VIA ELECTRONIC MAIL

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Dear Messrs. Joyner and Feder:

Reed Elsevier Inc. (REI) appreciates the opportunity to offer the following reply comment in response to the Federal Register Notice of 5 June 2000.[1]

I. Introduction and General Comments

Section 104 of the Digital Millennium Copyright Act (DMCA) directs the Register of Copyright, in conjunction with the Assistant Secretary for Communications and Information of the Department of Commerce, to submit a report on two issues: (1) the effects of the amendments made by chapter 12 of the DMCA and the development of electronic commerce and associated technology on the operation of sections 109 and 117 of the Copyright Act, and (2) the relationship between existing and emerging technology on sections 109 and 117 of the Copyright Act. As a publishing and an e-commerce company, the operation of both of these provisions is critically important to our business. REI joins the comments of certain other organizations in saying that no amendment to either section is necessary.[2]

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[1] 65 Fed. Reg. 35673 (June 5, 2000).

[2] These commentators include the Software and Information Industry Association, the American Film Marketing Association, et. al., and Time Warner Inc. As the library associations mentioned (and mischaracterized) our business practices specifically, REI believes it necessary to present its views in further detail.

Reed Elsevier is a world-leading publisher and information provider whose goal is to become an indispensable partner to our customers for information-driven services and solutions in our three areas of focus: Legal, Scientific, and Business Information. Our products include LEXIS-NEXIS, *Variety, Broadcasting and Cable, The Lancet,* and many other print and electronic products in numerous fields of endeavor. REI's Science Direct is the largest web-based service of its kind, containing over 800,000 scientific research articles. In order to continue competing successfully in the marketplace, REI recognizes that it must successfully capitalize on the potential of the Internet.

This year, Reed Elsevier commenced the first phase of a massive strategic investment program. Over the next three years, REI will spend over one billion dollars on a major upgrade of our products and services, the majority of which will be invested in improving the use of Internet technology. E-commerce, and the transmission of copyrighted works over digital networks, forms the core of our business plan for the foreseeable future. Indeed, the advent of the Internet has delivered an ultimatum to many publishers: go online, or go out of business.

Before embarking on this kind of expenditure, REI reviewed the risks of online distribution on such a large scale. Certainly, the DMCA has helped to make computer networks safer—but by no means risk-free—places to distribute copyrighted works.[3] Online piracy of copyrighted works of all stripes still runs rampant. Central to the decision to risk the offering of so many products and services online, however, are what we believe are relatively settled interpretations of sections 109 and 117, ones that have generated reasonable commercial expectations for publishers and consumers alike. Nonetheless, members of the library community and certain other commercial interests argue that both of these sections (and others) require wholesale revision.[4]

In our view, these commentators offer a solution in search of a problem, for several reasons. First, no need for amendment to the law has surfaced. It seems elementary to us that those who would seek a revision to the Copyright Act ought to bear the burden of demonstrating the need for a change to existing law.[5]

The explosive growth in e-commerce and the sale of copyrighted works supports the view that the current versions of sections 109 and 117 have served and are serving the

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[3] The recent public hearings on the effect of section 1201(a)(1)(A), as well as the DeCSS litigation in New York, underscore this point. Nonetheless, as the Copyright Office itself has noted, Congress's work is not yet done, as the copyright law's protection extends only to "original" elements of a work, and leaves labor-intensive works open to wholesale acts of theft. Hearing on H.R. 354, The Collections of Information Antipiracy Act, before the House Subcomm. on Courts and Intellectual Property, March 18, 1999 (statement of Mary Beth Peters) *available online*, www.house.gov/judiciary/106-pete.htm. Action still is needed on legislation to protect databases from misappropriation.

[4] *See, e.g.*, Peter Jaszi, Comments of the Digital Future Coalition (Comment 9), at 1, 4.

