Before the Copyright Office
Library of Congress

In re: Rulemaking Exemption to Prohibition}
on Circumvention of Copyright Protection } Docket No. 2002-4
Systems for Access Control Technologies }

I. Introduction

Reed Elsevier Inc. (REI) appreciates the opportunity to reply to the comments in this rulemaking. It writes specifically to express its view that no exemption should attach to the circumvention of access controls applied to databases in any form.

A. Reed Elsevier's Businesses and General Comments

REI is a world-leading publisher and information provider. Through our Elsevier Science products, including scientific and medical journals, books and online services, REI is the world's largest publisher of scientific information. Our divisions include the LexisNexis service, one of the country's earliest and most comprehensive online providers of information for corporate, government and legal professionals, as well as extensive scientific, medical, educational and business-to-business publishing activities and information services. Some of the best-known brands within the REI portfolio are *Variety, Broadcasting and Cable, Shepard's, Martindale-Hubbell, Michie, Matthew Bender, The Lancet, and Publishers Weekly.*

As a producer of numerous electronic databases, Reed Elsevier feels compelled to respond to recurring suggestions that databases should somehow be exempt from section 1201(a)(1)'s prohibition. In the year 2000, Reed Elsevier commenced the first phase of a massive strategic investment program. In the last three years, REI has spent over one billion dollars on a major upgrade of our products and services, the majority of which was invested in enhanced use of Internet technology. The publication of digitized copyrighted works—and the control of access to those works—forms the core of our business plan for the foreseeable future. REI has successfully responded to the challenge posed by digital technologies to the benefit of both our customers and our shareholders, and access control measures have formed a critical part of that success. In REI's experience, access control measures—and the legal protection of them—have not only helped preserve the profit motive that the copyright laws celebrate, *see Eldred v. Ashcroft*, 123 S. Ct.763, 785 n. 18 (2003), but have unequivocally increased the volume of works made available for non-infringing uses.[1]

REI therefore rejects categorically certain commenters' contention that "every major institution having an interest in fair use proposed at least one "class of works"

[1] As discussed in greater detail below, some of REI's current products would not be available (and could not be available) without the use of such measures. REI's omission of discussion of a specific comment does not imply an endorsement of its contents.

defined in part by user attributes or attributes of use or intended use."[2] As a publisher of books, newspapers, and magazines, REI has a tremendous interest in ensuring that the fair use doctrine and other non-infringing uses of digital works remain a vital and vibrant part of day-to-day commercial life. The presence of access controls has expanded the ease of making non-infringing uses by making the Internet a safer—but by no means risk-free—place to distribute copyrighted works. Access controls have not had any deleterious effect on non-infringing uses, and these commenters' attempts to cast themselves as the exclusive champions of fair use should not be taken seriously, "not even in a footnote."[3]

REI's positive experience is reflected in the record in this proceeding which falls considerably short of meeting the Copyright Office's standards for issuing an exemption. The Copyright Office's Notice of Inquiry[4] and its Final Rule promulgated in 2000[5] have provided commenters with a useful framework from which to analyze the record in this proceeding, and REI will not rephrase it here except to emphasize a few key points. The NOI instructs commenters that "the actual instances of verifiable problems occurring in the marketplace are necessary to satisfy the burden with respect to actual harm and a compelling case will be based on first-hand knowledge of such problems." NOI, 67 Fed. Reg. at 63579. While "likely" adverse effects will also be examined in this rulemaking, this standard requires proof that adverse effects are more likely than not to occur and cannot be based on speculation alone." *See id.*

This kind of first-hand, verifiable knowledge is conspicuously—and utterly—missing from this record. Many of the initial commenters have taken the opportunity to express a sincere (if, in REI's view, misguided) belief that enactment of the DMCA represented a poor policy choice.[6] Others simply do not understand the portion of the DMCA at issue in this rulemaking,[7] or raise issues of privacy[8] and network security[9] well beyond its scope. As the Copyright Office has noted, its task in this proceeding is *not* to second-guess Congress's sound judgment in enacting section 1201; it is to fashion an exemption to the DMCA's prohibition on circumvention of technological measures based on a record of "substantial adverse impact." 2000 Final Rule, 65 Fed. Reg. at 64562. Those adverse effects—if any—must balance against the benefit provided by '"use-facilitating" models that will allow users to obtain access to works at a lower cost than

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2 Comment 28, at 9.

3 *Id*. at 4 n.1 (internal citation omitted).

4 United States Copyright Office, Final Rule Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Measures, 65 Fed. Reg. 64556 (Oct. 27, 1998) (creating 37 C.F.R. § 201.40) [hereinafter 2000 Final Rule].

5 United States Copyright Office, Notice of Inquiry, 67 Fed. Reg. 63578 (Oct. 15, 2002) [hereinafter NOI].

6 *See, e.g*., Comment 1 (Eric Eldred); Comment 30 (John Mitchell).

7 *See, e.g.*, Comment 42 ("DMCA prohibits making copies of digitalized [sic] works for archival and backup purposes"); Comment 43 (arguing that the DMCA allows a copyright owner to "accuse you" and have Internet access cut off); Comment 46 (discussing works played on Maine radio station); Comment 48 (apparently discussing copy controls).

8 *See* Comment 30, class 5. Section 1201(i), in any event, already permits the circumvention of technological measures to protect personal privacy.

9 *See, e.g.*, Comment 40 (discussed *infra* § III.D).

they would otherwise be able to obtain were such restrictions not in place." NOI, 67 Fed. Reg. at 63580.

