Will Corporations Own Our Identities?

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No one should be able to own facts about other people. Our names and numbers, and also the laws we must obey, should not be property that can be owned by corporations and policed by federal courts. But special interests, such as the Software and Information Industry Association, are seeking new powers to own facts about us and about information we need. After quietly shopping a bill to Members of Congress for several weeks, the Database and Collections of Information Misappropriation Act was finally introduced last week as H.R. 3261.

The Constitution authorizes Congress to create copyrights. But your name, address and telephone number are facts that cannot be copyrighted, as the Supreme Court said when it ruled in 1991 that no one can copyright the telephone book.

The Constitution authorizes copyright protection for "authors." The Court ruled in Feist v. Rural Tel. Serv. Co. that a collection of facts lacks sufficient creativity to constitute authorship.

H.R. 3261 doesn't use the word copyright, but it would create a new federal property right in online and offline databases (collections of information), and give the federal courts power to police the use of information in databases. Granting large U.S. and foreign corporations the power to own personal facts about individuals, and prevent others from using those facts, would be the most lucrative handout in years.

H.R. 3261 would allow federal courts to impose stiff penalties if someone uses information from a database that a corporation claims to own. The exceptions to this rule are vague and subject to contrary interpretations, leaving users liable to a lawsuit in which it's up to a federal judge to decide what is "reasonable."

Over the past decade, without federal legislation or judicial supervision, databases have grown rapidly in size and number, and today there are giant databases containing our travel plans, our medical records, our telephone calls, our credit card usage, and even the websites we visit. This Collections of Information bill would chill productive activity because few users of data can afford taking a chance on how a court might rule.

Prominent groups from all across the political spectrum vigorously oppose this new bill. The U.S. Chamber of Commerce says that the legislation could even prevent people from using data found in books checked out of libraries.

Peter Veeck felt the brunt of the corporate police. When he posted on his website the municipal building safety codes that all are required to obey, he was sued by a company that claimed to own the building codes.

After long and costly litigation, in 2002 Veeck won the case called Veeck v. SBCCI (PDF file). Judge Edith Jones wrote for the Fifth Circuit en banc: "Citizens may reproduce copies of the law for many purposes, not only to guide their actions but to influence future legislation, educate their neighborhood association, or simply to amuse."

On the last day of the U.S. Supreme Court term in June, the Court let Veeck's victory stand. During the litigation to force Veeck to remove building safety codes from his website, a hundred people perished in the Rhode Island nightclub fire attributed to ignorance about building safety codes.

The special interests still want Congress to allow corporations to exercise exclusive ownership over collections of facts. They failed to pass a similar bill called the Collections of Information Anti-Piracy bill in 1998 and are now trying again with H.R. 3261 in order to get from Congress what they could not win in the courts.

The real gold may lie in the medical databases that are still largely secret. The next time you want an itemization of why a brief hospital stay costs you far more than the most luxurious hotel, remember that medical procedure codes and reimbursement rates are not freely published.

The American Medical Association (AMA) claims to own these federally required codes, reaping tens of millions of dollars in royalty fees from them. You can go on the internet and find the price of almost anything from a plane ticket to an automobile, but the AMA will sue anyone who dares to post the billing codes and rates for simple medical procedures.

Giving new powers to the federal courts to police the use and exchange of information collected in databases would have a negative effect on our already shaky economy. Creating federally mandated ownership over data is not the way to go if we still believe in free enterprise.

Nor is H.R. 3261 the way to go if we believe that the federal government should exercise only enumerated powers. The Constitution does not authorize Congress to create any property rights beyond those specified in the Copyright Clause.