[5] *See* S. Rep. No. 101-735, at 7 (1990) (discussing the Computer Software Rental Amendments of 1990 and stating: "Congress has, in the past, resisted proposals to alter the balance achieved in section 109, requiring those seeking amendment to make a compelling case for change."); Michael Remington and Robert Kastenmeier, *The Semiconductor Chip Protection Act of 1984: A Swamp or Firm Ground?*, 71 Minn. L. Rev. 421, 444 (1985) (""If it ain't broke, don't fix it," is a familiar statement in the halls of Congress.").

public admirably. The Commerce Department estimates that this year, over 304 million people will use the Internet, and that North America will account for less than half of that usage.[6] Confidence in e-commerce has increased among both the technical *cognoscenti* and the general public.[7] With respect to commerce in copyrighted works, one report estimates that the core copyright industries accounted for over 4.3% of gross domestic product in 1997, and preliminary estimates for 1998 indicate that foreign exports of copyrighted works contributed over $71 billion to our balance of trade.[8] REI therefore views hyperbolic assertions such as "[w]ithout a digital first sale privilege, consumers will not buy in to electronic commerce"[9] as both remarkable and utterly unsustainable.

Second, many of the comments—in particular those of the library groups—brought forth arguments simply irrelevant to the task before the Copyright Office and the NTIA. Unlike the rulemaking process in section 1201(a)(1)(C) of the Digital Millennium Copyright Act, which allows the Librarian some discretion in determining adverse effects caused by the statute, the text of the study provision in section 104 of the DMCA directs the examination of two specific provisions and gives no comparable discretion. Moreover, as others have noted, Congress narrowed the scope of section 104 during the DMCA enactment process. The libraries' laundry list of complaints about pricing, use restrictions, site restrictions, the inability of staff to interpret contract terms, internet addresses, passwords, and archiving and preservation simply falls beyond the scope of the study.[10]

Other library comments, in addition to being irrelevant, can only be politely characterized as incomplete. The library associations assert that, in an unattributed quote:

> Elsevier has granted electronic access to their journals, but tells us they will only provide access for a 9 month period, so we will lose access to those electronic issues that we once had. We cannot afford their Science Direct product at the moment, which would give us more comprehensive, stable access to their journals.[11]

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[6] Economics and Statistics Administration, U.S. Department of Commerce, Digital Economy 2000 (June 2000) (opening statement of William M. Daley, Secretary of Commerce), *available online*, www.esa.doc.gov/de2k.htm (visited August 26, 2000).

[7] *See id.*

[8] Hearing on the Costs of Internet Piracy for the Music and Software Industries, before the Subcomm. on Int'l Econ. Policy and Trade of the House Comm. On Int'l Relations, 106th Cong. (July 12, 2000) (statement of Q. Todd Dickinson, Director, United States Patent and Trademark Office), *available online*, http://www.ogc.doc.gov/ogc/legreg/testimon/106s/dickinson0719.htm (visited August 26, 2000).

[9] Comment of the Digital Media Association (DiMA) (Comment 22), at 13.

[10] See Comment of the American Library Association et al. (Comment 18), at 6-7 [hereinafter Library Comments]. The libraries are not alone in this, however. *See, e.g.*, Comment of the Digital Future Coalition (Comment 9), at 4 (urging revision of section 301); Comment of the Future of Music Coalition (Comment 24), at 1-2 (discussing the section 114 "webcasting" license); Comments of the Digital Media Association (Comment 21), at 21 (discussing extension of § 110(7) to online retailers).

[11] Library Comments, at 16. Other inaccuracies too numerous to mention appear in the library comments, including a characterization of what the Uniform Computer Information Transactions Act does and does not do.

Missing from this discussion is the fact that Reed Elsevier DOES NOT CHARGE for access to the electronic versions of the most recent nine months of these publications, if the library has purchased a subscription to the print version.[12] REI also permits libraries perpetual access to electronic versions of the journals acquired during the course of the print subscription, but the expense of so doing requires a charge for this service.[13] In short, the libraries' description of REI's business practices, and the "harm" flowing therefrom, is both inaccurate and misleading.

The balance of this reply discusses sections 109 and 117 separately, but follows the same basic format for each discussion. First, it will examine the status of existing law, and the historical impetus underlying each provision. In light of that purpose, it will then examine the main arguments advanced by those who seek the section's amendment. This reply concludes that an amendment to either section is both unnecessary and ill-advised.

