

Digital copyright exceptions and limitations for scholarly publications in the education and research communities (Position paper of the International Association of STM Publishers)

Introduction

There are few copyright exceptions & limitations specific to education and research in the digital environment, but it is likely that over time more exceptions will be considered.ⁱ Any possible future exceptions or limitation must of course be developed in the context of the Berne Convention's 3-step test, which requires that any exception must be confined to a certain special case that does not interfere with the normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the rights-holder.ⁱⁱ

What should be the guiding principles in considering or developing exceptions? What pitfalls should be avoided? STM publishers have valuable input and wish to contribute to this debate.

A. Basic Principles

STM publishers prepare and distribute their materials (scholarly and scientific journals, books and databases) for and into the research and education communities, communities that therefore constitute their most significant audiences and markets.

It is often stated that because education and research are in the public interest, they constitute a "certain special case" on which any copyright exception is premised (first step under the Berne Convention). Moreover, the presumed non-commercial nature of many educational and research activities is frequently cited as a strong indicator that the use should be legitimised under an exception and does not "interfere with the normal exploitation", ie *the market*, of the rights-holder (the second step), or is not "unreasonably prejudicial" to his/her interests (the third step).

The public interest of research and education is best served by encouraging the creation of new publications and information services with these audiences and markets in mind. For example, journal articles, academic treatises and textbooks are published by STM publishers for the very purpose of contributing to scholarly communication and education. Libraries for non-commercial research or non-commercial educational institutions are the primary purchasers of (or licensees for) STM publisher materials and services. Offering publications and information services

to these non-commercial communities, eg by way of subscription or individual journal article supply, is the very essence of "normal exploitation" which must be left free of exceptions that prejudice the legitimate interests of rights-holders unreasonably.

Further, STM publishers have embraced digital technology and offer much of their material online or in digital form (almost all journal and database content, and an increasingly large number of books) and provide online services such as individual article purchase and access. Publishers have entered the digital environment, recognising both the new opportunities for distribution it presents, and also the significant risk for widespread unauthorised downloading.

STM publishers are also actively engaged with other agents and distributors to distribute or provide access to or copies of such materials.

Clearly any exceptions and limitations for education and research dealing with STM materials would need to be carefully and cautiously crafted to minimise any potential distortion of this vital and well-functioning system for scholarly communication. Given that STM materials are prepared specifically for the educational and research context, this context does not constitute a "certain special case" (1st step under Berne Convention) in relation to STM materials. An unqualified exception that includes all STM materials would also interfere with the normal exploitation of the work (2nd step under the Berne Convention). Recognising this, a number of copyright laws with digital exceptions and limitations pertaining to research and education exclude STM materials designed for such markets, i.e. an "exception from a more general exception", as one of a number of specific qualifiers the exception or limitation.ⁱⁱⁱ Further, any exception or limitation newly introduced would also fully need to take into account the amplified risks of the digital environment (in this sense, "digital is different"). Finally, it must also be recognised that different circumstances will apply in different countries, consistent with local legal traditions and experience.

STM publishers are aware of the information needs of researchers and educators, the general contributions that such scholars make towards society, and the role that specialized libraries play in the dissemination of knowledge.

STM therefore recognises that some exceptions and limitations remain relevant in the digital environment and supports those exceptions and limitations noted herein, and believes that these principles, if carefully applied^{iv}, will not erode or interfere with the market for scholarly communication.

We distinguish between those activities that could be an **exception** to relevant copyright law, with no requirement for direct rights-holder authorisations or collective licenses (whether voluntary or mandatory), and those activities that are suitable for a **limitation**, areas of use that have more of a potential to impact the market for STM materials and thus require direct authorisation or a collective licence approach. STM supports direct voluntary rights-holder licensing and permission-granting, and voluntary collective efforts as well. Mandatory collective licences

should be considered only in the most rare and circumscribed circumstances where voluntary collective solutions would be impossible to organise administratively.

B. Exceptions in the digital environment for non-commercial research and educational institutional libraries

1. *Archiving needs (libraries)*

Libraries for non-commercial research or educational institutions should be able to create and use a digitized archival copy to replace lost or damaged originals in the public or “circulating” collection of the institution (or in restricted collections for scholarly use), if new originals or authorised copies are not available commercially or if the library cannot obtain access to an archival copy through the mechanisms identified in their licence or subscription access agreements.

Many STM publishers provide for archiving in their licence or subscription access agreements.

Libraries should also be able to “refresh” the archive by creating new digital copies from time to time (to accommodate technological changes in areas such as formatting or digital storage requirements). More than one copy at a time can be made as may be necessary to ensure that replacement archival copies can be made in the future.

