June 23, 2003

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United States Copyright Office
101 Independence Avenue, S.E.
Washington, D.C. 20559-6000

VIA E-MAIL

Re: RM-2002-4: Copyright Office Request for Supplemental Response

Dear Mr. Carson:

Reed Elsevier Inc. (REI) appreciates the opportunity to respond to the hefty submission offered by Mr. Montoro at the Copyright Office hearing on 2 May. Having now had a chance to review his written comments, REI believes that their length is inversely proportional to their probative weight. *None* of Mr. Montoro's written submissions or oral remarks remotely concern technological measures that have prevented access to electronic databases—online or otherwise—and therefore no exemption should issue affecting such a "class" of works.[1] His statement deals entirely with dongles, which the Copyright Office has described as "hardware locks attached to a computer that interact with software programs to prevent unauthorized access to that software."[2]

Our position therefore remains now as it was at the beginning of this proceeding: no exemption should issue that affects databases of any stripe. Given the characteristics of the "evidence" that Mr. Montoro has offered, no exemption should issue at all.[3] Indeed, Mr. Montoro has built his entire argument for the reissuance of the prior exemption on a series of flawed assumptions.

First, the existence of technical support for a particular product or service does not create a record for an exemption. Of the 81 pages following Mr. Montoro's prepared remarks, over half consist of the technical support pages from existing software providers offering differing solutions to performance issues to anyone who needs them.[4] LexisNexis, for example, routinely provides password and technical help to its customers

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[1] REI questions whether a "database" constitutes a class of works, as it cuts across at least two categories: literary works and compilations. As such, exemptions affecting such a broad sweep of copyrighted materials probably lie beyond the Librarian's authority. That said, we believe that the 2000 Final rule drew the proper line with respect to "classes of users," and reject recent suggestions by some commentators that a "class of user" based exemption may permissibly issue.

[2] 2000 Final Rule, 65 Fed. Reg. at 64565.

[3] Only Mr. Montoro's prepared statement contained page numbers. As cited herein, his written remarks consist of pages 1-11, and the attachments pages 12-93.

[4] *See* Montoro Submission, at 19-34; 49-77. The remaining pages consist of irrelevant material from the INS, financial statements from Rainbow Technologies and Aladdin Software (*id.* at 37-48), and sales inquiries from prospective customers (79-93).

if they have problems either with access to a database or other software. This practice is common in both the database industry and—if Mr. Montoro's attachments are to be believed—in the software industry as well. Under Mr. Montoro's analysis, the mere existence of an extensive support network is sufficient both to justify unauthorized access to intellectual property and perpetually warrant his desired exemption. To put it another way, "no good deed shall go unpunished." That position is simply wrong. The pages attached to Mr. Montoro's submission in fact prove the opposite: that copyright owners make extensive efforts to ensure that their products continue to function properly, and that noninfringing uses are not prevented by malfunction, damage or obsolescence.[5] Contrary to the Copyright Office's 2000 Final Rule, the market has in fact moved to address these issues.[6] Mr. Montoro's assertion that "the event itself [*e.g.*, of malfunction] is too much"[7] is belied both by the conduct of copyright owners in the marketplace and the careful balancing required by the statute and the NOI, especially respecting the nature and extent of evidence needed to justify an exemption.

Second, in addition to failing to support a new exemption, Mr. Montoro's submission highlights the overbreadth of the old exemption covering "malfunction, damage or obsolescence." For example, the last thirteen pages of the submission consist of sales inquiries received by his company in the last three years. That does not mean, however, that these access controls have done anything other than function as intended.[8] As many of the preceeding support documents show, the resolution of performance issues often involves much less intrusive solutions (such as driver updates or contact with the software provider) than circumvention of the access control.[9] In fairness, some of the submissions from prospective customers mention truly "obsolete" external devices—where the copyright owner has gone out of business or has otherwise fully discontinued all support for any version of the computer program. This evidence, however, does not support an exemption of the breadth proposed, and the few isolated instances described in the sales inquiries remain at best anecdotal.

Third, conduct *permitted* by the DMCA cannot constitute "adverse effects" in determining whether an exemption should issue. In both his oral remarks and his written statement, Mr. Montoro has made much rhetorical hay out of the fact that his company had assisted the Immigration and Naturalization Service with certain issues relating to aging document management systems.[10] That activity is, of course, already carved out of

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[5] Indeed, as one page put it, the failure of a particular measure to function as desired is "usually a setup problem"—in other words, user error. *See id.* at 75.

