

3 November 2016

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Dear Sirs

PUBLIC CONSULTATION ON PROPOSED CHANGES TO SINGAPORE'S COPYRIGHT REGIME – Submission by the International Association of Scientific Technical and Medical Publishers (STM)

STM is the leading global 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 and private companies.¹

We have pleasure in responding to the Public Consultation on proposed changes to Singapore's Copyright Regime as set out in the Public Consultation Document dated 23 August 2016.

In this submission, STM is only commenting on certain aspects of the proposed changes insofar as it relates to copyright and the academic publishing industry, specifically the

¹ STM's website at <http://www.stm-assoc.org/>.

questions around text and data mining, where STM's members have unique experience in making content available for that purpose, and the supply of non-patent literature to patent applicants. STM's members also have an interest in the proposed extension of the ban on contracts overriding exceptions, having done some research on the topic, and the adaptation of the 'fair use' test, as well as orphan works, where many STM members already have contributed to accessibility.

The International Publishers Association (IPA) has submitted more extensive comments, all of which STM supports.

Introductory remarks

In a paper entitled "How Copyright Drives Innovation in Scholarly Publishing" (2013),² Prof. Adam Mossoff, Professor of Law at George Mason University School of Law and a member of the Copyright Alliance Academic Advisory Board, wrote:

"Today, copyright policy is framed solely in terms of a trade-off between the benefits of incentivizing authors to create new works and the losses from restricting access to those works. This is a mistake that has distorted the policy and legal debates concerning the fundamental role of copyright within scholarly publishing, as the incentive-to-create conventional wisdom asserts that copyright is unnecessary for researchers who are motivated for non-pecuniary reasons. As a result, commentators and legal decision-makers dismiss the substantial investments and productive labors of scholarly publishers as irrelevant to copyright policy."

The mission of publishers is to maximise the dissemination of knowledge through economically self-sustaining business models.³ Publishers invest considerable sums of money in their products, both in technology and in employment of people having the necessary skills, and thereby add considerable value to the creative input and its dissemination. Publishing books and journals means assuming commercial risk, such as the estimation of the size of the market for the work and the resultant structuring of the production of the work, as well as royalty arrangements with the authors. Also, it is publishers who are called on to act, at their cost, to enforce copyright in cases of infringement, which is something that an individual author would likely not have the resources to accomplish. Publishers add value to the finished article containing the creative work, and rely on a solid and certain framework of copyright law to enable them to earn a return on their investment.

Against this background, we comment on some specific questions relating to the changes being proposed.

² Available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2243264 with an introduction at <https://copyrightalliance.org/2013/04/how-copyright-drives-innovation-scholarly-publishing#.VknXaL-HcZN>.

³ STM Brussels Declaration at <http://www.stm-assoc.org/public-affairs/resources/brussels-declaration/>.

Proposal 6: Exceptions that cannot be restricted by contracts

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 solutions in respect of some of the exceptions, as is being proposed.

With the transition of published content to digital from paper, content is made available by way of licence, which will involve delivering an electronic copy of the content onto a device which would make that content accessible to the disabled user. Licensing of electronic content since the inception of the internet has become the very life blood of STM publishing, and is part of STM members' normal exploitation of the works they publish.

The practices and experiences of STM publishers do not relate to the notion implied by the Public Consultation Document, that copyright licence conditions habitually override specific exceptions under copyright law. A qualitative survey undertaken by STM in 2014 of the standard licences of its principal members, covering more than 11,400 journals, did not find provisions in these licences which explicitly override copyright exceptions.

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.

This principle is particularly important when considering contract override for a 'fair use'-style exception, since it would mean that an agreement settling threatened litigation between a rightsowner and an infringer in respect of a usage the infringer argues is fair use, can never be enforced by the rightsowner, who then faces the risk of being compelled to go to the highest court in the land every time an infringement case is defended on the ground of 'fair use.'

- (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 Singapore will not necessarily be subject to provisions banning contract override.

