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March 28, 2000

David O. Carson, General Counsel
Copyright GC/I&R
P.O. Box 70400, Southwest Station
Washington, DC 20024

Dear Mr. Carson:

On behalf of the National Federation of Abstracting & Information Services (NFAIS), I am writing in reply to the formal comments that were submitted in response to the Copyright Office's request for input on possible exemptions to the prohibition on circumvention of copyright protection systems for access control technologies.[1] NFAIS members represent approximately 60 of the world's leading producers of databases and information services in the sciences, engineering, social sciences, business, and the arts and humanities. NFAIS is aware that the Librarian of Congress must make a recommendation by October 28, 2000 on any such exemption(s). In general, NFAIS members would applaud your efforts to develop a recommendation that will maintain "an appropriate balance between the rights of copyright owners and the interests of users."[2] However, having read the posted comments, it would seem *premature* that *any* class of work should be exempted from the prohibition, based on the following concerns:

1) Electronic databases have *very little protection* under the current copyright law; further exemptions will only dilute what scant protection is now afforded by the combination of contract law and technology.

2) The three controversial issues evolving from the *Digital Millennium Copyright Act* ("DMCA")— the use of electronic data in distance learning, the possible negation of license agreements, and the circumvention of copyright protection technology—are inseparable from the perspective of the protection of copyrightable databases *and the library community itself has widely diverse and inconsistent opinions on these issues.*

[1] *Federal Register*, Vol. 65, No. 28, Thursday, February 10, 2000, Proposed Rules pp. 6573-6574.
[2] *Federal Register*, Vol. 63, No. 246, Wednesday, Decembers 23, 1998, Notices, p. 71167.

Therefore, any recommendation on one issue *must* be considered within the context of all three and the ultimate implications on the remaining, thin protection for databases under U.S. copyright law.

3) The majority of the general population, *including some members of the academic community*, have little knowledge and understanding of the information usage behavior that is currently permissible under copyright law and traditional fair use exemptions. Sanctioned circumvention of data protection technologies at this time could cause significant problems and impede the release of new information in digital format.

4) The requirement to submit recommendations to Congress by October 28, 2000 does not allow sufficient time for discussion and resolution of the many significant issues that have evolved from the *Digital Millennium Copyright Act*—issues that *must* be resolved before any exemptions can be put forth *if* the aforementioned goal of "balanced needs" is to be satisfactorily reached.

The following further clarifies these concerns.

Current Database Protection Environment

Owners of copyrightable databases have been aggressively seeking legislative protection for their digital content since 1996, when the negative consequences of the 1991 Supreme Court decision in *Feist* began to impact the ability of U.S. database owners to offer products and services without fear of wholesale taking of their works. As the Office is well aware, these efforts have thus far come to naught, in part because of the continued criticism and opposition of the library and academic user communities. Indeed, even as Congress was preparing the final text of the *Digital Millennium Copyright Act* the library, academic, and scientific communities opposed inclusion of database protection legislation passed twice by the House of Representatives. They argued that such new statutory clarifications of how otherwise noncopyrightable databases should be protected was not needed, because: 1) the combination of legal (i.e., limited copyright), contractual, and *technological protection* available today is adequate, asserting ". . . that technological protection has the potential to be extremely effective, easier and more economical to rely on than legal rights, and could make additional legal protection unnecessary as a practical matter"[3] and 2) it is critical to proceed with great caution in this area given the risk of unintended negative consequences.

NFAIS members, other than government agencies whose materials are precluded from copyright protection under the Copyright Act, have thus been left with relying solely on the combination of legal, contractual, and technological protection as means of securing their copyrightable databases, partly as a direct result of actions taken by the academic, library, and scientific communities.

Digital Millennium Copyright Act: Critical Issues Impacting Database Protection

The circumvention of technological protection of copyrightable databases is one of three interrelated issues that have emerged from passage of the DMCA. The remaining issues are both related to issues involving distance learning, namely the use of these materials for that purpose and the possible negation of license agreements. This reply will focus on the library community's diverse opinions on technological protection.