That calculus, when applied to this record, does not support the issuance of any exemption from section 1201(a)(1)(A). Part II of this reply provides information on REI's experience using access control technologies over the last three years, and discusses some disturbing recent developments that warrant against any legal shelter from acts of circumvention. In general, however, Reed Elsevier's experience now is the same as it was three years ago. Access control measures and licensing terms have allowed scholars, students, and business people to make productive uses of electronic databases on a wide variety of subjects. Against this backdrop, Part III of this reply examines particular comments or groups of comments effectively espousing the exemption of databases of any kind from the scope of 1201(a)(1)(A),[10] with particular focus on the exemption governing "malfunction, damage, or obsolescence." In the unlikely event that the Copyright Office were to decide to re-issue a "malfunction or obsolescence" provision that were to apply to databases, REI believes that it should be substantially narrowed from the previous exemption, and it offers additional factors which ought to be part of any such promulgation.

II. Positive Effects of Access Control Measures

REI 's success in making copyrighted materials available online to students, faculty and researchers is second to none, and our ability to do so is directly related to legal and technological regimes that limit access. Our award-winning LexisNexis Academic product, introduced in 1998 to enthusiastic reviews, is the most ubiquitous commercial information service available in the U.S. academic environment.[11] Some 7.2 million students at almost 1,700 two-and four-year institutions are currently authorized for unlimited access to LexisNexis Academic. This amounts to nearly three-fourths of the entire university enrollment nationwide, and represents a 26% increase in the number of students and a 42% increase in the number of higher education institutions from three years ago. Access to copyrighted works has increased, not decreased, since the last Copyright Office rulemaking on section 1201 (a).

As it was at the time of the last rulemaking, the key element in this partnership is a series of license agreements under which colleges, universities, libraries, and the other institutions represented in the consortia obtain unlimited access to LexisNexis Academic for all their students, staff and researchers on a per-capita fee basis. Because of the economies of scale that the mega-consortia structure makes possible, these fees are extremely low, averaging roughly $1.59 per person for the 2002-2003 academic year. This fee is a small fraction of the considerable costs that universities and libraries would bear to provide access to the hard copy sources, as well as a truly de minimis portion of the expenses incurred by a student on an annual basis.

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[10] REI grouped these classes together to avoid redundancy.

[11] LexisNexis Academic currently features electronic access to the full texts of more than 5,200 periodicals, newspapers and research journals from all over the world. For a current list of these titles, see http://www.lexisnexis.com/academic/1univ/acad/ContentInformation.htm.

In order to offer this unprecedented, nationwide online access to copyrighted materials to the higher education community, REI must employ access control mechanisms in connection with LexisNexis Academic and similar products. The main mechanism we use continues to be IP validation. This access control protocol allows access to LexisNexis Academic only through computers with Internet Protocol (IP) addresses supplied in advance by the participating institutions to REI. Thus, institutions may (and often do) validate all computers on their internal networks for access to LexisNexis Academic. Within each institution, a large number of simultaneous users can enjoy unlimited access to all data offered within the service, with no limits regarding connect time, number of searches conducted, or volume of material printed, downloaded, or e-mailed. Licensee institutions may even extend this validation to authorized off-campus users who access LexisNexis Academic via proxy servers operated by the institution.

While the spectrum of eligible students, administrative staff, faculty members, library staff and those who physically walk into the libraries of the participating institutions is extremely broad, it is not infinite. Nor does the low-cost LexisNexis Academic subscription fee entitle users to access all other REI databases, including those compiled and maintained at great additional expense for use by specialized medical, scientific or other researchers. The IP address validation requirement, as well as password protection for some of the services falling outside the scope of LexisNexis Academic, are essential ingredients for making this extraordinary service possible. Measures taken to "spoof" REI 's systems into believing that a query came from a validated IP address, rather than from a data thief with no connection to a participating academic or library institution, undermine the integrity of the LexisNexis Academic licensing regime. If left unchecked, these circumventions of access control mechanisms could undercut the economic viability of the service and require its curtailment or discontinuance, to the detriment of both REI and its customers. Such actions should continue to be illegal and give rise to liability.

These observations about LexisNexis Academic also apply to a considerable degree to other REI products. We have moved aggressively over the past several years to make our huge range of business, scientific, medical and professional publications and databases available to users in whatever format our customers desire, including, increasingly, online over the Internet. In some cases the additional online access is provided at no additional cost to subscribers.

IP-validation systems have emerged as REI's preferred method of controlling access. In many cases, they are easier to administer, more convenient for (and perceived as less intrusive by) end-users, and more reliable in screening out unauthorized accesses. The security given to us by prohibition against circumvention of these access control measures helped us accelerate the trend toward greater availability of these copyrighted information resources to the students, researchers and professionals who need them. For example, subscribers retain access rights indefinitely to the issues of the journal published during the time in which they subscribed. Elsevier Science even provides

ongoing access to back issues of discontinued titles (provided, of course, that it has the right to do so), and provides the most recent twelve months for free to *all* subscribers.

In short, the speculative fears of decreased access expressed by the libraries, universities, and others in the last rulemaking remain exactly that—speculative fears. REI finds no support for the proposition that section 1201(a)(1)(A) is likely to have any significant adverse impact on the availability of any of its products for non-infringing uses. In this regard, we believe that the impact of the prohibition has been overwhelmingly positive.