II. Section 109

A. Background of the First Sale Doctrine

Section 109's predecessor in the Copyright Act of 1909 was intended to codify the result in *Bobbs-Merrill v. Strauss*.[14] In *Bobbs-Merrill*, the Supreme Court rejected the publisher's argument that the Copyright Law gave the copyright owner power to control the prices of subsequent sales of its books.[15] Because the function of the copyright statute centered around securing the right to *multiply* copies of a work, the Court flatly rejected the publisher's proffered construction as beyond the copyright law's intended purview.[16]

In 1909, Congress codified the result in *Bobbs-Merrill*, and although some debate occurred during the 1976 revision over the precise wording of the legislation, the principle embodied in the decision was not challenged.[17] Section 109 of the current law provides that "notwithstanding the provisions of section 106(3), the owner of a particular

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[12] The libraries are, of course, free to dispose of the printed versions as they wish pursuant to 17 U.S.C. § 109.

[13] Reed Elsevier has also undertaken extensive efforts to ensure that archival copies of these materials are kept. In addition, REI allows libraries to maintain their own archives of acquired material, and will deposit copies of REI publications into appropriate public repositories if our own facilities are dismantled. For more information on our business practices, see Comments of Reed Elsevier Inc. in the rulemaking on the Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies (March 31, 2000) [hereinafter REI 1201 Comment]. REI is working with libraries every day to develop and improve models of publisher and library co-operation.

[14] 210 U.S. 339 (1908).

[15] *Id.*. at 351. The contract from which the dispute arose also contained this term, but a state court voided it as an unlawful restraint of trade. *See Arguments on Common Law Rights as Applied to Copyright, Before the Copyright Subcomm. of the House Comm. on Patents*, 62 Cong., 2d Sess. (1909), *reprinted in* E. Fulton Brylawski and Abe Goldman, 5 Legislative History of the 1909 Copyright Act, at 36.

[16] 210 U.S. at 350.

[17] *See generally* Stephen W. Feingold, Note, *Parallel Importing Under the Copyright Act of 1976*, 1976, 17 N.Y.U J. Int'l L. @ Pol. 113, 128-32 (1984) (describing the enactments of § 109 in detail).

copy or phonorecord lawfully made under this title … is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord."[18] The legislative history states that "Section 109(a) *restates* and *confirms* the principle that, where the copyright owner has transferred ownership of a particular copy, the person to whom the copy is transferred is entitled to dispose of it by sale, rental or any other means."[19]

As Nimmer on Copyright explains, "the policy favoring a copyright monopoly for an author gives way to the policy opposing restraints of trade and alienation."[20] The policy favoring restraints of trade, however, is not unlimited. The first sale of a particular copy does not exhaust the copyright owner's right to control performance, display, the production of derivative works, and reproduction. Moreover, when the exhaustion of the distribution right implicates a threat of substantial unauthorized reproduction, Congress has decided that the policy on free alienation gives way to the policies favoring the encouragement of creativity.[21] This precise policy goal motivated amendments to the Copyright Act prohibiting the unauthorized commercial lease or lending of copies of computer software and sound recordings.[22] In other words, once the reproduction right becomes significantly implicated, the policy against restraints on alienation yields to the goal of protecting against the evisceration of the copyright owner's exclusive rights.

B. Digital Transmissions Implicate Reproduction, Not Alienation

Section 109 has little discernible application to most transactions in the digital world, as digital transmission of a copyrighted work requires the making of a copy on the receiving computer, and therefore involves a reproduction.[23] Some in the library and

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[18] 17 U.S.C. § 109(a) (emphasis added). In 1983 and 1990, Congress limited the first sale doctrine right with respect to sound recordings and computer programs. Record Rental Amendment of 1984, Pub. L. No. 98-450, 98 Stat. 1727 (Oct. 4 1984); Computer Software Rental Amendments Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089 (Dec. 1, 1990).