[3] *U.S. Copyright Office Report on Legal Protection for Databases,* August 1997

Library Acceptance of Technological Protection

During the Copyright Office hearings held in 1999 on the use of digital information in distance learning, the library community clearly and repeatedly stated that the use of digital content is increasing and that such content is used not only for traditional classroom instruction, but also for increasingly widespread practice of distance education. A few of the written comments submitted during that proceeding make the point clearly:

- "Virtually every university in the United States is involved in some form of distance education, as is almost every community college district. In addition, universities are relying more heavily on digital information to enhance the traditional classroom environment. . . . Therefore we are likely to see an increase in the use of digital and Internet-based material access for distance and traditional education."[4]

- Members of that same community *recognized the need for technological protection of digital content to ensure that owners' rights are protected both on and off campus.* The Indiana Commission for Higher Education presented a Statement of Principles to be followed in using digital content in distance learning. These principles include: "Promoting and undertaking the secure use of copyrighted works in our community of scholars and students by exploring and implementing reasonable means, both practical and technological, that will allow access to materials by students enrolled in specific courses, and restrict unauthorized access."[5]

- The University of Utah stated that "Encryption techniques to limit access, reproduction and retention of those protected works seems to be mandatory and should be considered as a necessary protection to encourage artists and authors to remain involved in instructional design."[6]

- And the College Art Association (CAA) also stated " . . . CAA supports implementation of means to limit access to on-line digital course materials to *bona fide* students and other qualified members of the educational institution's community. For these purposes we support use of passwords or other security systems to prevent unrestricted access to copyrighted items. Potentially, we would support other means to inhibit unlawful uses such as watermarking and canceling images."[7]

The majority of participants in the 1999 hearings agreed that technological protection is *essential* to the security of the rights of digital content owners! In fact one educator, in requesting broad exemptions from the exclusive rights of copyright owners, said: "The exemption (for the use of digital information in distance learning) should ***mandate*** the use of technological measures to protect against infringement or improper use of copyrighted works."[8]

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[4] *Promotion of Distance Education Through Digital Technologies*, submitted by the University of Texas System, http://lcweb.loc.gov/copyright/disted/comments.html

[5] *Copyright, Distance Education, and New Technologies: Meeting the Needs of Indiana Educators and Copyright Owners in a Digital Society*, submitted by the Indiana Commission for Higher Education and the Indiana Partnership for Statewide Education, http://lcweb.loc.gov/copyright/disted/comments.html

[6] *Online Distance Education Study and recommendations to the Registrar of Copyrights from the Utah Education Network*, Eccles Broadcast Center, University of Utah, 101 Wasatch Drive, Salt lake City, UT 84112, http://www.uen.org

[7] *Promotion of Distance Education Through Digital Technologies: Comments of the College Art Association*, http://lcweb.loc.gov/copyright/disted/comments.html

[8] *Comments of Education Management Corporation Regarding the Promotion of Distance Education Through Digital Technologies*, Robert B. Knutson, Chairman and CEO, http://lcweb.loc.gov/copyright/disted/comments.html

Most NFAIS Members would applaud the library and academic communities for their forthrightness and understanding in reporting last year on the need for technological protection and the significant current limitations in security with regard to the network distribution of copyrighted electronic material that contribute to the need for such protections.

However, members of the same community are now giving a quite different response when asked if certain classes of works should be exempt from technological protection under the current proceeding.

Library Rejection of Technological Protection

When discussing broad exemptions for the use of digital content in distance learning in 1999, the library community was accepting of access and usage controls as can be seen throughout the written comments on the subject. This year, when faced with the possibility of obtaining the right to *circumvent* such controls, however, the library community is now seeking broad exemptions to do so, *primarily* on the premise that such controls will: 1) limit fair access, 2) result in "pay-per-view" pricing, 3) allow data owners to dictate usage, and 4) prevent the ability to archive.[9]

The library community also makes other arguments, including purported concerns about privacy and the first sale doctrine. I will not comment on the concerns about protecting patron's privacy, other than to say that this is an argument that lies outside the purview of copyright law and only confuses the debate that should be the focal point of this proceeding. Similarly, the library community's confusing rhetoric regarding the "first sale doctrine" is inappropriate to raise in this context. As the Copyright Office is well aware, "first sale" applies only when a copy of a work is purchased and retained by the user, a situation rarely encountered in the world of *licensed* digital information.

With regard to the other points, the reasons offered do *not* provide a sufficient basis to circumvent the limited technological database protection currently available for the following reasons:

1) Technological protection does not limit *fair* access; rather, fair access *is* made available to *all* those who are *authorized* to use the information

2) In the highly competitive world of electronic information, pricing policies are dictated by the *market*, not technology.

