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**Technical review of draft legislation on copyright exceptions
Comment on proposed new exceptions for data analysis for non-commercial research,
education and research, libraries and archives, published 21 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.

Contract override

STM and its members are extremely concerned about the impact of the provisions of the draft legislation withdrawing the right of contracting parties to achieve nuanced, market-based approaches in some of the new exceptions being proposed, and appearing in some form or another in all the proposed Statutory Instruments.

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, e.g. 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 approach to 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.

Data analysis for non-commercial research

STM and its members have played a leading role in developing business models for text and data mining. For instance, In the Licences for Europe stakeholder consultation being hosted by the European Commission, STM has proposed a model clause that may be included in subscriptions for non-commercial scientific research (see http://www.stm-assoc.org/2013_05_29_Lavizzari_Text_and_Data_Mining.pdf and http://www.stm-assoc.org/2013_04_17_Readable_Summary_Sample_licence_for_Text_and_Data_Mining_of_subscribed_copyright.pdf). The model clause licenses users to download, extract and index subscribed content for the purpose of text and data mining and to store electronic copies of the subscribed content on their computers, on certain terms and conditions, which include limiting the use of the authorised copies to the text and data mining exercise, attribution of the authors and compliance with security and other technical access requirements.

In addition, publishers, including STM members, are actively engaged in other projects to facilitate text and data mining, such as those by Crossref (<http://www.crossref.org/>), a not-for-profit organization whose goal is to support a persistent, sustainable infrastructure for scholarly communication, the Copyright Clearance Center (<http://www.copyright.com/>), a collective rights management organisation, and the Publishers Licensing Society (<http://www.pls.org.uk/default.aspx>), which oversees the collective licensing scheme in the UK for book, journal and magazine copying, and which is developing a clearing house project to enable researchers to find publishers of non-subscribed content and obtain a click-through licence . Several individual publishers who are STM members, are also developing initiatives to facilitate data and text mining analytics in conjunction with the research community.

These developments, many of which have happened since the publication of *Modernising Copyright*, give greater definition to the subject matter of data analysis and show the need for far greater definition of the terms in the proposed legislation, and illustrate the importance of the role of contract.

We respond to the specific questions as follows:

Are these provisions an effective implementation of the Government’s policy? Do these provisions have any effect that is not consistent with the policy aim?

We respectfully submit that the answers to these questions is in each case “No.”

- Definition “data analysis”: From the outset, it has to be borne in mind that the data analysis contemplated in *Modernising Copyright* is an automated, electronic analysis, as part of a

technological process, and many of the actions described in the exception, including the heading of the legislation, must take this into account. In this regard:

- The heading could be amended to “Electronic data analysis for non-commercial scientific research.”
- The exemption that “copyright is not infringed” in Section 29A(1) only relates to an action “where a copy of the work is made as part of an automated technological process for the purpose of carrying out electronic analysis of data recorded in the work”. (Also see the comment on the term “electronic analysis” below.)
- Right of licensors to impose conditions of access: The introduction to the proposed legislation states that the licensor may impose conditions of access to the licensor’s computer system or to third party systems on which the work is accessed. Not only does the proposed legislation not contain wording to give effect to this intention, but section 29A(3) and Schedule 2C(3) contain contract override provisions which would inhibit, if not exclude, this possibility.

Licensors’ conditions of access are a critical requirement, primarily to safeguard the integrity of their on-line platforms. This in turn enables publishers to invest in their platforms to make the displayed content useful to their users.

Section 29A therefore needs a new sub-clause to allow this, and section 29A(3) and Schedule 2C(3) must be amended, if not deleted altogether.

- Extension of exception to all copyright works: *Modernising Copyright* envisaged that this exception would apply to scientific journals and other works. Article 5(3)(a) of European Directive 2009/29 on the harmonisation of certain aspects of copyright and related rights in the information society similarly envisages the harmonised exceptions to apply to “scientific research”. The proposed exception, however, applies to all copyright works

The exception therefore needs to be limited by stating the scientific purpose of the research by inserting “scientific” before “research” in section 29A(1)(a) and in the heading of the section.