Despite the success of this program, some additional, less positive developments have appeared on the horizon. Since the first rulemaking, the use of peer-to-peer networks for the unauthorized distribution of copyrighted works has mushroomed. REI is aware of educational texts, such as physics textbooks, being made available on "file sharing" networks. This experience suggests that regulatory expansion of the circumstances in which works may be accessed without the authorization of the copyright owner beyond the statutory defenses in the DMCA is ill-advised. Framed against this backdrop, none of the comments—individually or collectively—have generated a record sufficient to support an exemption.

III. Responses to Specific Proposals

A. Reissuance of the 2000 Class

Proposed Classes:

1. Literary works, including computer programs and databases, protected by access control mechanisms that fail to permit access because of malfunction, damage, or obsoleteness. (Comment 32, Class 2; Comment 33, Class 1).

2. Literary works, including computer programs and databases, protected by access control mechanisms that are at high risk of failure in the near-term future because of malfunction, damage or obsoleteness. In order to invoke this case, the potential malfunction, damage, and/or failure must not be due to intentional damage meant to invoke this clause. (Comment 32, Class 3).

3. Literary works, including computer programs and databases that fail to permit access because of the copyright owner and/or their designated agent fail to provide the necessary support means. (Comment 32, Class 5).

Position Taken:

In opposition or, in the alternative, amplification.

Summary of Argument:

Several commenters support the exemption promulgated in the 2000 Final Rule in various forms. REI is skeptical that the exemption should re-issue

> on this record, as no comment offers direct evidence that the exemption had been in the least bit useful to them, and the burden is on the proponents of an exemption to show that it should issue. However, if the Office does decide to re-issue such a class, it should be considerably narrower than the one it issued three years ago.

Although comments have urged that some form of the prior exemption issue, the "malfunction, damage or obsolescence" exemption that was promulgated in the first rulemaking should not be extended. In the 2000 rulemaking, the Copyright Office necessarily engaged in a predictive exercise since section 1201(a)(1)(A) had yet to go into effect. Now, however, the institutions proposing the exemption's re-issuance have had three years of experience under the prohibition. Based on this experience, one would expect that they would be able to adduce "concrete examples" (NOI, 67 Fed. Reg. at 63581), of either the prohibition's negative effect on non-infringing uses, or the exemption's positive effect in enabling such activity.

This evidence is nowhere to be found, and the libraries admit knowing of "no specific evidence suggesting that persons have or have not been adversely affected by the section 1201 prohibition." Comment 33, at 6. Instead, the libraries argue that the re-issuance of an exemption ought to be "presumed." *See id.* The NOI has already rejected this assertion, and there is no need for the Office to re-examine it. NOI, 67 Fed. Reg. at 63580 ("There is a presumption that the prohibition will apply to any and all classes of works, including those as to which an exemption of applicability was previously in effect, unless a new showing is made that an exemption is warranted."). Indeed, if anything has changed, the complete absence of any actual adverse experience should support the presumption that no exemption is needed. The proponents of this class have adduced no affirmative evidence to support its reissuance—for example, by stating that they took advantage of it for a non-infringing use.[12]

Although several variations on the "malfunction" exemption have been proposed, not a single commenter has proffered evidence suggesting that any exemption apply to an online database. The sole, truly isolated instance of *actual* difficulty that might be causally connected to the prohibition suggests—at most—that a far narrower version of the above exemption is warranted.

The comment that might lay a factual foundation for an exemption involved an anecdote describing the need to circumvent an access control measure for a computer program licensed to a college, where an employee has lost or refuses to provide the passwords that it created on behalf of the college for access to that computer program. *See* Comment 18 (The Center for Electronic Law). REI does not believe that a college attempting to guess what password a wayward employee might have used to lock up the college's system constitutes a violation of section 1201, as the college has lawful access both to the computer program and to its system, any more than a consumer's trying to regenerate a file protection password would constitute a violation. The more extreme

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[12] *Compare* 2000 Final Rule, 65 Fed. Reg. at 64565 (citing direct testimony by educational institutions). In contrast, neither the libraries nor the universities have offered any similar evidence.

measures suggested by this comment (decompilation, disassembly and the like), which effectively denude the work of any access protection should only be available in very limited circumstances. Any exemption governing "malfunction, damage, or obsolescence" should therefore have the following conjunctive requirements:

- **The Malfunction, Damage or Obsolescence Creates Risk of Loss of Data Created by the Person Claiming the Exemption or in Which that Person has Proprietary Rights, and Such Data Contained on Physical Media within the Actual Control of that Person.** There is no suggestion anywhere in the record that an exemption should apply to acts of circumventing an access control that is applied to an online database under the control of someone other than the person seeking to take advantage of the exemption. A college locked out of its own student identification system is one matter; a person locked out of someone else's raises a completely different—and much more serious—set of concerns.[13]

- **Initial and Continuing Lawful Access.** The act of circumvention must occur to a copy that was not only lawfully acquired, but to which the user was entitled to use up to and through the time at which it found it necessary to circumvent the access control. It should not apply to copies that the user does not have a right to access, for example in violation of a license restriction.

- **Failure of the Copyright Owner or its Authorized Agent to Respond to a Request for Assistance to Which the User is Entitled in a Commercially Reasonable Manner.** In Comment 18, the school stated that the copyright owner could not respond in a reasonable time to the request for assistance.[14] This seems to be a crucial aspect of any such exemption. Most copyright owners, when presented with the problem faced by the university, would have attempted to help if possible; REI, for example, routinely and promptly helps its licensees with forgotten passwords, damaged media, and IP validation issues.