This exception should be limited to *replacement* and not for the creation of further copies or generally for access outside the institutions’ user community.

2. *Technological support for access by blind and visually disabled (libraries)*

Libraries for non-commercial research or educational institutions should be able to create a digitized copy of a print original, or a digital copy of a digital original, to enable access by those with visual disabilities (e.g. blindness or inability to read small print) for STM materials that are not already made available for these purposes. The library may use specialised formatting of the digital copy to enable the copy to have an enhanced visual display or sound capability. In order to obtain such copies, users with visual disabilities should register with or otherwise be certified by relevant local or national authorities or organisations that specialise in such disabilities.

STM publishers also encourage government and foundation grants and funding, and cooperation amongst libraries and such organisations, to ensure appropriate technological standards are developed and made more accessible, in part to encourage and incentivise publishers to develop new products for such users.

3. *Interlibrary copying*

The traditional underlying reason for library copying exceptions has been that, in an environment dependent on print production and distribution, a given library would not necessarily subscribe to or purchase all relevant materials, but would rely instead on the collections of other institutions (perhaps more specialized institutions) to fulfil

the library's patrons' needs. This would be especially applicable for materials not deemed to be central or essential for that particular library's collection. It is understood in most jurisdictions where this legal and procedural tradition has developed for such "lending-and-borrowing", that an essential issue would be to ensure that such lending-and-borrowing would not be likely to substitute for the potential purchase of such material.

We note that, as described above, and with the advent of the Internet and STM publisher's innovations, the availability of digital STM content is ubiquitous in a world that is by now close to borderless. Moreover, STM journal content is now not only available to potential journal subscribers, but to everyone: individual articles are instantly and globally available for purchase and access. Our view is that the rationale for permitting interlibrary copying and supply is thus much reduced, almost to the point of being irrelevant, in the digital environment.

STM does accept that there may be a scholarly need for a non-commercial and educational library to make a digital copy of unique and rare scholarly material for another non-commercial and educational institution, but for in-copyright works this must be limited to material which is not commercially available in the geographic territory of the "requesting" institution. Such copying cannot be done systematically for the purpose of substituting for the normal purchase or licence of STM material (including the supply of individual journal articles) for the requesting library's collection. Libraries should be obliged to keep records of materials copied for such purposes and their requests from other libraries for such copies.

C. Limitations in the digital environment for non-commercial research and education needs

1. *"On-the-spot consultation" on dedicated terminals within library premises*

Libraries of non-commercial research or educational institutions should be able to offer access to works acquired in print for a library's permanent collection on terminals situated within the library premises^v. Digitisation and display may be permissible under an exception for research and private study within a publicly accessible library (a library with no direct or indirect commercial purpose) on dedicated electronic reading places. The displayed digitised extra copy and any print-out copies of the work made by researchers and students under exceptions available to them should be permissible to the extent that a royalty fee is paid either under licence to the publisher concerned or to a collective licensing society acting as a clearing house.

However, as far as digital versions or electronically accessible works are concerned re-scanning or display on any terminals, whether dedicated or not, remains a matter of licensing terms and conditions. Moreover, where display on dedicated reading places is permissible, not more copies of a work that is still in-print and available at a reasonable commercial price may be made available or displayed simultaneously than have been made part of the print collection. Where the library or educational institution wishes to display additional copies simultaneously, further royalty fees

should be payable either to the rights-holder or the collective licensing society the rights-holder is affiliated with.

2. *Course-packs*

Course-packs and their digital equivalent “Electronic Reserves” constitute an area where rights-holders and user communities are best served by electronically facilitated rights-clearance that can take various shapes and forms. Terms and conditions (licence or subscription agreements) for born-digital content may provide an all-in fee that permits the use of these electronic resources in the generation of Course-packs and/or Electronic Reserves. However, for some content this may not be available and a separate electronic rights clearance may be appropriate. Moreover, many Course-packs and Electronic Reserve items combine items that are from born-digital sources subscribed to by the library or institution, legitimately digitised resources and print resources. In such cases a licence from a clearing house such as a properly mandated collective licensing society represents a win-win solution. In this regard, STM endorses and subscribes to the approach taken by the American Association of Publishers and Cornell University – and more recently Hofstra University and others.^{vi}