[19] H.R. Rep. No. 1476, at 79 (1976) (emphasis added).

[20] M. Nimmer and D. Nimmer, Nimmer on Copyright § 8.12[A].

[21] *Cf.* S. Rep. No. 98-162, at 5 (1983) ("Commercial record rentals, to the extent they displace sales, offend the precepts of the Constitution because they deny creators a fair return for the exploitation of their works.").

[22] *See, e.g.*, H.R. Rep. No. 101-735, at 9 (1990) ("Rental of software will, most likely, encourage *unauthorized copying*, deprive copyright owners of a return on investment, and thereby discourage creation of new products."). 17 U.S.C. § 109(b)(1)(A).

[23] The construction urged by the Video Software Dealers Association and the National Association of Recording Merchandisers in pages 13-16 of their comment flies in the face of the plain language of the statute and the overwhelming weight of existing authority. *See, e.g., MAI Sys. Corp. v. Peak Systems, Inc.*, 911 F.2d 511 (9th Cir. 1993) (finding that a copy in RAM is sufficiently fixed to be a reproduction for purposes of the Copyright Act); Report of the Working Group on Intellectual Property Rights, Intellectual Property and the National Information Infrastructure 90-95 (1995) ("NII Report") (detailing the application of section 109 to a digital transmission). House Judiciary Comm., Section by Section Analysis of H.R. 2281 as Passed by the House of Representatives on August 4, 1998 (Comm. Print) (Ser. No. 6), at 24 ("The first sale doctrine does not readily apply in the digital networked environment because the owner of a particular digital copy usually does not sell or dispose of the possession of that copy."). Moreover, reliance on the cases referenced by VSDA and NARM misses the point. For example, in *United States v. Sachs*, 801 F.2d 839 (6th Cir. 1986), and *United States v. Cohen*, 946 F.2d 430 (6th Cir. 1991), the court upheld the defendant's conviction for criminal copyright infringement based on the fact that they had repeatedly

academic community, as well as certain commercial interests, have argued in this and other fora that the first sale doctrine needs to be altered for the digital age. This argument reared its head when President Clinton formed the Information Infrastructure Task force in 1993, and was resoundingly rejected by that task force two years later:

> Some argue that the first sale doctrine should also apply to transmissions, as long as the transmitter deletes from his or her computer the original copy from which the reproduction in the receiving computer is made. … This zero sum gaming analysis misses the point. … To apply the first sale doctrine in such a case would vitiate the reproduction right.[24]

Similarly, the 105th Congress took no action on the "simultaneous destruction" proposal contained in H.R. 3048, and the 106th has yet to introduce legislation continuing it.[25] The Task Force's statement remains as true today as it was five years ago, and any such amendment to section 109 would be equally unwise.

First, as discussed above, the existing state of the law serves both publishers and users admirably, and no need for any such amendment has been demonstrated. The enactment of the DMCA represented an important step towards making online networks safe places to distribute copyrighted works. To the extent that chapter 12's effects have been examined by third parties, the parade of horribles predicted by some members of the library and user communities remains pure, unsubstantiated and implausible speculation. Others in the academic community, for example, feared that the DMCA would have a severe effect on encryption research, and as a result Congress required the Copyright Office and the National Information Technology Administration to study the effects of section 1201(g). After the required comment period, the report found that:

> Of the 13 comments received in response to the Copyright Office's and NTIA's solicitation, not one identified a current, discernable impact on encryption research and the development of encryption technology; the adequacy and effectiveness of technological protection for copyrighted

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violated the copyright owner's reproduction rights *with lawful copies that they had already acquired.* In short, the acquisition of a lawful copy under section 109 does not give the transferee the right to make additional reproductions, although fair use and other defenses will excuse certain acts.

[24] *See* NII Report, at 94.

[25] The text of that proposal states:

> The authorization for use set forth in subsection (a) applies where the owner of a particular copy or phonorecord in a digital format lawfully made under this title, or any person authorized by such owner, performs, displays or distributes the work by means of transmission to a single recipient, if that person erases or destroys his or her copy or phonorecord at substantially the same time. The reproduction of the work, to the extent necessary for such performance, display, distribution, [sic] is not an infringement.