- **The exemption should not apply to any entity that has not waived its sovereign immunity from copyright infringement suits and suits under the DMCA.** In enacting the DMCA, Congress attempted to respond to the problem faced by copyright owners when a work becomes widely available in electronic form without authorization. Preventing unlawful access, therefore, is a key to preventing not only infringement, but evisceration of the work's market value. In REI's view, this policy concern suggests a corollary: no entity should receive the benefit of any exemption from the DMCA unless it bears the full responsibility of compliance with the underlying copyright law. For example, assume that a state university engaged in acts of circumvention that are permissible

13 *See infra* section III.D.

14 Comment 18, at 1.

under a regulatory exemption adopted by the Librarian, but later makes infringing use of that now unprotected work over the Internet, or within a particular state university consortium. Certainly one would assume that the university would face full copyright liability for its illegal activity, but because of the doctrine of sovereign immunity that would not be the case. The benefit of any exemption should be limited to those who accept all the responsibilities imposed by the copyright laws.

B. "Fair Use Classes"

Proposed Classes:

1. Fair Use Works" – This class is meant to be a more extensive version of proposed exemption no. 1 above. The exemption would apply to "any lawfully acquired copy or phonorecord including a copyrighted work falling within any category in section 102 that, due to its nature and the users who typically use it, is likely to be lawfully used in particular environments under the fair use doctrine. The exemption shall apply only to such users in connection with such fair use" (*e.g.*, the exemption would protect a university professor who circumvents a lock on a lawfully acquired e-book to use a short excerpt in a classroom setting, but would no longer protect the professor from suit under section 1201 if the professor then posts the (unlocked) e-book on the public Internet). (Comment 28).

2. "Per se Educational Fair Use Works" – This class of exempt works would consist of the following subcategories of literary works, musical works, pictorial, graphic, and sculptural works, audiovisual works, and sound recordings: (a) scientific and social science databases, (b) textbooks, (c) scholarly journals, (d) academic monographs and treatises, (e) law reports, and (f) educational audiovisual works. (Comment 28).

3. "Thin Copyright works" – This category consists of "works that contain limited copyrightable subject matter, and which derive significant value from material in the public domain, such as facts, processes, ideas, or other elements that are beyond the scope of copyright protection." (Comment 28).

4. "Per se Educational Thin Copyright Works" – Thin Copyright Works are works that contain limited copyrightable subject matter, and which derive significant value from material in the public domain, such as facts, processes, ideas, or other elements that are beyond the scope of copyright protection. To satisfy concerns of vagueness, the Copyright Office should recommend a specific list of types of works that are subject to the exemption, i.e., a "per se" list. The list proposed herein is focused on those works most often lawfully used in research and education. Thus, this class of exempt works consists of "particular subcategories within section 102 and 103, namely databases, histories, statistical reports, abstracts, encyclopedias, dictionaries, and newspapers." (Comment 28).

5. "Any work to which the user had lawful initial access (i) during the period of lawful access, or (ii) after any period of lawful access if the user has physical possession of a copy of the work." (Comment 28).

6. Literary works, including computer programs and databases, protected by access control mechanisms in which the mechanism controls access both to copyrighted works and to works not under copyright. (Comment 2).

7. Works in the Public Domain that have been distributed using access controls. (Comment 14, Class 1).

8. Literary works, including computer programs and databases, protected by access control mechanisms that fail to permit access to recognize shortcomings in security systems, to defend patents and copyrights, to discover and fix dangerous bugs in code, or to conduct forms of desired educational activities. (Comment 40).

9. Literary works restricted by access controls that limit lawful access to and post-sale uses of the work, where circumvention allows a lawful possessor to use the work in a non-infringing way. (Comment 20, Class 4).

10. Copyrighted content that the copyright holder consents to publish or distribute without payment. A slightly broader way to describe this class: copyrighted content for which the copyright holder consents to provide *open access*, when "open access" is defined as access permitting the unrestricted reading, downloading, copying, sharing, storing, printing, searching, linking, and crawling of some body of work. (Comment 22).

11. Works embodied in copies or phonorecords that have been lawfully acquired by users or their institutions who subsequently seek to make non-infringing uses thereof. (Comment 30, Class 7).

12. Literary works, including computer programs and databases, protected by access control mechanisms in which the mechanism controls access both to copyrighted works and works not under copyright. (Comment 2).

13. Everything, non-commercial use, educational use, fair use, personal use. (Comment 43).

14. All digitally recorded content. (Comment 44).

15. Musical, literary, and cinematological works in digital formats. (Comment 42).

16. Sound recordings, audiovisual works and literary works (including computer programs) protected by access control mechanisms employed by or at the request of the copyright holder which require, as a condition of gaining access, that the prospective user agree to contractual terms which restrict or limit any of the limitations on the exclusive rights of that copyright holder under the Copyright Act. (Comment 30, Class 4).

Position Taken:

In Opposition.

Summary of Argument:

Despite many diverse formulations, these classes of works seem to be established on the unfounded assumption that access control technologies or licenses spell the end of fair use or other non-infringing uses. The Copyright Office addressed these arguments exhaustively in the first DMCA rulemaking, and need not re-examine them.