[6] *Compare*, *e.g.*, 2000 Final Rule, at 64565 ("Nor has evidence been presented that the marketplace is likely to correct this problem in the next three years.") *with* Montoro Statement at 30-32 (Rainbow's troubleshooting guide); 52-55 (software provider's troubleshooting tips in the event of malfunction).

[7] Montoro Statement at 6.

[8] In this respect, we share the concerns of the Joint Reply Commenters expressed on 14 May 2003. *See* 14 May 2003 Transcript, at 97-102. *See also, e.g.*, Montoro Statement at 80 (suggesting only that the user "wants to get rid of the damn thing," not that the control had failed for any reason); *id*. at 33, 65 (describing how to handle dongle performance issues by updating the device driver).

[9] *See, e.g., id.* at 33 (containing update of dongle driver); 50 (describing potential device conflicts).

[10] *See*, *e.g.*, Montoro Statement at 2-3. These devices, in any event, were not malfunctioning, but truly "obsolete"—"their manufacturers were no longer in business and there was no way to replace these devices that were starting to act up." *Id*. at 2.

the DMCA in section 1201(e); Congress already thought of the concern he raised and has addressed it. These anecdotes are therefore irrelevant to the Librarian's determination.[11]

Fourth, the fact that an access control company (such as Rainbow or Aladdin) has profited financially does not prove either that copyright owners have suffered no harm or, for that matter, that their access controls have malfunctioned. Mr. Montoro has offered several press releases and excerpts of financial statements from some access control providers.[12] The documents say nothing about the dongle's failure rate, or the number of copyright owners who do not support the devices. What these increased revenues suggest is an increased demand for devices that prevent infringement and very little else. Moreover, very few software or database proprietors are in a position to know whether access controls have been circumvented pursuant to the exemption, particularly if the uses were non-infringing or carefully concealed.[13]

Taken as a whole, Mr. Montoro's comments establish, at most (1) that some software companies buy dongles; (2) that some software companies fail; (3) that some dongles fail; and (4) that in a handful of instances, all three events happen simultaneously.[14] Those facts do not support an exemption covering "databases" of any kind, much less "malfunction" or "damage."[15] If a sustainable record exists at all, it exists only for obsolescence, and only for those works protected by external hardware locks.

Finally, we note that during the 2 May hearing, some questions were raised over whether 1201(a)(1)(D) would permit the insertion of "threshold conditions" or other conduct-based elements into a class of works, such as whether the end use is ultimately infringing, the use is otherwise lawful or the vendor has been contacted to correct the problem. Mr. Montoro seems to think that promulgation of conduct-based elements into a class of works lies beyond the Librarian's authority.[16] REI takes no position on this particular point. We suggest, however, that if in the Copyright Office's opinion the Librarian does *not* have the authority to insert threshold conditions such as those

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[11] Similarly, Mr. Montoro points to Spectrum Software's relationship with Stratus Technologies as an example of the need for an exemption. Montoro Statement at 6. However, Spectrum Software provided support to that company "*with the full knowledge and approval of the software vendor*." *Id.* (emphasis added). The DMCA does not prevent the *authorized* circumvention of a technological measure. Indeed, the fact that software vendors would give permission undercuts the need for an exemption in the first instance.

[12] *See* Montoro Statement at 37-46.

[13] *Cf.* 11 April Transcript at 28-29 (describing success at decrypting N2H2's filtering database, but refusing to give particulars on how it was done). In contrast, those who *have* taken advantage of the old exemption—particularly for non-infringing uses—would be in an excellent position to give the Copyright Office the "compelling case" the NOI describes. NOI, 67 Fed. Reg at 63579. That evidence is missing.

[14] The fact that a particular type of media might perish at some undetermined time has nothing whatsoever to do with the failure of access control devices in general or a "class of works." *See, e.g.*, Montoro Statement at 46, 78-79 (describing, respectively, the optional installation of floppy drives on new PCs as well as the degradation of floppy disks as a media).

[15] The lone instance of "damage" involves a dongle damaged in a move. *See* Montoro Statement at 89.

[16] *See* Montoro Statement at 4. We also note that, in the event the statute is ambiguous, its interpretation receives deference. *See United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001).

suggested by REI, the Software & Information Industry Association, or the Joint Reply Commenters, than the record for an exemption cannot exist in this proceeding. A few isolated instances of hardware failure do not warrant a free pass to "hack at will" for any purpose, lawful or otherwise.

Thank you again for the opportunity to present our views.

Respectfully Submitted,

/s/

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on behalf of Reed Elsevier Inc.