H.R. 3048, 105th Cong. (1997).

works; or protection of copyright owners against the unauthorized access to their encrypted copyrighted works, engendered by Section 1201(g).[26]

Similarly, the recent rulemaking on section 1201 did not reveal any adverse effects flowing or likely to flow from the section's application.[27] It seems incumbent on those seeking to amend section 109 to present more than undifferentiated fears and hyperbolic predictions.[28]

Second, the simultaneous destruction proposal advanced by the Digital Future Coalition renders the copyright owner's right to control reproduction a virtual nullity in practice. Even the willful pirate may escape liability by deleting the originating material from its hard drive, and claiming the benefit of the "simultaneous destruction defense" during litigation. Moreover, it would be impossible for the copyright owner to verify that the transmitting party had actually destroyed the original copy. The problems of proof posed by this language make its adoption ill-advised.

Third, although U.S. law has made significant strides in securing copyrights in digitally distributed works, many countries have not.[29] Further pursuit of a simultaneous destruction proposal may well have adverse international implications. As of 1 January 2000, all members of the World Trade Organization must have domestic laws that structurally comply with the Trade Related Agreement on Intellectual Property Rights (TRIPS). Specifically, article 13 requires each member country to confine its exceptions and limitations on the exercise of enumerated rights to certain special cases which do not conflict with the normal exploitation of the work and do not unreasonably prejudice the rights of the copyright owner. By substantially eviscerating the reproduction right, the "simultaneous destruction" proposal arguably violates both of these provisions. The United States' ability to foster respect for copyright law abroad will be vastly undercut by eviscerating the copyright owner's ability to control reproduction under domestic law.[30]

Fourth, the adoption of an absolute "digital first sale" in combination with a broad preemption of license terms, as envisioned by the Digital Future Coalition, the libraries,

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[26] United States Copyright Office and National Telecommunications and Information Administration, Joint Study of Section 1201(g) of the Copyright Act, part VI, *available online*, http://www.loc.gov/copyright/reports/studies/dmca_report.html.

[27] Indeed, the record amassed by the Copyright Office in the 1201 hearings suggests that the increased protection will greatly benefit the market for copyrighted works. *E.g.*, 3 May 2000 Transcript of Anticircumvention Rulemaking, at 17 (noting that the compromise of the content scrambling system (CSS) prevented the launch of sound recordings in the DVD audio format). Similarly, to REI's knowledge, the enactment of the prohibition against falsification, alteration, or removal of copyright management information has had no effect on the first sale doctrine. *See* 17 U.S.C. § 1202 (prohibiting alteration, falsification, or removal of CMI with the *intent* to infringe or aid or facilitate infringement).

[28] Indeed, it seems incumbent on these groups to explain why existing defenses to infringement, such as fair use, do not apply to these transmissions. REI has no opinion in this respect.

[29] *See* Dickinson statement, *supra*. More detailed information on the failure of certain countries such as Brazil, Uruguay, and the Russian Federation to meet international standards can be found at http://www.iipa.com/2000_AUGUST_GSP_PRESS.PDF.

[30] *See generally* Dickinson Statement, *supra* (describing the efforts of the PTO to garner international respect for copyright law).

and others undermines the ability of copyright owners to lawfully account for the differing situations of their licenses. Loss of the ability to prevent unauthorized reproduction would cause pricing structures to flatten, hurting most those institutions that rely on inexpensive access to copyrighted works. For example, many libraries and universities acquire inexpensive access to LEXIS NEXIS and Reed Elsevier's Academic Universe at a flat rate or, in the alternative, at cost subject to certain restrictions.[31] REI can offer this service because its contracts ensure that public institutions do not become de facto competitors in the for profit market. If, as the Digital Future Coalition and the libraries seem to envision, this new "digital first sale" would preempt a license term preventing this from occurring, then the small nonprofit library would pay the same price for access to REI's service as a Fortune 50 corporation. REI urges that the NTIA and the Copyright Office consider the benefits of lawful price discrimination[32] when evaluating whatever proposals this process may yield.