The comments in this category share two primary defects: (1) None of them contain any evidence that non-infringing uses have been negatively affected by access

controls; and (2) all of them have proposed classes well beyond the Copyright Office's own description of its authority.[15] Instead, they speculate about access to ideas or public domain materials, or fair use of digital materials. As a group, these comments do not discuss a "specific technological measure," see NOI, 67 Fed. Reg. at 63581; the availability (or lack thereof) of materials available in other formats; or how a technological measure may distinguish between fair and unfair uses. These proposals invite not the promulgation of an exception to a statute, but a regulatory repeal of it.

As a group, these comments rest on the premise that because works of authorship, including "scientific and academic databases" and "databases," contain large amounts of information and unprotected expression, they should be exempt from the prohibition. This argument knows no bounds—*every* copyrighted work contains public domain material to which the copyright does not adhere, and by the nature of the copyright regime itself, *every* infringement is subject to the fair use defense.[16] The comments suggesting, for example, that access be permitted to databases containing so-called "open" journals, or that consist of public domain materials (see Comment 10) therefore ignore the function that aggregated databases of information serve. If the copyright owner wishes to make her work as free as the air, she may do so. It does not follow, however, that that wish warrants mandating unauthorized access (particularly when the work is available through other sources including, presumably, from the author) to the products of aggregators that have expended substantial resources in creating a comprehensive,

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[15] The AAU's comments are based on one mistaken premise: that the Manager's Report constitutes "subsequent legislative history" and that the Copyright Office acted arbitrarily in relying on it. *See* Comment 28, at 5 n.1. Their proposed application of the rule is procedurally absurd. By parity of reasoning, legislative reports written by staff and filed after committee votes do not 'reflect" what happened at committee markups.

Putting aside the substantial changes made to the text of 1201(a)(1)(A) between the time of the House Commerce Committee report and subsequent floor consideration, the AAU neglected to mention that at least one court has already upheld Copyright Office reliance on the Manager's Report as legislative history, see *Bonneville Int'l Corp. v. Peters*, 153 F. Supp. 2d 763, 778 (E.D. PA 2001) (relying on the Manager's Report as legislative history). The AAU also neglects to mention that Congress had the Manager's Report before it *two more times* during the consideration of the DMCA, and well before the final conference report went to the President for signature. The AAU's remaining arguments have all been addressed extensively in both the NOI and the 2000 Final Rule and REI thus treats them in summary fashion.

[16] It bears noting that application of any of the above recommended classes to works in which the copyright is thin would have harmful practical effects for database producers. The onset of the Internet medium has vastly increased the economic value of electronic databases. Database publishers typically invest tremendous effort in producing products that are thorough, accurate, and comprehensive, but which have a lesser level of protection under copyright than other works. Investments in these products come with substantial risk. *See* Hearing on H.R. 2652 Before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary, Statement of Marybeth Peters, Register of Copyrights, at 5 ("After examining the post-*Feist* case law and listening to the participants in the meetings we held, the Copyright Office is convinced that the theoretical gap in the law is leading to real-world consequences. ... We have heard reports of reluctance on the part of many producers to create legally vulnerable database products, or to disseminate them widely to the public . . ."); United States Copyright Office, Report on Legal Protection for Databases, 17-18 (1997). Database publishers such as these, or those who publish works in printed format, face grave risks of piracy. Protection from unauthorized circumvention of a technological measure is thus critical for "thin Copyright works" and preserves the incentives in current law to create and distribute these valuable products.

thorough, and lawfully created compilation of work for use by their customers.[17] Such proposals (in addition to being unsupported by the record) are inherently unfair, unwise, and unworkable.

The Copyright Office recognized as much during the last rulemaking when it stated:

> In general, it appears that the advent of access control protections has increased the availability of databases and compilations. Access controls provide an increased incentive for database producers to create and maintain databases. Often, the most valuable commodity of a database producer is access to the database itself. If a database producer could not control access, it would be difficult to profit from exploitation of the database, resulting in diminished availability for use.

2000 Final Rule, 65 Fed. Reg. at 64567.

Despite the Copyright Office's stated position on these issues, many commenters continue to argue that, because a nonprofit or educationally motivated user wants to use a copyrighted work, it is entitled to an exemption from section 1201(a)(1)(A).[18] More recently, when enacting an update to section 110(2) to enable a broader use of copyrighted works for educational uses, Congress required accredited institutions both to respect technological measures applied by copyright owners, and that the institutions apply their own measures to prevent unauthorized dissemination. *See, e.g.*, 17 U.S.C. § 110(2)(D)(I)(aa). Congress's recent enactment of the TEACH Act should dispel any notion that access controls are somehow inimical to the availability of electronic works for non-infringing educational uses; they are essential to them. The proposed "educational user" exemptions are nothing more than an attempt to rewrite both the bargain struck by Congress in the enactment of the DMCA and the TEACH Act. The Copyright Office wisely rejected the creation of education-based exemptions in the first triennial rulemaking, and it should do so again.

C. Internet Archive (Comment 25)

Proposed Class:

Literary and audiovisual works embodied in software whose access control systems prohibit access to replicas of the works.

Position Taken:

In Opposition.

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17 *See, e.g.*, Comment 14 (Class 1); Comment 22.

18 *E.g.*, Comment 28; Comment 40.

