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

July 26, 1999

The Honorable W. J. Tauzin
Chairman, Subcommittee on Telecommunications,
Trade and Consumer Protection
Committee on Commerce
House of Representatives
Washington, D.C. 20515-6117

Dear Mr. Chairman:

Thank you for giving me an opportunity to elaborate upon the views expressed in the Administration's June 15th statement regarding H.R. 1858, the "Consumer and Investor Access to Information Act of 1999." We are pleased to address some additional issues raised at the hearing.

One topic raised at the hearing was the issue of online service provider (OSP) liability. Whatever the final form of a database protection law's "basic prohibition," there may be situations in which prohibited dissemination of a database takes place over the Internet, but the OSP should not be held liable. The issue of OSP exposure to such potential liability was addressed in the Digital Millennium Copyright Act (DMCA), Public Law 105-304, and we believe that the DMCA provides a sound template for the appropriate safeguards for OSPs in any database protection legislation.

At the same time, it should be remembered OSP liability in the DMCA was addressed as part of a legislative package that gave private citizens significant new means of protecting their investments in copyrighted works. The present framework of H.R. 1858 does not provide private citizens with any means to protect their investment in database products beyond lobbying the Federal Trade Commission to act on their behalf, or relying on the great uncertainty of an implicit private cause of action.

As you know, the Administration believes that meaningful database protection must include an explicit private cause of action and that such a cause of action should operate simply, transparently, and predictably -- particularly for users. We remain concerned that H.R. 1858's open-ended definition of a "discrete section" of a database could create liability for extractions of very small subsets of large databases; we believe that a "substantial" taking test would better allow courts to develop reasonable standards for protection of investments in databases. We also believe that the "diminution of incentive" requirement built into section 101(5)(B) of the bill unduly complicates the basic prohibition because a competitor or database user would have no way to judge in advance whether her acts would "threaten" recovery of a "return on investment"; also, that standard does not take into account the impact of multiple prohibited acts. We would

be happy to work with the Subcommittee to refine these elements of the bill and other elements discussed in my testimony of June 15th, including sole source databases, the definition of government data, and other access issues.

At the hearing, Congressman Boucher also raised the question whether it would be best for the Congress to allow state law to develop in this area. We acknowledge that there is already some limited case law at the state level involving either the misappropriation of information or analogous unfair business practices. But there are, however, several reasons to think that development of a Federal cause of action in this area would be preferable -- for both producers and users -- to state law.

First, there is already some divergence in state law on misappropriation. For example, New Jersey and New York appear to require harm from direct commercial competition to support a cause of action for "misappropriation," while California and Illinois do not. We agree with recent testimony before the Subcommittee on Courts and Intellectual Property, the House Committee on the Judiciary, that both producers and users of databases need national standards when marketing their products nationally. Second, Federal law is already involved in this area in the sense that section 301 of the Copyright Act may be interpreted by some courts as preempting certain state laws on the misappropriation of databases. The shadow cast by 17 U.S.C. 301 may create further discrepancies and complications in the development of state laws on misappropriation. Finally, Internet delivery of databases creates the need for international standards for protection of and access to data. Federal law in the United States is needed to permit the United States to provide leadership in the formulation of such international standards..

We have been advised by the Office of Management and Budget that there is no objection to the submission of this letter to the Congress from the standpoint of the Administration's program.

Sincerely,

Andrew J. Pincus

cc: The Honorable Edward J. Markey
The Honorable Rick Boucher