database company and violates its contract with the provider (for example by substantially duplicating the database services and offering it in competition with the original provider) such inequities already are addressed by long-established principles of contract law, without need to resort to a special category of intellectual-property protection for mere collections of facts.

We recognize that the authors of the discussion draft have made a strong effort to address criticisms of earlier versions of this proposal, but we remain convinced the central concept of broadening database protection is a bad one. We believe a central democratic interest principle is at stake. Our leaders and policymakers should strive to make it easier and less costly — not more difficult and more costly — for citizens to have access to public information. This should be the goal even when that information has been assembled or reassembled by a small number of commercial enterprises.

Regretfully, we must strongly oppose the discussion draft, not only for the reasons outlined above, but also for the detailed criticisms offered in separate letters you will receive from such organizations as the American Library Association and the American Civil Liberties Union. The Constitutional, privacy-related, and other issues identified in these letters are considerable and deserve as much concern as the ones we have discussed here. We would welcome the opportunity to further discuss the many issues raised by this "discussion draft," including whether its proponents have identified any specific problem that has not already been addressed by existing law. As always we stand ready to work with Congress as we go forward in maintaining the best balance between two vital interests: (1) intellectual property protection and (2) every citizen's Constitutionally guaranteed freedoms of speech and inquiry.

Respectfully submitted,

Consumers Union
Electronic Frontier Foundation
Electronic Privacy Information Center
Media Access Project
Public Knowledge