Summary of Argument:

The Internet Archive's (IA) proposed exemption is riddled with problems. This exemption is circular—a point that its authors attempt to obscure by using the word "replica" rather than "copy." Even if it were not, however, it is far from clear that the activity of the Internet Archive, if done without the permission of the copyright holder in the underlying works, is free from copyright liability, (a point evinced by the fact that the exemption is not limited to use of the works that are "otherwise lawful."), and a point acknowledged on their website but not—tellingly—in their comment. To the extent that the Internet Archive brings forward problems caused by *access* controls (and REI is not sure that it does) on physical media, REI believes that it should consider those concerns in the unlikely event that it decides to reissue the "malfunction" exemption. Once again, however, none of the evidence advanced by the IA has anything whatsoever to do with databases.

According to its initial filing, the IA is a "library" that "provides free access to an enormous and wide-ranging collection of web pages, movies, books, sound recordings and software," (Comment 25, at 1) so that the current "explosion of digital creativity is not lost to history." *Id*. at 2. In order to fulfill that mission, it has created—at some indeterminate date—what it now calls a CD ROM archive.[19] The IA, however, is not a library in any relevant sense. Indeed, the purpose of the Internet Archive's filing seems largely to be to voice its disapproval with enactment of the DMCA in the first instance, and in particular its application to the copying activities of so-called "digital libraries". The IA is a web site that makes available material without charge over the Internet. It can—and should—be able to engage in that activity, provided it does so in compliance with existing law. There is no basis in this record for extending any special exemption for this kind of activity.

1. The Class is Defective.

As the Copyright Office acknowledged in the NOI, the "malfunction and obsolescence" proposal promulgated three years ago reached the outer limits of the statutory authority granted to the Librarian by Congress. *See, e.g.*, 2000 Final Rule, 65 Fed. Reg. at 64561 (Oct. 27, 2000). IA does not discuss this exemption, or how (or if) it would apply to its activities. Instead, the IA asks the Copyright Office to render

[19] *See* http://www.archive.org/cdroms/cdroms.php (printed 08 February 2003). Counsel for REI visited the software archive site when the comments in this proceeding were initially filed, and recalled a mention of "software" available for download, but did not recall a discussion of CD ROMS such as that which currently appears. When counsel attempted to verify his recollection, he typed the above address into the IA's "Wayback Machine," which, although containing dozens of entries for "yahoo.com," did not reveal a single archived copy of the above page. When counsel ran www.archive.org through the same search mechanism, it found no entries for all of 2002 and none for 2003. The "explosion of digital creativity" that the IA proclaims a desire to protect apparently does not extend to much of its own contents.

1201(a)(1)(A) a nullity by adopting an "infringe first, crack later"[20] policy—a fact not rendered any less obvious by use of the word "replica" rather than "copy." This kind of proposal is "more appropriately directed to the legislator rather than to the regulator," 2000 Final Rule at 64562, and REI can envision no set of facts that would warrant its promulgation, much less its enactment. *See* 2000 Final Rule, 65 Fed. Reg. at 64572-73 (preservation and "migration" concerns implicate copy controls and are beyond the scope of rulemaking).

Much of the IA's filing discusses theoretical problems faced by the IA in archiving works in the event that it obtains permission from the copyright owner to copy and disseminate those works. The DMCA, however, only prohibits *unauthorized* circumventions of technological protection measures. REI finds it odd that, if a copyright owner were willing to grant permission to the IA to post works on the Internet for unrestricted download, that it would not grant permission to the IA to circumvent these access control measures for archival purposes. The IA filing is conspicuously silent on this point, and its application to other scenarios remains completely speculative.[21]

To the extent that the comment raises concerns over archiving, the marketplace continues to respond to this concern. REI has continued its commitment to archive back issues of all our scientific journals in perpetuity, and will not dismantle our archival facility without depositing copies in selected libraries or similar approved archives. We have also offered libraries the opportunity to maintain their own local archives of our material, and have designated the Koninklijke Bibliotheek (the national library of the Netherlands) to become the first official digital archive of Elsevier Science electronic journals. Every institutional subscriber also receives *permanent* access to electronic versions of journals published during the term of their subscription. REI continues to work with library organizations and national libraries worldwide to develop new models for publisher-library co-operation to ensure appropriate archiving of digital materials.

2. The Doubtful Status of the IA's Alleged Non-infringing Use.

The legal basis for the IA's exemption revolves around the creation of non-infringing uses. It alleges three different bases for legality: sections 108, 117, and 107. None of these sections intrinsically apply to the IA's activity.

Section 108 of the Copyright Act does not apply to web sites, irrespective of what name the proprietor chooses to name the site, or the particular form chosen by the

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[20] Unlike the proposals of nonprofit groups in the past, this language covers both legal and illegal activities.

[21] The access control measure allegedly supporting the exemption is based on a vague reference to the technology at issue in *Vault v. Quaid*, 847 F.2d 255 (5th Cir. 1988), roughly fifteen years ago. That case involved the application of so-called "original only" technology to floppy disks, which could both read and write information. CD ROMS, in contrast, are read-only, and have obviated the purpose behind 117's enactment. As the Copyright Office found in its Section 104 Study, "The CDROM serves as the backup copy once a computer program is loaded from the CD-ROM to one's computer." U.S. Copyright Office, DMCA Section 104 Report, 152 (2001).

proprietor to organize itself.[22] An "archive" of digital material, available instantly to the world without condition or restraint is electronic publishing, and, frankly, is precisely the kind of activity that access controls were designed to prevent unless those activities were undertaken lawfully. Neither section 108 nor 117 apply to the activities of the IA nor, if performed without the full consent of *all* the relevant copyright owners, does fair use.