STM supports the IPA in considering that a case could be made for specific exceptions to provide that unfair contract terms were unenforceable. Such specific exceptions would be for circumstances where a contractual relationship between the rightsholder and the copyright owner is foreseen. As mentioned before, this should be carefully evaluated, exception by exception.

Proposal 7: Factors determining 'fair use'

STM considers that It would be ironic if the fifth factor of commercial availability in the 'fair use' test in Singapore were to be removed and that commercial availability would no longer be expressly described as a test for 'fair use' (and therefore militate in favour of certain permission-free and unremunerated uses), especially in the light of STM's members having been in the forefront of making the works that they publish available electronically since the 1990s.

STM's concern is that over recent years, 'fair use' in the United States has mutated from a defence for 'follow-on creators' to a sanctioning, in the words of noted American copyright lawyer Jon Baumgarten, of "regular, concerted, systematic, commercially purposed, 100% complete, uncompensated, copying, without permission, day in-day out, of millions of

copyrighted books.”⁴ Examples are the recent court decisions in the *Google Books*⁵ and *Hathi Trust*⁶ cases, which imply allowing the reproduction of the entire corpuses of whole works in library collections without rightsholder consent in order to achieve some object that is considered to be ‘fair use’. This mutation of ‘fair use’ in the United States illustrates that its application is not just a case of ‘Courts interpret[ing] the application of legislative principles’, but rather a case of the Courts taking over the legislative role from Parliament. The simple removal of the fifth factor in Singapore could therefore result in these and more unintended consequences.

The experience in Canada with the introduction of its fair dealing exception for education is instructive for the proposal to extend ‘fair use’ in Singapore in respect of works that are commercially available. A report by PricewaterhouseCoopers, *Economic Impact of the Canadian Education Sector’s Fair Dealing Guidelines*⁷ points to the devastating effect of the new exception on the local publishing industry⁸ and on revenues to authors and publishers.

Research by the Australian Copyright Council and reflected in its submission in this consultation⁹ indicates that the Singapore open ending fair dealing exceptions have their origin in the fair dealing exception for research and study under the Australian Copyright Act, not the defence of ‘fair use’ in the United States. The Australian test for its fair dealing exception for research and study has five factors and includes the fifth factor of ‘commercial availability.’ The factor of ‘commercial availability’ is deliberately a part of the Australian test so as not to hamper normal exploitation of the work or to unreasonably prejudice the legitimate interests of the rightsholder, as meant in the second and third steps of the Berne Convention three-step test.

We therefore join the IPA in suggesting that the fifth factor should not be removed, but that, at the most, it should be adapted to indicate its inapplicability in certain defined circumstances which do not interfere with normal commercial exploitation of copyright works.

⁴ “Global trends in Copyright: Fair Use and Beyond”, presentation at the International Publishers Association Congress, 10 April 2016, at http://www.internationalpublishers.org/images/events/ipa-congresses-events/2016_London/Jon_Baumgarten.pdf.

⁵ *The Authors Guild Inc., et al. v. Google, Inc.*, decision of the United States 2nd Circuit Court of Appeals, 16 October 2015.

⁶ *Authors Guild v. HathiTrust*, decision of the United States 2nd Circuit Court of Appeals, 10 June 2014.

⁷ June 2015, at https://www.accesscopyright.ca/media/94983/access_copyright_report.pdf, commissioned by the Canadian reproduction rights organisation Access Copyright.

⁸ P.74 of *Economic Impact of the Canadian Education Sector’s Fair Dealing Guidelines*, PricewaterhouseCoopers, June 2015. See also the article “Canada’s Access Copyright Cites 20% of Publisher Revenues Lost” in *Publishing Perspectives*, April 2016, at http://publishingperspectives.com/2016/04/copyright-protections-canada-australia/#.V_yXySQw3lN.

