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**Technical review of draft legislation on copyright exceptions
Comment on proposed new exceptions for private copying, parody and quotation, and on
amendments to exception for public administration, published 7 June 2013**

Introduction

The International Association of Scientific, Technical and Medical Publishers (“STM”) is the leading trade association for academic and professional publishers. It has over 120 members in 21 countries who each year collectively publish nearly 66% of all journal articles and tens of thousands of monographs and reference works. STM members include learned societies, university presses, private companies, new starts and established players.

European Union-based publishers publish 49% of all research articles worldwide (STM’s members originate approximately 2/3 thereof), employing 36,000 staff directly and another 10-20,000 indirectly, and make a €3billion contribution to the EU’s balance of trade.

STM members obviously have a substantial interest in the development of copyright legislation and submitted comments in the consultation chaired by Professor Ian Hargreaves leading up to the statement *Modernising Copyright*. We therefore thank you for the opportunity to submit comments on the draft legislation containing the new and amended exceptions which flow from this consultation.

These comments will be confined to the draft legislation published on 7 June 2013. We will make a separate submission in respect of the draft legislation published on 21 June 2013.

Contract override

As a general comment, cutting across all the proposed exceptions, STM and its members are extremely concerned about the impact that the provisions, contained in all the exceptions that have been proposed, that to the extent that the term of any contract purports to restrict or prevent the doing of any act which would otherwise be permissible under the exception, that term will be unenforceable. As an international organisation whose members trade across borders as a matter of course and often select the laws of England and Wales as the governing law of their cross-border

licences and other contracts for reasons of the wealth of its jurisprudence and the availability of forums for dispute resolution, STM is extremely concerned about legislative amendments of the common law of contract, especially where copyright is the subject.

Since the inception of the internet, contract, by way of licensing of electronic content, has become the very life blood of STM publishing. STM believes that the following are key issues to consider on the relationship of contract and copyright:

- (a) Licensing is flexible as to terms. Due to the vibrancy of the licensing market and the dynamic development of ever new licensing models, there is a great variety of licenses and products available. Licensing has the advantage over copyright law (and copyright exceptions) by remaining customisable, flexible and adaptable over time and at short notice. Licensing, when coupled with the provision of access to users, achieves more elegantly, swiftly and sustainably many of the purposes served in the past by copyright exceptions. Licensing contracts also deal with matters that exceptions do not, such as warranties and precisely defined usage rights. Negotiated usage rights create legal and business certainties between the parties, often obviating the need to agree on the precise scope of an exception.
- (b) Licensing is flexible as to duration. Licences are in the rule subject to a specified fixed term or are otherwise terminable on a period of notice. If, after termination, there is the desire to continue with any given licence, the licence can be renegotiated. Any renegotiated licence can take into account any new exceptions and limitations brought into force during the term of the previous licence. This illustrates that, even if commercial terms are not overruled by copyright exceptions, commercial terms are not immutable and will over time take changes in the law, including to copyright exceptions, into account.
- (c) Conflict between licensing terms and the scope and reach of exceptions which override contracts will create uncertainty. If copyright exceptions were allowed to overrule commercial terms, it is quite probable that this will lead to cases where there are disagreements between users and rights holders over the scope and reach of exceptions. For instance, some users may feel that a contractual provision limits an exception, when the rights holder believes the use does not fall within the scope of an exception. In such a scenario, the contract would actually reduce the risk of misunderstanding and provide legal certainty where an exception cannot.
- (d) Legislating exceptions does not necessarily provide an across-the-board solution for all copyright industries. Licensing of copyright-protected materials covers a range of diverse content, eg software, film, literary works, broadcasts and music, as well as visual art. It is therefore wrong to generalise what exceptions are really over-ridden by licensing terms and/or relevant to users. For instance, exceptions pertaining to software, differ from those applicable (and relevant) for the use of literary rights, and vice-versa. Moreover, the law applicable to licensing terms also differs depending on where the licensor is located, so a licence governed by a legal system outside the UK will not necessarily have override provisions.

Please consider that contract override would not only affect licences, which give access to copyright works, but also other contracts where copyright is the subject, even settlement agreements concluded to resolve disputes concerning copyright infringement. It is not uncommon that, in a dispute as to whether the exclusive rights of copyright apply or not in the light of an exception, the parties, for the purpose of settlement, agree to disagree on the applicability or not of the exception. Statutory contract override will make such settlements impossible due to key clauses, if not the

whole agreement, being made unenforceable, thereby compelling the parties to proceed with litigation.

Therefore, if statutory law would reduce the ability of users and rights holders legally to agree on permitted uses or create doubt over the enforceability of contractually agreed terms and conditions, that would create less certainty for parties negotiating a contract. As a result, the law of England and Wales will be less attractive as a choice of law, especially for licences of copyright where the parties are located in two or more jurisdictions.

Statutory law in the United Kingdom already regulates unfair contract terms, such as the Unfair Contract Terms Act, 1977, and the Unfair Contract Terms in Consumer Contracts Regulations, 1999, under which certain unfair and unreasonable terms in consumer contracts are ineffective. We therefore submit that to the extent that consumers might be excluded from the benefit of copyright exceptions by any particular standard contract under terms which are unfair and unreasonable, they are already protected by legislation and contract override provisions attached to copyright exceptions are unnecessary.