Finally, we note that some groups have heralded the emergence of so-called "move" technologies,[33] which permit deletion of a copyrighted work simultaneously with its transmission, as the basis justifying adoption of a "simultaneous destruction" statutory amendment. This is analogous to arguing that the potential of anti-lock brakes to make vehicles stop faster justifies abolition of the speed limit. Unauthorized reproduction of all kinds of copyrighted works still runs rampant on the Internet, and it is an open question whether section 1201(a) would prevent circumvention of such technologies in the United States.[34] Though intriguing, these technologies are still in a period of relative infancy; are not in widespread use by copyright owners or users in the U.S., much less abroad; and an open standard for such technologies has yet to surface. Rather than drastically amend section 109 in a manner that requires the copyright owner to rely on a legally untested technologically nascent protection, REI urges the Copyright Office and NTIA to recommend that the market decide whether and how such technologies will be used.

III. Section 117

A. Background

Section 117 emerged from the Report of the National Commission on New Technological Uses of Copyrighted Works (CONTU). After examining the purposes of copyright and finding its application to both the source and object code of computer programs consistent with the act's purposes, it recommended that Congress amend the then-existing copyright law on three fronts. First, it recommended that the Act be amended to include a definition of computer program.[35] Second, it recommended that the

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[31] *See, e.g.*, REI 1201 comment, *supra* (describing the terms and conditions of access to Academic Universe).

[32] *Cf. USM Corp. v. SBS Technologies*, 816 F.2d 1191 (7th Cir. 1987).

[33] *See, e.g.*, Comment of the Home Recording Rights Coalition (Comment 22), at 5; Comment of the Digital Media Association (Comment 21), at 10.

[34] REI has no opinion as to whether these technologies fall subject to § 1201(a) or 1201(b).

[35] Final Report of the National Commission of New Technological Uses of Copyrighted Works 13 (1978) [hereinafter CONTU Report].

possessor of a copy have the right to make an additional copy as an essential step in the utilization of the program in conjunction with a machine and in no other manner. [36]

Third, in order to "guard against destruction or damage by mechanical or electrical failure,"[37] it recommended that the possessor have the right to make a backup copy, and destroy it when possession of the original ceases to be rightful.[38] Congress adopted section 117 almost verbatim from the CONTU report; the sole change involved striking the phrase "rightful possessor" and requiring the privilege to be used by an "owner."[39] At the time section 117 became law, this exception was of much greater importance. Most computers of the day ran on 5 1/4" floppy disks, which are extremely fragile and degrade quickly. If those disks became damaged, the computer would cease to function. Modern digital media lasts much longer, with minimum risk of degradation if properly stored.

B. Section 117 Applies to Computer Programs Only

Much misunderstanding about section 117 seems to exist, in particular with respect to the right to make a backup copy. First, the exemption extends only to the owners of copies of computer programs. It does not apply to every kind of work fixed in digital media. REI is aware of no "trend" (much less a case) supporting this proposition, the statements of the Digital Media Association notwithstanding. The Digital Media Association cites *DSC Communications v. Pulse Communications, Inc.,* 976 F. Supp. 359 (E.D. Va. 1997), for the assertion that the trend is to read section 117 broadly.[40] In that case, the District court dismissed several claims of infringement against the defendant based on the unauthorized reproduction of software. What the Digital Media Association neglects to point out, however, is that *the District Court was reversed on every claim relating to copyright infringement, including its construction of 117. See DSC Communications v. Pulse Communications., Inc.,* 170 F.3d 1354,1362, 1364 (5th Cir. 1999).[41]

In light of the lack of any support for this proposition in current law, REI opposes the blanket extension of section 117 beyond computer programs to temporary copies of any work. First, such a provision is unnecessary if the reproduction of the work is authorized, the infringement is de minimis, or the infringement may be excused as fair use as in the case of a lawfully made CD, DVD, or digital download of copyrighted

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36 *Id.* at 12.

