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March 31, 2000

Mr. David O. Carson, Esq.
General Counsel
Copyright Office LM-403
James Madison Memorial Building
101 Independence Avenue, SE
Washington, D.C. 20024

Dear Mr. Carson:

I write on behalf of the Newspaper Association of America, an industry trade group that represents more than 2,000 newspapers in the United States and Canada. NAA respectfully submits these reply comments in response to comments submitted by the Association of American Universities *et al.*'s (AAU). AAU filed comments in response to the Copyright Office Notice of Inquiry, "Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies," 64 Fed. Reg. 66, 139-143 (Nov. 24, 1999).

NAA limits our comments to AAU's inclusion of newspapers into its proposed classification of "Thin Copyright Works." NAA strongly objects to AAU's classification of newspapers as "Thin Copyright Works" and believes the consequences of such a classification—the exemption of newspapers from the protection in Section 1201(a)(1)(A) of the Copyright Act—are unjustified. AAU incorrectly asserts that newspapers are not worthy of full protection under U.S. copyright laws because of the nature of the information that newspapers provide. As a result, AAU inappropriately proposes to prohibit or limit newspapers from using access control technologies to protect their online content. NAA urges the Copyright Office to reject such a classification when making its recommendations to the Librarian.

AAU appears to base its inclusion of newspapers into its proposed "Thin Copyright Works" group on its interpretation of *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340 (1991). In *Feist*, the Supreme Court said "all facts – scientific,

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historical, biographical, and *news of the day* ... are part of the public domain available to every person.” (emphasis added) NAA recognizes that “news of the day” is not protected by copyright law, which is amply evidenced by the fact that there are more than 1,400 daily newspapers and more than 8,000 non-daily newspapers in the US that all report on daily news events. NAA believes, however, that AAU is incorrect in asserting that the lack of copyright protection for news of the day extends to newspapers.

Unlike the factual compilations referenced by the Court in *Feist*, 499 U.S. at 349 which the Court held to deserve “thin” copyright protection, newspapers of all sizes publish original and creative products that are protected by U.S. copyright laws. News articles and photographs, editorials, cartoons, display advertisements and classifieds are original and creative and are material protected by copyright laws. Copyright law also protects the combination of all these materials into a newspaper.

More than 2,000 newspapers are providing valuable online content such as breaking news coverage, extensive original news content, as well as the republication of most, if not the entire, printed newspaper. Most newspapers offer readers unlimited and free access to the most recent editions of their online publications. This does not mean, however, that newspapers in the future should be restricted to any greater extent than other copyright owners in their efforts to protect their online content. As the Internet develops and business models mature, newspapers, just like book publishers, broadcasters or movie producers, may need to use access control technologies with their online products in order to continue to offer valuable content on the Internet.

Today, newspapers are experiencing copyright infringement on the Internet. As a result, the ability of a newspaper as a copyright owner to avail itself of the protections of U.S. copyright law is extremely important. Recently, several newspapers have filed copyright infringement lawsuits against defendants who violated the newspapers’ copyright.¹ While these cases were settled out of court or are still pending, they demonstrate the willingness of newspapers to defend their content from online copyright infringement. This willingness even has extended globally². Moreover, the fact that scores of newspapers over the years have received Pulitzer Prizes for their high literary quality and originality in journalism—both in print and online—attests to the creativity used by newspapers in the reporting of news and information³. Newspapers should not be precluded from using access control technology if their valuable content is being infringed.

Newspapers that utilize access control technology have done so because US copyright law grants copyright owners the exclusive right to control the distribution of their product – whether it is on- or offline. Newspapers should not be forced to give up this exclusive right simply because they publish an online product.

¹ *The Washington Post Co. et.al. v. Total News Inc.*, Feb. 20, 1997 SDNY, 97 Civ. 1190; *Los Angeles Times et. al. v. Free Republic*, C.D. Calif., No. 98-7840 MMM(AJWx), (9/28/98).

² *See, Shetland Times Ltd. v. Wills, Scot. Sess. Cas.*, (10/24/96) 1 EIPLR 723 (11/1/96), settled 11/11/97.

³ It is important to note that Pulitzer Prizes also are awarded annually in literature, music and drama—all categories protected by copyright.

While most newspapers do not use access technology for the most recent online editions, many are using access control technology for their archives. Not only does the Internet allow newspapers to preserve its publications with greater ease and less expense, it also provides a newspaper the ability to offer its archives to a much larger audience. And just as newspapers have done with their print products, newspapers are limiting access to those archives by utilizing access control technologies.

In the NOI, the Copyright Office specifically asked for evidence or examples of how access control technology has hindered noninfringing uses. Despite the widespread use of access control measures on newspaper archives, AAU presented no evidence or examples suggesting that this technology has had a “substantial adverse effect on noninfringing uses” of online newspapers.

Finally, the NOI, as well as the legislative history of the Digital Millenium Copyright Act⁴, recognize that in addition to assessing the substantial adverse effects such technology may have on noninfringing uses, the Librarian also must look at mitigating factors. One such mitigating factor that is detailed in the NOI is the existence of the same material in another format, which does not utilize access control technology. The US Copyright Office and the Librarian should keep in mind that newspapers are still available in print format—and will be for a long time to come.

NAA urges the Copyright Office to resist any effort to recommend classifying newspapers differently from other information publishers. Not only is there no evidence to support such a classification, exempting newspapers from the protections in Section 1201(1)(a) will greatly diminish for newspaper those rights afforded similarly situated copyright owners and will place newspapers at a greater disadvantage on the Internet.

Respectfully submitted,

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⁴ Pub. L. 105-304 (1998). *See* THE HOUSE COMMITTEE ON THE JUDICIARY, SECTION BY SECTION ANALYSIS OF HR 2281 AS PASSED BY THE UNITED STATES HOUSE OF REPRESENTATIVES, 105TH CONG., at 6 (August 4, 1998).