⁹ Obtainable from

http://www.copyright.org.au/acc_prod/ACC/Submissions/SUBMISSION%20IN%20RESPONSE%20TO%20PUBLIC%20CONSULTATION%20ON%20PROPOSED%20CHANGES%20TO%20SINGAPORE%E2%80%99S%20COPYRIGHT%20REGIME.aspx.

Proposal 8: Orphan Works

With the IPA, STM counsels against provisions allowing uses of orphan works otherwise limited by copyright become a compulsory obligation on copyright owners to “use it or lose it.”

We understand Proposal 8 not to relate to the mass digitisation of works by libraries and archives. In relation to mass digitisation projects, where orphan works are bound to be part of the subject works, STM has always advocated a licensing solution involving the libraries and archives wishing to undertake such projects, publishers and other rightsholders, and the local reproduction rights organisation. Indeed, in September 2011, STM, together with other stakeholders representing public libraries, other publishers and copyright management organizations in the European Union, signed a Memorandum of Understanding on making out of commerce works available for digitization projects in European Union member states.¹⁰

In response to Question 8(a), the STM would prefer a limitation of remedies, with the right of the copyright owner to charge the user a reasonable licence fee – on the basis that it is understood to be the same as the licence fees charged by that copyright owner for the same usage to other customers. We consider this to be a simple and effective solution for published literary works, but are mindful that it might not be effective for all kinds of copyright works. STM has a signatory statement, *Safe Harbor Provisions for the Use of Orphan Works for Scientific, Technical and Medical Literature*, signed by 24 of its members, including the biggest science publishers worldwide, advocating precisely such a solution in relation to works incorrectly identified as orphan works and of which the signatories are the rightsholders.¹¹

The limitation of remedies should only apply after the person intending to reproduce, etc, the work concerned has carried out a diligent search. Standard and procedures for a reasonably diligent good faith search are the following:

- The potential user of orphan works should be required to conduct a thorough search in good faith, with a view to identifying, locating and/or contacting the copyright owner, prior to using the orphan work.
- The reasonably diligent search should necessitate a high level of care. However worded, the search standard prescribed should require the potential user not only to research the identity/location of the current copyright owner, but also to inform her-/himself about the possible sources where such information could be found.
- Stakeholders should be encouraged to develop standards and guidance on what they consider a reasonably diligent search. These must be flexible as resources available change and improve.
- The user of an orphan work should bear the burden of proving that her/his search was reasonably diligent, and must maintain records of his/her efforts to meet that burden.

¹⁰ http://www.stm-assoc.org/2011_09_20_STM_Out_of_Commerce_MoU.pdf and http://www.stm-assoc.org/2012_10_18_MoU_OOCW_OMIT_in_EU.pdf. For a summary of the MoU see Press Release, Conference of European National Libraries (CENL), *et al.*, *Making Out-of-Commerce Works Available in EU Member States* (Sept. 2012)

¹¹ *Safe Harbor Provisions for the Use of Orphan Works for Scientific, Technical and Medical Literature* at http://www.stm-assoc.org/2014_03_04_Safe_Harbor_Provisions_for_the_Use_of_Orphan_Works.pdf.

It is not possible to provide an exhaustive list of resources that would be useful for a reasonably diligent good faith search. In virtually all cases, searches and reviews must be conducted of these kinds of resources identified generically as:

- Published indexes of published material relevant for the publication type and subject matter.
- Indexes and catalogues from library holdings and collections.
- Sources that identify changes in ownership of publishing houses and publications.¹² including from the local reprographic rights organisation, namely CLASS.
- Biographical resources for authors.
- Searches of recent relevant literature to determine if the citation to the underlying work has been updated by other users or authors.
- Relevant business or personal directories or search engine searches of businesses or persons.
- Sources on the history of relevant publishing houses.