37 *Id.* at 13.

38 *See id.* at 12.

39 *Compare id.* at 12 with 17 U.S.C. § 117(a).

40 Comment of the Digital Media Association (Comment 21), at 15 n.18.

41 The confusion does not stop there, however. The Computer and Communications Industry Association believes that 117 can require software to be maintained by the copyright owner's service organization. Comment of the Computer and Communications Industry Association (Comment 19), at 2. As amended in 1998, the text of 117 provides exactly the opposite. *See* 17 U.S.C. 117(b). Moreover, attempts to improperly extend the copyright monopoly beyond the scope of the rights in § 106 fall subject to claims of misuse. *See, e.g., Lasercomb, supra. See, e.g., Lasercomb Am., Inc. v. Reynolds,* 911 F.2d 970 (4th Cir. 1990). Of course the circumstances under which a misuse claim may arise have nothing whatsoever to do with section 117, and are beyond the scope of the study.

material. As the library associations, Digital Media Association, the Home Recording Rights Coalition, and the Digital Future Coalition support the addition of this amendment, REI believes that they should compellingly demonstrate to the Copyright Office and the NTIA why (1) existing defenses, including fair use, would not apply in these contexts; and (2) that leaving § 117 in its current form would seriously inhibit important uses of these works.[42]

Second, many (though certainly not all) of the works published by Reed Elsevier are factual compilations, containing only thin copyright protection. Copyright does not protect the massive investment required to create these works in the labor required to ensure their thoroughness, accuracy, currency and ease of use; and this leaves these works vulnerable to acts of piracy. Any blanket exemption of temporary copying would enable a would-be "competitor" to strip valuable material out of the underlying database, and offer a competing product at a fraction of the cost of the original. This is particularly so in the Internet environment, which lends itself to costless and immediate manipulation.. One district court has already (REI believes erroneously) found this kind of activity non-infringing under existing law.[43] Statutorily exempting this kind of copying renders an anorexic copyright nonexistent.

V. Conclusion

The long series of events leading up to the DMCA's enactment relied on certain settled interpretations of existing law. REI, along with many of the other groups that have submitted comments on this provision and in the 1201(a)(1) rulemaking, believes that the statute and the compromises reflected in its provisions should be given a chance to work as intended—in conjunction with existing rights, remedies, and defenses. Changes in technology will pose new challenges to the Copyright Act, and create new markets for copyrighted works; indeed, technological change drove the enactment of the DMCA. Many of the policy arguments of the user community relating to the amendment of sections 109 and 117 were made during the course of the DMCA's consideration by Congress. In the wake of a statutory revision involving the balance of many competing policies, the wiser course of action is to allow the market's evolution through private adjustment and judicial interpretation. REI believes—and the balance of experience suggests—that e-commerce will continue to flourish as a result, producing a variety of products and business models to the benefit of the public.

What does harm e-commerce, however, is epidemic and unchecked piracy of copyrighted works. The groups that submitted comments may not like existing law, but they do respect it. There is, however a class of users that believes copyrighted works become "free" by mere virtue of their placement in digital media. REI urges that NTIA and the Copyright Office should use the opportunity presented by this study to "contribute to a climate of appropriate respect for intellectual property rights in an age in

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[42] The Home Recording Rights Coalition states that is fair use. *See* Comment of the Home Recording Rights Coalition, at 6. REI has no opinion on whether such acts are lawful.

[43] *Ticketmaster v. Tickets.com*, (CV 99-7654 HLH (BQRx)) (C.D. Cal.) (August 10, 2000) (unpublished opinion), *available online*, www.gigalaw.com.

which the excitement of ready access to untold quantities of information has blurred in some minds the fact that taking what is not yours and not freely offered to you is stealing."[44]

Should the Copyright Office and NTIA deem it necessary to hold hearings on this matter, Reed Elsevier would welcome the opportunity to present its views.

Respectfully submitted,

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[44] *Universal Studios, Inc. v. Remeirdes*, 2000 U.S. Dist. LEXIS 11696, at *144 (S.D.N.Y. 2000).