3. *Orphan works*

Orphan works are copyrighted works for which the user is unable to identify, locate and/or contact the legitimate holder of the relevant rights (“copyright owner”) for the purpose of obtaining permission to use her/his works. Such “orphan works” risk exclusion from the cycle of creation and exploitation, as copyright compliant users may prefer non-use over the risk of liability for infringement. For this reason, and in order to avoid such outcome, STM has developed a Position on Orphan Works in December 2006, followed by a Position Paper in November 2007 on a “Safe Harbour”, providing some guidelines as to what constitutes a “diligent search” in relation to a potentially orphaned work. In June 2008, STM, together with 24 other stakeholder organisations, signed a Memorandum of Understanding on Diligent Search Guidelines for Orphan Works. This complements a declaration subscribed to by a growing list of STM members outlining their position in case of use of orphan works in the field of scientific, medical and technical literature. These documents are available on the STM web site:

- STM Position on Orphan Works (December 2006):^{vii}
- STM/ALPSP/PSP Position On Use of Orphan Works in Scientific, Medical and Technical Literature (November 2007):^{viii} and
- Press Release MoU on EU Diligent Search Guidelines For Orphan Works:^{ix}

It has been suggested that the need for a “diligent search” may be obviated in the case of so-called “mass-digitisation” exercises. STM remains of the view that whilst users and rights-holders should collaborate in an effort to streamline and facilitate diligent searching, there is no substitute for a diligent search even in cases of mass-digitisation.

4. *Interlibrary copying*

While our view is that in the digital environment there should be only a very limited exception for interlibrary copying (see paragraph A.3 above), due to the significant availability of STM material in electronic form, we do accept that collective licensing might be useful for digital copying and/or delivery of material for the education and research markets. Such licensing must not disrupt existing market functions and should be in the context of voluntary collective licensing schemes on a competitive basis.

D. Restrictions

None of the areas identified in this Position Paper for copyright exceptions and limitations contemplate distribution by the library or institution to users or consumers who are not affiliated with the institution or authorised by the institution to access and use its collection (with the exception of the discussion above on "interlibrary copying"). Any expansion of the user community would inevitably impact and distort the underlying market for STM materials.

We also believe it is vital for all the exceptions noted herein, that any reproduction be made in a manner consistent with and faithful to the original, and should not in any way injure the moral rights of the author nor obscure any information provided by the publisher.

STM believes that many of these principles could be set out in STM publisher licence or subscription access agreements, and notes that such negotiated agreements should take precedence over inherent copyright law.

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ⁱ Note that for purposes of this discussion, we do not address commercial researchers or companies doing research, nor does this Position Paper address materials published by educational publishers directly for use in teaching.

ⁱⁱ Art. 9(2) Berne Convention, Art. 13 TRIPS, Art. 10 WIPO Copyright Treaty.

ⁱⁱⁱ See also the annex listing a number of exceptions contained in copyright laws of EU Member States and comparing them to §52a of the German Copyright Act. §52a of the German Copyright Act contains a carve-out in favour of school book publishers who would be prejudiced where a trade publisher may not suffer equally under an exception. §52a is too widely worded in other ways and, importantly, fails to provide a similarly warranted carve-out for publications serving the academic market. Art. 122(5)(e) of the French Intellectual Property Code does contain such a carve-out in favour of academic textbooks and related materials. Section 32(2) of the Spanish Copyright Act provides for a general exception in favour of teachers who use small parts of in-copyright works for illustration in the class room. Importantly, section 32(2) also provides a carve-out from that exception for school and university books. Section 110 of the US Copyright Act has a similar provision (an exception to the "TEACH Act" exception that notes that works that are "produced or marketed primarily for performance or display as part of mediated instructional activities" must still be purchased or licensed through normal market means).

^{iv} Any exception would have to comply with the three-step test and be “state-of-the-art”, ie narrowly tailored by way of describing the use accurately (eg “for the sole purpose of illustration ...”), the persons who may rely on the exceptions (eg “teachers in public schools”) and the extent (eg “excerpts or small parts of works”), see Art. 5(3)(a) of the EU Copyright Directive 29/2001 and national implementing legislation in EU Member States.

^v For an example of such an exception, see newly enacted §52b of the German Copyright Act, implementing Art. 5(3)(n) of the EU Copyright Directive 29/2001.

^{vi} See <http://www.publishers.org/main/PressCenter/CollegeCopyrightGuidelinesRelease.htm>

^{vii} See <http://www.stm-assoc.org/documents-statements-public-co/2006-documents-statements-public-correspondence/>

^{viii} See <http://www.stm-assoc.org/documents-statements-public-co/2007.11%20Safe%20Harbor%20Provisions%20for%20the%20Use%20of%20Orphan%20Works%20Nov2007%20Ver%201.1.doc>

^{ix} See <http://www.stm-assoc.org/home/stm-and-other-stakeholders-sign-memorandum-of-understanding.html>