Web sites did not exist when Congress first enacted the provisions of section 108, and there is no evidence in the legislative history that Congress intended to permit libraries to engage in online publishing or that it applies in any circumstance other than bricks and mortar. *See, e.g.*, H. Rep. No. 94-1476, at 74-77 (discussing the intent behind section 108). This interpretation is bolstered not only by the legislative history, but the language of the statute. Indeed, in its recent study of the effect of digital technology on sections 109 and 117, the Copyright Office and Congress have already rejected application of the same rules to digital materials that apply to paper.[23]

The statutory language supports this distinction in numerous places. For example, when Congress amended section 108(b) to provide a right in libraries and archives to make copies of digital materials, it retained the restriction prohibiting the library from making those works available outside its "premises." In contrast, the materials available on the Internet archive are available to anyone with a modem who wishes to access them. Similarly, section 108(b) only applies to acts of reproduction and distribution—not the display right that may be implicated in electronic transmission. *Cf.* 108(f) (mentioning the display right in the context of works in their last 20 years of copyright). The other provisions of 108 only exempt rights to make available a *single copy* or *three* copies of that work. *See, e.g.*, 17 U.S.C. 108(d), (g). It plainly does not address (for example, in the manner that the TEACH Act did) the *multiple* copies made in the course of a digital transmission.

Construction of section 108 aside, it is not at all clear that the IA's activities—even if engaged in with the permission of a publisher—necessarily amount to fair use. The IA states that "Macromedia has donated over 10,000 software packages containing CD ROMs and floppy disks storing copies of literary and audiovisual works embodied in software." Comment 25, at 4. This assertion lays the foundation for its proposed exemption. For example, one of the works allegedly "donated" to the IA by Macromedia involves "The Mighty Morphin Power Rangers." Macromedia does not, according to any record we could find in the Copyright Office records, own any copyright in those characters. Instead, it most likely acquired a license to publish software using that expression. Macromedia may well consent to having its computer program published for free over the Internet; the owner of the copyright in the Power Rangers, however, may not wish to see its licensed property so freely distributed. The copyright owner retains

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[22] As the Copyright Office is well aware from its recent involvement with the TEACH Act, nonprofits may be organized for any lawful purpose, and the line between profit and nonprofit has become somewhat blurred. For that reason, the TEACH Act contains a requirement that any educational institution be "accredited" within the meaning of the statute. *See* 17 U.S.C. § 110(2).

[23] *See, e.g.*, United States Copyright Office, DMCA Section 104 Report, at 86, 91.

the right to control the use of that property if it so desires, and it is the retention of that control that section 1201(a)(1)(A) is intended to maintain.

The Internet Archive acknowledges as much, but not in its comment. The following appeared in the Internet Archive's CD ROM forum under the title "confusion re: CD ROM archive":

> Our statement that Macromedia donated 10,000 CDROMs is incorrect. What Macromedia graciously did was to let us use their catalog of the CDROMs sent to them through the Made With Macromedia program. They also let our staff examine the CDROM's so that we can ensure the catalog is correct and facilitate contacting rightsholders to see if they would be interested in access to their materials.

See *http://www.archive.org/iathreads/post-view.php?id=4171* (visited 12 February 2003).

The CD ROM archive is not the only activity conducted by the IA that carries dubious intrinsic legality. REI notes that the cache copies provided to the public in the "Wayback Machine" could lead to liability.[24] REI checked the IA website and found that the IA had respected the *robots.txt* messages that REI uses to prevent crawling of its LexisNexis servers. It does not follow, however, that the failure to include that message means that a copyrighted work may be taken, copied, and made available to whoever uses the IA's website. If the IA wishes to make the content of others available to the world without permission—whether by title in the case of Macromedia software or, in the case of its "Wayback Machine," by URL, it must assume the risk of doing so.[25] The IA's complaints about the inconvenience of tracking down rights holders under title 17 are properly the subject of legislative debate, not the province of this proceeding.

Finally, section 117, which applies to computer programs, is irrelevant to the uses of audiovisual works claimed by the Internet Archive. Here, the IA seems concerned with "audiovisual works" contained in software. Comment 25, at 4. Section 117 applies not to "software" nor "audiovisual works," but the making of one backup copy of a computer program made by the owner of a particular copy. *See* 17 U.S.C. § 117(a)(2). As the Copyright Office is well aware, most software is licensed, not sold, and the CD ROM constitutes the backup copy in the overwhelming majority of cases. *See* U.S. Copyright Office, DMCA Section 104 Report, at 105, 152 (2001). Furthermore, even if IA had actually received donated software, it may not have come from persons able to convey rights under § 117. *See id.* Section 117 has nothing whatsoever to do with the activity sought to be engaged in by the Internet Archive.

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[24] The online service provider exemption that applies to caching and web storage would not apply to the permanent archival activities of the IA. *See* 17 U.S.C. 512(d) (2)(B) (excusing "intermediate and temporary" copying, but requiring the person performing the caching to comply with the refresh policy of the site proprietor).

[25] REI wonders, for example, if the Wayback Machine contains sites with infringing motion picture clips, or photographs taken down at the copyright owner's request, or stolen credit card numbers, or child pornography removed from the web by law enforcement authorities.

In short, if the IA wishes to make the works of others available over the Internet, or store copies on its servers for worldwide transmission to posterity, it should have to take the same steps as anyone else: clear the rights. No doubt the IA finds this state of affairs both ill-advised and extremely inconvenient, but "mere inconveniences or theoretical critiques", NOI, 65 Fed. Reg. at 63580, will not support an exemption from the prohibition in section 1201.