The contract override provisions are being introduced by secondary legislation, and, being a derogation of the common law principle of freedom of contract and not apparently required by primary legislation, STM questions whether doing so would be lawful.

Override of contract is certainly not required by the directive governing exceptions under European law. Recital 45 of the Directive on the harmonisation of certain aspects of copyright and related rights in the information society states that “the exceptions and limitations referred to in Article 5(2), (3) and (4) should not, however, prevent the definition of contractual relations designed to ensure fair compensation for the rightholders insofar as permitted by national law.” Article 9 states that “This Directive should be without prejudice to...the law of contract.”

In addition, we submit that the Directive does not permit the importation of these contract override provisions by way of statutory instrument. Article 6(4) of the Directive, although it deals with technological protection measures, specifically states that Member States can only provide the means of benefitting from an exception or limitation “*in the absence of voluntary measures taken by rightholders.*” Contract override in the way adopted in the proposed exceptions under review would, by removing the freedom of contract, deprive rights holders from taking the most obvious “voluntary measures”, namely licence terms.

STM therefore respectfully submits that a case should be made out, publicly, on what basis the blanket contract override provisions in the exceptions by way of secondary legislation is lawful and, if this is not possible or this course of action is found to be unlawful, the proposed exceptions should be amended by removing the contract override provisions. Ideally, any contract override provisions should not be made on the basis of a blanket approach, but be considered in detail, specifically in which cases, under what conditions and to what extent the override of contracts is necessary to achieve the Government’s policy objectives, also in the light of existing legislation, and to have such provisions in an amendment to the Copyright Designs and Patents Act, 1988.

Private copying

In principle, STM welcomes a narrowly crafted exception allowing private copying, provided that the three-step test under the Berne Convention and the conditions of the European Directive on the harmonisation of certain aspects of copyright and related rights in the information society are met.

Our specific comments on the proposed exception are:

- (a) The requirements of article 5(2)(b) of the Directive on the harmonisation of certain aspects of copyright and related rights in the information society must be met by providing for “fair compensation which takes account of the application or non-application of technological measures”.
- (b) STM members have had experiences with certain internet platforms which purport to serve as an electronic storage facility or repository for the documents of a user, which documents could include scientific peer reviewed articles subject to copyright, and which documents are then, subject to the user not changing the default settings, capable of being accessed by other users of the same service or even by search engines. The proposed exception places an obligation on the user to ensure that the reproductions he makes are made in accordance with the conditions of the exception – there is no corresponding obligation on any third party who makes or stores reproductions for the user.

STM therefore considers that the “electronic storage” permission in proposed section 28B(3) is open to abuse and that, at the very least, the consequences of this permission be reconsidered. In that sense, the “electronic storage” permission goes far further than the reasonable expectations of an individual person to make a private copy. If section 28B(3) were not to be included in the final text, it would still mean that the user could keep lawful private copies in his or her own home, which is consistent with the purpose of the exception.

- (c) The private copy exception should not apply to copyright works acquired by the user pursuant to another exception. As stated in our initial response in the *Modernising Copyright* consultation, STM supports the view that “fair compensation” is achieved through a payment made to the rights holder as part of a primary act of exploitation of copyright-protected works, with no need for additional secondary forms of compensation (such as equipment levies). However, we do not see where there would be the opportunity to collect “fair compensation” outside of equipment levies if a user can make a private copy from a copyright work obtained under an exception.

We recommend adding in proposed section 28B(1) after the words “of a copyright work lawfully acquired by him”, the words “for money or money’s worth” or “under the authority, whether express or implied, of the owner of the copyright”.

- (d) STM welcomes the specific conditions circumscribing the act involved in making a private copy which qualifies for the exception set out in proposed section 28B(1). However, the term “permanently transfers” in subsection (2), describing further conduct which would undo the benefit of the exception, is unclear and could create the basis of unnecessary dispute in an infringement action. We recommend instead the word “delivers”.

Quotation

STM is in principle being in favour of a fair dealing exception that allows academic citation without undermining the general protection provided for copyright works, as stated in the introduction to the quotation exception in the technical review, and fair dealing with quotation when exercising freedom of expression as sanctioned by Article 10 of the European Convention on Human Rights.

However, STM considers that the proposed exception on quotation, as drafted, will go far further than that, to the extent that the exception could be used for new forms of information products

which make use of copyright works without compensation to rights holders. STM's position is that the use of quotations for such information products should be licensed and not allowed under an exception.

Unlike the existing exception for criticism and review which the proposed exception on quotation seeks to replace, there is no "special case", as required by the three-step test under the Berne Convention, which is specifically described. Even with this deficiency, commercial use is not specifically excluded, and, if this exception were to come into force, it is conceivable that certain commercial uses without compensation to rights holders could be argued as being fair dealing. Finally, there is no limit to the extent of the quotation, leading to the concern that substantial parts of copyright works could be reproduced or communicated under the proposed exception "if required by the specific purpose."

In these circumstances, the contract override forming part of the proposed quotation exception is particularly prejudicial to STM members.

Yours faithfully,

A handwritten signature in black ink, appearing to be 'M Mabe', with a long horizontal stroke extending to the right.

MICHAEL MABE, CEO, STM