3) Members of the library community have stated that the license agreements traditionally used for the access and usage of digital content *have facilitated flexibility* in agreed-upon product usage based upon a given client's needs.[10]

4) Technological protection of data is only one of many issues related to the very complex problem facing further development of the digital information economy with regard to archiving, and it is one of the few easily resolvable ones.

Many of the examples proffered by the library community as "problems" resulting from technological protection of digital content are related to off-site usage, such as distance learning, to usage limits that a library chose to accept in its license negotiation, the level of service it agreed to pay for, and other factors within its control, as noted in the following two quotes:

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[9] *Exemption to Prohibition on Circumvention of Copyright Protection Systems For Access Control Technologies, Comments of the Library Associations*, Comment # 162, http://lcweb.loc.gov/copyright/1201/comments

[10] Okerson, A., "Copyright or Contract? Licensing Emerges in Making the Online Deal," *Library Journal*, Volume 122, Number 14, p. 136, 1997.

- "Teachers and students engaging in distance learning activities are actively blocked from accessing works that are purchased by the library, but that are otherwise not accessible outside of the library."[11]

Many producers of databases do in fact permit access beyond the walls of a library and are willing to negotiate a license to make such access possible. If libraries are not able to support distance learning for this reason, the problem is rooted in finances, not technology.

- "We do, however, subscribe, by necessity to several online databases that limit the number of users. We cannot afford to increase those numbers in some cases, and consequently we put up with waiting for access until the resource is freed up."[12]

The same problems existed in the print environment: How much of a main library's holdings can a satellite campus afford to duplicate? What is the affordable number of subscriptions to any one journal that will meet the demand for that title? Such issues are budgetary, and completely unrelated to the technological protection of data and fair use.

These are only two examples. Others could be cited. In general, those who are seeking the right to circumvent database protection technology at this time have *not* provided sufficient evidence that such circumvention is warranted.

However, as noted earlier, that same community *has* made it *very* clear that the use of copyrighted digital information in education, both on campus and off, is *widespread* and has *necessitated* the protection of such data. For example, consider the *worldwide* programs offered by the University of Maryland and highlighted in their testimony during the distance learning inquiry in 1999: "At present, more than 6,200 UMC students are enrolled in 150 online courses and are able to fulfill all of the requirements for seven different degrees online, . . . and for more than 50 years, UMUC has provided educational opportunities to United States armed services personnel in Europe and Asia under a contract with the Department of Defense."[13] And consider the lack of security in some such programs: "Video Cablecast courses: anyone may view them. The only restrictions are that a person must live within the cable viewing area and subscribe to the cable."[14]

Given the fact that UMC and other, similar institutions are seeking to reach a global user community, it is worth noting that that virtually every individual European law adopted in accordance with the European Union directive on the legal protection of databases has included technological protections commensurate with the terms of the WIPO copyright treaty. Disallowing copyrightable databases that same standard in the United States will only further weaken the potential for American database producers to compete effectively in the world marketplace, placing those businesses and their workers at risk. This is particularly important in an era of worldwide distribution of material developed and marketed for distance learning

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[11] *Exemption to Prohibition on Circumvention of Copyright Protection Systems For Access Control Technologies, Comments of the Library Associations*, Comment # 162, p. 19, http://lcweb.loc.gov/copyright/1201/comments

[12] *Exemption to Prohibition on Circumvention of Copyright Protection Systems For Access Control Technologies, Comments of the Library Associations*, Comment # 162, p. 22, http://lcweb.loc.gov/copyright/1201/comments

[13] *Promotion of Distance Education Through Digital Technologies*, University of Maryland University College, http://lcweb.loc.gov/copyright/disted/comments.html

[14] *Northern Virginia Community College Comments: Distance Education Questions*, prepared by Merrily Stover, Ph.D., Director, Extended learning Institute, Northern Virginia Community College, 833 Little River Turnpike, Annandale, VA 22003-3796, http://lcweb.loc.gov/copyright/disted/comments.html

In the absence of strong database protection legislation, the security provided to data owners by technological protection is essential—as noted even by members of the academic, library, and scientific communities when seeking exemptions for the use of digital information in distance learning last year. Any circumvention of such technologies now will leave database owners extremely vulnerable in today's environment in which digital content is broadly distributed and accessed.

