



March 30, 2000

David O. Carson, Esq.  
General Counsel  
United States Copyright Office  
LM-403  
James Madison Memorial Building  
101 Independence Avenue, SE  
Washington, DC 20024

Re: Copyright Office Docket RM 99-6 – 64 Fed. Reg. 66139 (November 24, 1999) – Notice of Inquiry: Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies.

Dear Mr. Carson,

The National Library of Medicine (NLM) submits these comments in response to the Notice of Inquiry under 17 U.S.C. Sec 1201 (a) (1) concerning circumvention of copyright owners; access control technologies.

### **General comments**

For 165 years the National Library of Medicine has acquired, organized, preserved and provided access to the world's medical literature to support the advancement of medicine and the public health. NLM serves as a national information resource for medical education, research, and service activities of Federal and private agencies, organizations, institutions, and individuals. NLM's collection now contains more than 5 million items in print, video, photo image and computer related formats. NLM spends over \$5 million annually to acquire materials for its collection, and an increasing percentage will be spent in licensing rather than purchase. An extensive preservation program seeks to ensure persistent access to this national treasure. During FY1999, NLM provided access to 355,000 items to patrons through its onsite Reading Room in Bethesda, MD, and nearly 400,000 items to medical libraries throughout the country through interlibrary loan services. Many of the items requested by libraries were in response to clinical emergencies, in direct support of patient care. NLM's collection is the largest medical collection in the world. To date, both public access and preservation of this tremendous resource has been assured by the fair use and copying exemptions of the Copyright Act, Sections 107 and 108. It is imperative that library exemptions for both access and preservation be

carried forth in the transition from print format to the electronic formats now replacing print publications.

## **Circumvention**

The rulemaking proceeding is to “determine whether there are classes of works as to which users are, or are likely to be, adversely affected in their ability to make noninfringing uses if they are prohibited from circumventing such technological measures.” During the last few years, NLM has encountered an increasing number of instances where access to published works has been impeded or denied because of technological measures. User authentication devices such as passwords, address limitations and software controls over features such as printing or downloading necessarily impede or deny access for uses, which with print material, would clearly be considered to have been “fair use” under current copyright law. Technological measures to control use of copyrighted works have also limited the ability of this library (as well as all other libraries) to archive, preserve, and provide continuing access to some publications. This rulemaking seeks to determine classes of works that might be adversely affected by such technological protections. Clearly all forms of scientific technical information dissemination would be adversely affected. Most blatant would be the limitation on access to publications of government scientists, for which no copyright protection is available, but which constantly appear within the copyright imprimatur and under the technological barriers of published works.

The following are examples of the adverse affects of these early technological measures. NLM expects that these and other measures will become more prevalent and limiting during the next three years. These examples are practical issues that impede NLM’s ability to carry out its mission.

- More and more publications in electronic format contain articles, images, data and other content not available in the print format. Thus more and more information will only be available online. There is no defensible justification for assuming that access to that information should not continue to be assured under the copyright laws that have served us so well for the last twenty-five years. Publishers are increasingly using licenses to preclude non-infringing uses under copyright law (e.g., interlibrary loan).
- While many publishers are now stating their intention to preserve their electronic publications for the future, in NLM’s experience, this may not be a dependable situation. As an example, the *Online Journal of Current Clinical Trials* was published and distributed in electronic form only. Though NLM subscribed to this electronic journal, it did not obtain the right to copy it electronically to preserve it. Articles were printed for patrons as they were requested to provide access to the journal. When the journal ceased publication, no content remained online and only selected issues were made available on CD-ROM, therefore NLM was unable to preserve this journal in its entirety.
- Some computer disks for interactive programs, now less than a decade old and not available in other formats from the publisher, exist only on obsolete disk formats that incorporate technological measures so that they cannot be reformatted. These cannot be preserved. In addition, because these formats cannot be copied, the Library is required to maintain obsolete equipment and operating systems so that library users can access these materials. Maintaining

obsolete equipment and operating systems is not a sustainable solution for the future. The Library has also encountered videotapes with technological measures to prevent illegal copying that are no longer available from the producer. As the videotapes wear and become unusable, NLM can neither provide access nor preserve the content.

Copyright's fundamental purpose, "to promote the progress of science and useful arts" cannot be served if technological devices are allowed to limit the dissemination of creative ideas and data, rather than simply their expression. Nor can it achieve its purpose if it limits access to one elite group, based on their ability to pay. The preservation of libraries' social purpose may be at stake if the tools of access can reside only in the hands of the copyright owner. Therefore fair use and related exemptions require not only the authority but also the ability to implement them in a 1201 environment.

Kent A. Smith  
Deputy Director  
National Library of Medicine

301-496-6661  
301-402-2586 (fax)  
kent\_smith@nlm.nih.gov