

The National Federation of Abstracting & Information Services

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

Dear Mr. Carson:

On behalf of the National Federation of Abstracting & Information Services (NFAIS), I am writing to submit brief comments with regard to the Public Hearings held in May on possible exemptions to the prohibition on circumvention of copyright protection systems for access control technologies.¹

NFAIS members represent approximately 60 of the world's leading producers of databases and information services in the sciences, engineering, social sciences, business, and the arts and humanities. On behalf of those members, NFAIS submitted a formal reply² on March 28, 2000 to the initial comments presented on the abovementioned issue. However, the organization was anxious to learn if the concerns detailed in that reply document would be alleviated by the testimonies presented in the hearings. For that reason, I attended the hearing held in Washington, D.C. on May 2nd and, in addition, the NFAIS Information Policy Committee listened to *all* of the remaining Testimonies and Q&A sessions that were posted on the Copyright Office's Web site.³ Unfortunately, our concerns were reinforced, *not* lessened. We therefore restate our position that considering the *current* existence of *significant* potential risk to owners of intellectual property, and considering the fact that the issue under consideration will be re-examined by law within three years, it is *premature* for any class of work to be exempted from the prohibition on the anticircumvention of access control technologies as detailed in the *Digital Millennium Copyright Act*. Indeed, even members of the Library community who are requesting such exemptions testified during the hearings that *as of this current point in time they have not suffered any adverse affects as a result of the technological protection of copyrightable works, nor do they know of any circumstances where librarians or professors are being forced to circumvent access control protections in order to make use of works.*⁴⁻⁵

¹ *Federal Register*, Vol. 65, No. 53, Friday, March 17, 2000, Proposed Rules, pp.14505-14506, <http://www.loc.gov/copyright/fedreg/65fr14505.html>

² Reply Comments, Document #51, <http://www.loc.gov/copyright/1201/comments/reply/051nfais.pdf>

³ <http://www.loc.gov/copyright/1201/hearings/index.html#audio>

⁴⁻⁵ Fred Weingarten, May 19, 2000, Morning Q&A Session, <http://www.loc.gov/copyright/1201/hearings/index.html#audio> and James Neal, May 4, 2000, Morning Q&A Session, <http://www.loc.gov/copyright/1201/hearings/index.html#audio>

Let me restate here why we believe that there should *not* be any exemption to the prohibition on the circumvention of copyright protection systems for access control technologies at this point in the lifecycle of the newly-emerging Digital Information Society:

- Copyrightable Databases are not adequately protected by the current U.S. Copyright Law, as noted by the Copyright Office itself.⁶
- Technology is one method of protection used to supplement the legislative void—a method supported by the Academic, Library, and Scientific communities.⁷
- Copyrightable Databases are increasingly used in worldwide distance learning, necessitating technological access controls to prevent abuse—as supported by the Academic community.⁸
- Copyrightable Databases are used by millions of U.S. citizens via Library Access—as noted in the comments of the Library Associations.⁹
- Knowledge and understanding of Copyright law and Intellectual Property Rights are not widespread.

The hearings process only confirmed that the current perceptions and interpretations of the protection afforded by Copyright Law—even among well-educated members of the academic and library communities—are diverse, un-informed, and conflicting. The growing belief that a copyrightable work containing one or more facts is unentitled to technological controls because such protection denies public access to the fact(s)^{10,11} is just one example of the confusion abounding in the marketplace. (Has the novel been written that doesn't contain a fact? Will digital novels only be given "thin" copyright protection?) Members of the library community have themselves admitted to being confused as to what they can and cannot do with copyrighted works:

“Now we have this broad new law that confuses and concerns us, because of the ambiguity and apparent contradiction. . . . We need a precise—a clear, precise—sense of what is and is not proper, so we can exercise those rights.”¹²

NFAIS members believe that the time during which a law is clouded in confusion is *not* the time to be creating exemptions to that law, particularly when confronted with the admission that the lack of such exemptions has not caused harm in the market!

⁶ U.S. Copyright Office Report on Legal Protection for Databases, p. ii, August 1997

⁷ *Ibid.*, p. ix

⁸ See comments with regard to the use of Digital Information in Distance Learning, <http://lcweb.loc.gov/copyright/disted/comments.html>

⁹ “Exemption to Prohibition on Circumvention of Copyright Protection Systems For Access Control Technologies, Comments of the Library Associations,” Comment #162, pp. 4-5, <http://lcweb.loc.gov/copyright/1201/comments/162.pdf>

¹⁰ Association of American Universities, Comment #161, <http://lcweb.loc.gov/copyright/1201/comments/161.pdf>

¹¹ Dr. Siva Vaidhyanathan, May 18, 2000, Afternoon Q&A session, <http://www.loc.gov/copyright/1201/hearings/index.html#audio>

¹² Linda Crowe, May 18, 2000, Afternoon Q&A session, <http://www.loc.gov/copyright/1201/hearings/index.html#audio>

The Digital Millennium Copyright Act (DMCA) has emerged as *the* focal point for the conflicting, complex, and inter-related issues that have been at play in the digital information marketplace for many years—well before the *DMCA* was enacted. Indeed, it is apparent from listening to the hearings that the issue of technological protection of copyrightable works is *not* the sole concern of those who gave testimony. The issues of licenses, distance education, and finances are additional factors tightly woven into the presentations and the discussions that followed as shown by a sampling of quotes:

“... the implementation of access controls is part of—it sounds grandiose—but a new economic order or new licensing order within this copyright world. . . .”¹³

“While the higher education community has become accustomed to the use of site licenses for computer software programs, . . . the concept of licensing books, journals, and databases is a proposition that we have not fully embraced.”¹⁴

“... the system of distributed learning that’s being anticipated at our University, the University of Maryland, and several other research institutions will increasingly depend upon information that’s accessible on the Internet and through our digital libraries.”¹⁵

“... we are very concerned that technological measures are not designed to prevent alleged piracy, but actually seek to advance a pay-per-use business model for accessing electronic information . . . and we need to be concerned about this economic model.”¹⁶

Usage rights, education, licenses, and money—all evoke intellectual *and* emotional responses to the issue of technological protection of copyrightable works. Time is required for these responses to be satisfactorily sorted and resolved *if* an appropriate balance between the rights of copyright owners and the interests of users is to be maintained. Unfortunately, there is *insufficient* time between now and the October 28, 2000 deadline for a *satisfactory* resolution to be reached. Therefore, NFAIS members firmly believe that exemptions to the prohibition on circumvention of technological measures that control access to copyrightable works *should not be given at this time*.

However, *NFAIS members are equally strong in their belief that legal access to and fair use of information is essential*. We would like to offer our collective expertise, and work with the Copyright Office and other interested parties in seeking a satisfactory solution to the many conflicting, complex, and inter-related issues highlighted by the *Digital Millennium Copyright Act*, and ask that you include us in any activities that are developed to reach that end.

Sincerely,

Richard T. Kaser,
NFAIS Executive Director

¹³ Julie Cohen, May 4, 2000, Morning Q&A Session,

<http://www.loc.gov/copyright/1201/hearings/index.html#audio>

¹⁴ Rodney Peterson, May 3, 2000, Afternoon Session, Testimony

<http://www.loc.gov/copyright/1201/hearings/index.html#audio>

¹⁵ *Ibid.*

¹⁶ James Neal, May 4, 2000, Morning Session, Testimony

<http://www.loc.gov/copyright/1201/hearings/index.html#audio>