Is the term “lawful access” effective?

We submit that the answer to this question is “No” because the term “lawful access” needs further definition, especially in the context that the research to which this research relates is meant to be scientific research.

Considering that the object of the exception proposed in *Modernising Copyright* was to facilitate access over a range of publishers’ platforms and not just a general “right to mine”, STM considers that the exception should only apply to content to which the user has acquired with the rightsholder’s permission, e.g. by way of subscription or licence, such as Open Access works.

The term “lawful access to a copy of a copyright work” should therefore be qualified by adding “under the authority, whether express or implied, of the owner of the copyright”.

We do not foresee a situation where a lawful computerised electronic data analysis cannot record the source of the data. The exception must therefore require that the copy be accompanied by an acknowledgement, and the part between parentheses in section 29A(1)(b) should be deleted.

Does the term “electronic analysis” capture the range of analytical techniques used in scientific research?

We submit that the term “electronic analysis” could cover far more actions than intended in *Modernising Copyright*, and as such could have unintended consequences which will jeopardise the primary market for scientific material.

STM understands that this proposed exception derives from the proposal in *Modernising Copyright* for an exception for text and data mining for scientific research. Based on consultation with experts

knowledgeable in the field, STM proposed a working definition for text and data mining as being “a computational process whereby text or datasets are crawled by software that recognises entities, relationships and actions” in its public statement on text and data mining (at (http://www.stm-assoc.org/2012_03_15_STM_Summary_Statement_Text_Data_Mining_final.pdf)), emphasising that text and data mining was not an end in itself, but a research tool.

It is suggested that the Government could consider the above working definition to further circumscribe the term “electronic data analysis.”

Is the wording (relating to infringing uses outside the purpose of non-commercial research) effective?

We submit that the answer to this question is “No”, because the wording allows too many actions in the making of and dealing in the copy that many would consider infringing conduct.

- As stated above, the kind of research that is to qualify for the exception is only scientific research.
- The term “non-commercial research” (even if qualified by the word “scientific”) is too vague and we submit that the concept would be better defined in section 29A(a), as “the sole purpose of scientific research that has no object which is directly or indirectly commercial.”
- In section 29A(2), we understand the words “and where such a copy is permanently transferred to another the copy shall be treated as an infringing copy” as only one case of what conduct falling outside the exception would be, and that, as the section says, “any dealing” not conforming with subsection (1) is an infringement.

In the specific case quoted here, the qualification of “transferred” by “permanently” would, in our view, render the case being described as so limited so as to have no effect, which in turn may affect the interpretation of other infringing actions intended to be caught by subsection (2), and we therefore submit that the word “permanently” should be deleted. The word “delivered” may be an improvement on “transferred”.

Considering that the copy is likely to be an electronic copy, communications to the public should also be mentioned in subsection (2) as an example of an act of infringement.

- We think most would consider any dealing in a copy where technological protection measures have been circumvented, to constitute an infringement of legitimate rights. In *Modernising Copyright*, it was stated that “it would be essential to ensure that adequate protections are in place to ensure that the copying undertaken is not used to develop or distribute substitutable copies,” and by requiring TPMs to remain in place as a condition for dealing with the copy not to be infringing would support that aim.

Is the wording protecting the exception to copyright from override by contract effective?

As we have noted earlier, STM does not consider the contract override provisions to be effective. That applies particularly in this case, where the policy in the preamble of the draft legislation precisely contemplates the imposition of conditions of access. The provisions of section 29A(3) and Schedule 2C(3), as they now stand, contradict this.

Education

STM materials are prepared specifically for education and research (their target market), and they do not, therefore, constitute a “certain special case” (1st step under Berne Convention). Any unqualified exception that included all STM materials would also interfere with the normal exploitation of the work (2nd step under the Berne Convention). By way of example, the teaching exception should not apply to works intended primarily for teaching purposes, as that would conflict with their normal exploitation.