Current General Understanding of Copyright Law and Fair Use

It is apparent upon reading all 235 comments posted on the issue of exemptions to the anti-circumvention provisions in the *Digital Millennium Copyright Act* (DMCA) that the general public, *including some members of the academic, library, and scientific communities*, are unaware of the evolution of the Act, the issues surrounding the database protection debate, and what constitutes fair use, under copyright law, of copyrighted materials. Indeed, it is ironic that the submission made on behalf of the major library associations urges the Librarian to preempt further judicial interpretation and clarification of the DMCA's provisions on technological protections, given that those very courts are responsible for developing many of the concepts regarding fair use that are now enshrined in U.S. copyright law.

Almost all of the comments from individuals with regard to the DMCA focus solely on the highly controversial and highly visible litigation with regard to the posting of software (DeCSS) that allows DVDs to be viewed on unauthorized players.[15] Many of the comments indicate a true lack of understanding for the current laws that protect intellectual property, a disrespect for intellectual property ownership in general and, even, a disdain for content producers, who are often typified as being villainous.

Some of the more disconcerting comments are as follows:

- "Circumvention of some of these [expletive deleted] access controls give me the freedom to live my daily life without territorial boundaries. . . . I don't make enough money to view all this stuff without circumvention . . . Big business will claim that this is going to cost them hundreds of millions. Out of billions, that's not too much."[16]

- "One has to accept that the newly-formed global community will follow its own rules, regardless of the laws of individual countries. . . . Digital media will always be copied. . . . I believe that this simple fact has yet to be acknowledged by content producers."[17]

- "I resent any abridging of my rights to do whatever I please with any multimedia or electronic content I have purchased."[18]

- "It is us, the generation x/y kids who are shaping the new world. Maybe it's time that the government, the career politicians, the people's who's pockets are consistently padded by big business' special interest lawyers step back, and look at how they are impeding progress."[19]

- "I'm going to fight for my own freedom, and that of my fellow " hackers. . . . Our goal is to live in a truly free society, where the exchange of information is not illegal."[20]

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[15] Benson, C. N., *Comment # 198*, http://lcweb.loc.gov/copyright/1201/comments
[16] Chan, C. S., *Comment # 178*, http://lcweb.loc.gov/copyright/1201/comments
[17] Roberts, N., *Comment # 9*, http://lcweb.loc.gov/copyright/1201/comments
[18] Ball, W., *Comment # 21*, http://lcweb.loc.gov/copyright/1201/comments
[19] Halligan, M. T., Comments #81/82, http://lcweb.loc.gov/copyright/1201/comments
[20] O'Brien, J. W., *Comment # 99*, http://lcweb.loc.gov/copyright/1201/comments

- "The nature of digital is all or none. Frankly, today it is a fiction that a copyright purchaser does not redistribute copyrighted material."[21]

These are only a few examples of some of the opinions that have been officially lodged with the Copyright Office by the general public, but alarmingly, they represent the tenor of many of the public's statements.

Many NFAIS members are *very* concerned about the perception among people *of all ages* that information is free, that if material is electronic it can (and should) be duplicated and redistributed at will and without permission, and that the digital world should not be governed by longstanding concepts of law, such as copyright, which have proven quite adaptable to new technologies. Many in the general public apparently believe that "fair use" equates to the freedom to use all information products without restriction, even though that is not what "fair use" as defined by the Copyright Act means. Also troubling is the misunderstanding of a fundamental principle of copyright law, including the DMCA, namely that reasonable protection offers incentives to produce and distribute even more materials

Perhaps the most disconcerting comment filed with the Copyright Office on the topic at hand is from representatives of today's educators who believe (and therefore undoubtedly teach) that works such as scholarly journals, databases, and other reference works are valuable for the information that they contain (facts), and since the individual facts themselves are not copyrightable, it is only right that the full works should not be allowed to be protected by access control technologies. To quote their statement: "Works such as scholarly journals, databases, maps, and newspapers are primarily valuable for the information that they contain, information that is not protected by copyright under Section 102(b) of the Copyright Act ("Thin Copyright Works"). Access control technologies applied to such works will protect primarily material in the public domain, not copyrightable authorship."[22]

It is quite surprising to learn that the academic community is now equating scholarly journals—which contain a good deal of creative expression beyond whatever factual material the authors' comments and conclusions may be based—should now be deemed noncopyrightable.