D. Computer Program and Database "Security" Classes

Proposed Classes:

1. Those literary works, musical works and audiovisual works, for which a person has lawfully obtained a right of use, protected by access control mechanisms which include features, flaws or vulnerabilities that (a) expose (i) the works to be protected or (ii) other assets of the users of such measures—including computers, computers systems or computer networks or the data or other protected works used with them—to infringement, compromise, loss, destruction, fraud and other adverse actions or (b) permit the privacy of such users to be compromised. (Comment 29).

2. Those literary works representing computer software programs and databases, for which a person has lawfully obtained a right of use, that operate to control access to works protected under the Copyright Act but contain features, flaws or vulnerabilities that (a) expose (i) the works to be protected or (ii) other assets of the users of such measures—including computers, computers systems or computer networks or the data or other protected works used with them—to infringement, compromise, loss, destruction, fraud and other adverse action. (Comment 29)

3. Literary works, including computer programs and databases, that fail to permit access to recognize shortcomings in security systems, to defend patents and copyrights, to discover and fix dangerous bugs in code, or to conduct forms of desired educational activities. (Comment 40).

4. Open source and free software and other works licensed under licenses such as the GNU GPL (General Public License). (Comment 3).

Summary of argument:

These comments offer no evidence suggesting that unauthorized access to databases is needed, and the issues that they seem to raise have more to do with objections to or misunderstanding of the trafficking provisions in 1201(a)(2).

These comments reflect a view of some that 1201(a)(1)(A) has had "substantial negative impacts on the conduct of basic research in the U.S."[26] The DMCA does not, for however, prohibit the "teaching" of techniques to investigate security risks, *see* Comment 40 at 2; it contains provisions for bona fide encryption research, a broad exemption for law enforcement activities, and a statutory defense for acts of

[26] *See* Comment 40, at 1.

circumvention to protect personal privacy. *See* 17 U.S.C. 1201 (e), (g)-(i). The DMCA also contains a provision exempting reverse engineering for the purpose of interoperability. *Id.* § 1201(f). It would seem incumbent on those seeking an exemption to explain why these existing defenses would not apply to the referenced activity. *Cf.* 2000 Final Rule, 65 Fed. Reg. at 64569 (noting that an exemption referencing the same reverse engineering activity treated in statutory defenses ought to proceed conservatively).

Even were they to show that these acts were not covered by the existing statutory defenses, the proposed exemptions are overbroad for at least three reasons. First, irrespective of the weight accorded the unverifiable, anonymous anecdotes contained in these comments, none of the "evidence" has anything whatsoever to do with electronic databases. On that basis alone, the exemptions should not issue.

Second, at least one of these proposals exempts acts of circumvention directed at "literary works, including computer programs and databases … to conduct desired educational activities." This is simply the "class of user" argument advanced—and resoundingly rejected—by the Copyright Office in the last rulemaking, in slightly different clothes. *See, e.g.*, 2000 Final Rule, 65 Fed. Reg. at 64559 (Oct. 27, 2000) (describing the proposed "class of user" method for defining "class of works" as "untenable").[27]

Finally, with respect to the portion of the exemption that proposes security testing and checking for infringement, REI appreciates the concerns of CERT and the USCM over the security of computer networks and the integrity of intellectual property. As a preliminary matter, the publication or research papers, or anything else, cannot violate section 1201(a)(1)(A). Those activities would be prohibited (if at all) under section (a)(2).

To the extent that these comments raise issues of unauthorized access, REI's position is simple. No one should have the right to access our online databases without permission. In addition to the diverse published copyrighted works available in REI's products, many of REI's databases contain information protected by state and federal privacy laws (such as credit reports and other sensitive information), and a mere 'malfunction' should not give third parties the right to access it. There is no sound policy reason for permitting online databases to become hacker test cases, no matter what the claimed purpose.

Overall, REI expresses no opinion on whether nondisclosure or disclosure of security flaws better serves the public interest; it does believe, however, that this rulemaking is not the proper forum in which to analyze this matter. The Copyright Office should therefore tread very carefully when crafting any exemption that could potentially permit unauthorized access to databases to ensure that it does not conflict with existing

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[27] *See also supra* § III.B (addressing this issue in more detail).

national security and privacy policy. [28] In any event, REI shares the concerns of the copyright owner groups over preventing the unlawful dissemination of copyrighted works. REI is not aware of a copyright owner that has asked for an exemption similar to those proffered in these classes, nor is it aware of any facts that would urge it to do so.

IV. Conclusion

For the foregoing reasons, Reed Elsevier believes no exemption should issue for any of the proposed classes of works.

Respectfully submitted,

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[28] The vulnerability of computer networks and software to malicious attack has risen from a peril of electronic commerce to a grave national security concern and presents a difficult policy issue. Some believe that the best way to ameliorate these security risks is through full and immediate, and widespread disclosure of security flaws. Others believe that the wide dissemination of vulnerabilities does little more than provide wrongdoers with a roadmap of how to attack a system and are better left quiet. The current Congress and Administration, by means of the Homeland Security Act, have created an incentive for these vulnerabilities to be disclosed, but not to the general public. *See* Pub. L. No. 107-296, § 214 (stating that information about security risks voluntarily provided to the government are exempt from certain disclosure requirements under FOIA and elsewhere).