For this reason we are concerned that the term “instruction”, as used in the proposed new section 32 (i.e. in that it is not qualified by the term “course of”, as currently in the CPDA), is far broader than the

stated policy objectives. We submit that this exception should be limited to illustration or demonstration for the purposes of instruction, and to fair dealing carried out only for that purpose.

From the perspective of drafting, section 32(1) and (2) is not as accurate as the current section 32 CPDA in that the drafting (especially in subsection (2)) conflates the acts to be covered by the proposed exception with the persons who are to benefit from the exception. For instance, as it now stands, proposed section 32(2)(b) seems to extend the exception to “receiving instruction” in isolation, which we submit is over-broad. The structure of the current section 32(1) CPDA, in which “instruction” is defined in the introduction and paragraph (a) directs the exception to “a person giving or receiving instruction” is preferable. In this regard, we note that the European Copyright Directive does not refer to a person “receiving instruction”, but we accept that the term, in the limited context described above, is already in the CPDA.)

Reprographic reproduction should not be covered by the exception in section 32, as is currently the case with the existing exception in section 32(1)(b) CPDA. The purpose behind this exception, as stated in *Modernising Copyright*, was to extend the exception to new non-reprographic technologies.

Related to our concern about the over-broad scope of the new proposed exceptions in new sections 32 and 36, where ever there is a reference to the staff of an educational establishment in a fair dealing, that reference should be limited to a “teacher”, since the exception should not relate to members of staff of an educational institution who are not teachers, and the word “teacher” is suggested to be consistent with the definitions in section 174 CPDA.

Research and Private Study

We have no comment on the proposed change to the exception for research and private study.

Provision of copies by libraries and archivists

STM welcomes the consolidation and simplification of the various provisions under this heading. We only have relatively minor comments:

- We submit that it is clear from the object of non-commercial research or private study the person described in section 37 should be an individual. We therefore suggest that, as in the proposed exception for private copies, the word “individual” (or “researcher or student” as in section 29 CPDA) should replace “person”.
- Proposed section 37(1) will allow a user to order a digital copy of a STM journal article, whether the library holds a print or digital version. Since the vast bulk of STM journals, including back copies, are now available in digital form, the making and supply of a digital copy in these circumstances *per se* is not of direct concern to STM (although it could be of concern to other publishers). However, the main concern is to ensure that there will be no further use of the digital copy so supplied, since that could compete with the offering by STM publishers. Section 37 must therefore provide that any further use, copying or other exploitation of the copy will constitute infringement.
- STM supports the concept that supplying libraries should be able to recover the costs attributable to the production of the copies they supply, but the words “not less than” preceding “the cost ... attributable to its production” in proposed sections 37(3)(f) and 43(1)(f) create a potential for abuse. We suggest that this terminology should be replaced with the corresponding terminology relating to the charging of costs for inter-library loans in proposed section 42(2)(c), where the word “representing” is used.
- STM has no objection in principle to copies of subscribed STM materials being made available for viewing only on dedicated terminals on the physical premises of publicly accessible libraries and archives, but has the following comments in relation to some of the extensions of that principle proposed in proposed section 43A:

- Museums benefitting from this exception must be open to the public and operated on a not-for-profit basis. The CPDA already has many provisions relating to libraries and archives, but the inclusion of museums is new, hence the term must be properly defined.
- The exception must only apply to works acquired by the institution by outright purchase or licence, i.e. with the permission of the rights holder.
- The institution must not make more copies available at any one time than it has in its collection.
- The proposed exception should not be extended to educational institutions. Firstly, the condition for such making available of being accessible to individual members of the public (subsection (2)(b)(i)) does not follow from being available in an educational institution, and, secondly and more importantly, education institutions already benefit from an exceptions regime specific to them. Subsection (1)(b) should therefore be deleted.

We hope that our submission today will assist with the technical review of the proposed exceptions and stand ready to engage with the IPO in any way that will further aid this process.

Yours faithfully,



Michael Mabe
Chief Executive Officer
STM, International Association of Scientific, Technical and Medical Publishers