It is dismaying to hear those, including educators, who in the past have said that database legislation is *not* needed because databases are adequately protected by the existing copyright law, now say that because such works are "thinly protected" under that same law, these works should automatically *not* be granted the same protections against circumvention provided other works under the *Digital Millennium Copyright Act.*

Those who maintain that works based on facts should receive no protection might as well argue that buildings—being comprised of nothing other than atomic particles—should be free for occupancy by all who may wish to inhabit them.

In today's copyright environment the protection of copyrightable databases is limited—a belief that has been reinforced by comments submitted during this rulemaking process. Most NFAIS Members rely on protection through technology and through license agreements. These methods were cited in responses by the academic, library, and scientific communities as being a reasonable substitute for new statutory protection for databases, when they opposed such legislation in the past. Without such a federal, legal framework, how could we regard as justifiable exemptions from the provisions of the DMCA that would further undermine the limited protections that remain for database producers under U.S. copyright law, particularly against the background of a society in which the knowledge, understanding, and acceptance of intellectual property rights appears to be limited?

[21] Pinc, K. O., *Comment # 201*, http://lcweb.loc.gov/copyright/1201/comments
[22] Association of American Universities, *Comment # 161*, http://lcweb.loc.gov/copyright/1201/comments

Additional Time Required for Discussion

During the final debates surrounding passage of the DMCA less that two years ago, the academic, scientific, and library communities stated that it was critical to proceed with great caution in enacting database protection legislation, for fear that unforeseen, negative consequences could result. It is now clear that this same level of caution needs to be applied to the creation of *any* exemptions to the prohibition on circumvention of copyright protection systems for access control technologies, particularly to the breadth of the exceptions now being sought by these very same communities, for the following reasons:

- Copyrightable databases are not adequately protected by the current U.S. Copyright Law, as noted by the Copyright Office itself.[23]

- Technology is one method of protection used to supplement the legislative void—a method previously supported by the academic, library, and scientific communities.[24]

- Copyrightable databases are increasingly used in worldwide distance learning, necessitating technological access controls to prevent abuse—again, as supported by the many members of the academic community.[25]

- Copyrightable databases are used by millions of U.S. citizens via library access—as noted in the comments of the Library Associations.[26]

- Knowledge and understanding of copyright law and other intellectual property rights are not widespread.

Certainly, the use of digital information is not new. It began with the advent of online systems more than twenty-five years ago. But the technology employed to distribute, access, and use information has changed dramatically. This change has facilitated the emergence of a new society—one that is increasingly computer-literate and information hungry. It is a society that is still in its formative stage—one that must be developed in concert with a legal framework that sets the stage for its successful development and growth in order to achieve its full potential. It is far too soon to be establishing exemptions when the legal framework itself has not yet been fully established and tested. The issues being discussed as part of the Digital Millennium Copyright Act are complex and interrelated. Much more discussion—based in experience and not potential worst-case scenarios—is required if the Copyright Office's goal of maintaining "an appropriate balance between the rights of Copyright owners and the interest of users is to be reached." [27]

Let me state clearly: *legal access to and fair use of information is essential*, not only for the future well-being of the United States, but for that of our larger, global society. NFAIS would like to work with the user community and the Copyright Office in seeking a satisfactory solution to the current dilemma, and we believe that we have the necessary expertise and experience to serve in such a role. As noted earlier, NFAIS members represent approximately 60 of the world's leading producers of databases and information services in the sciences, engineering, social sciences, business, and the arts and humanities.

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[23] *U.S. Copyright Office Report on Legal Protection for Databases*, p. ii, August 1997
[24] *Ibid*., p. ix
[25] See Comments with regard to the use of Digital Information in Distance Learning, http://lcweb.loc.gov/copyright/disted/comments.html
[26] *Exemption to Prohibition on Circumvention of Copyright Protection Systems For Access Control Technologies, Comments of the Library Associations*, Comment # 162, pp. 4-5, http://lcweb.loc.gov/copyright/1201/comments
[27] *Federal Register*, Vol. 63, No. 246, Wednesday, Decembers 23, 1998, Notices, p. 71167.

Some of our members have been creating products and services, including databases, for more than a century and all are experienced in handling issues related to the creation, dissemination, and usage of digital information. We offer our collective experience to you in all further activities related to developing your recommendations to Congress on this critical issue

Sincerely,

Richard T. Kaser
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National Federation of Abstracting and Information Services