In response to Question 3(c), STM does not favour the extension of any provisions relating to orphan works to unreachable owners, firstly since it is within the rights of a copyright owner not to reply, amounting to a withholding of consent, secondly since such an extension would amount to a “use it or lose it” obligation on rightsowners, something which is alien to copyright law, and thirdly since such an extension would place requests for permissions emanating from Singapore on a completely different footing to requests emanating from other countries, bearing in mind that (as in the example in para 3.60 of the Public Consultation Document), the recipients of such requests may most likely be outside Singapore.

Proposal 9: Text and Data Mining

Science publishers already make their published content available for text and data mining, the requirements not only being access to the copyright work (such as the reproduction of copyright works envisaged in para 3.62 of the Public Consultation Document), but also access to a format which is useful for this purpose. In response to the actual demand for such a service (which was initially much less than often presented), science publishers have invested in ways to make text and data mining of curated works possible for subscribers of the material they publish. In addition, there are licensed solutions available for mining across the corpus of works owned by various science publishers.¹³

In 2013, STM publishers declared their commitment to the facilitation of text and data mining for non-commercial scientific research in the European Union,¹⁴ signatories to the STM statement committing themselves to grant the necessary copyright licenses to permit the text

¹² STM maintains a publicly accessible list of the imprints owned by participating members at <http://www.stm-assoc.org/about-the-industry/stm-imprint-list/>.

¹³ Examples are *RightFind™ XML for Mining* - <http://www.copyright.com/business/xmlformining-2/> of the Copyright Clearance Center and Crossref's text and data mining services - <http://tdmsupport.crossref.org/>.

¹⁴ *Text and Data Mining for Non-Commercial Scientific Research* at http://www.stm-assoc.org/2015_11_10_Text_and_Data_Mining_Declaration.pdf.

and data mining of copyright-protected content and other subject-matter on reasonable terms for non-commercial scientific research purposes in the European Union. Whilst enabling managed use of their subscription platforms and electronic resources, either online or offline, signatories will retain the ability to apply and develop safeguards, such as technological solutions to minimise online system performance degradation. The signatories recognise that there should not be an undue burden on bona fide researchers at non-commercial institutions intending to engage in text and data mining of their subscribed or open access journal content for non-commercial scientific research that does not compete with and does not substitute for the content and services of STM publishers.

The declaration illustrates the requirements that are needed to facilitate text and data mining and the commitment of the 20 signatory publishers to meet these needs.

We consider the example given in para 3.64 of the Public Consultation Document not to be a representative example of a text and data mining case, but that it rather describes a case of an internet search.

STM proposes that Singapore should look to the nature of the demand for text and data mining in Singapore and to licensed solutions for text and data mining that are available internationally before considering legislation. Our answer to Question 9 is therefore that it is premature to consider a new exception for copying of works for data analysis.

We submit that any legislative intervention on this topic must take the following into account for permission-free uses:

1. the absence of offers for licences or offers for contractually negotiated agreements;
2. the non-profit and public nature of the institution undertaking the work;
3. that reproductions are made:
 - i. from scientific periodical publications lawfully accessed with the consent of the rightsholder; or
 - ii. from copies of scientific periodical publications included in the institution's own collection with the consent of the rightsholder; and
 - iii. consistent with any voluntary, or co-regulatory, adopted cross-industry standards and best practices;
4. that reproductions made for purposes of computational analysis must be destroyed upon completion of the work, and during the computational analysis securely stored by maintaining adequate and effective security systems and measures in line with industry standards and practice and may under no circumstances be substantially or systematically reproduced;
5. results of any computational analysis may only contain short extracts that do not substitute or replicate the scientific periodical publications or parts of scientific periodical publications, and which must acknowledge the sources and include copyright notices as they appear on scientific periodical publications from which any extracts emanate.

Proposal 10: Educational Uses

STM expressly supports the submission made by the IPA on this topic, noting that the educational market is a legitimate market for publishers and therefore not a “special case”, as meant in the Berne Convention’s three-step test, and also cautioning against the potential damage that could result from some of the proposed exceptions and from the exceptionally high thresholds for copying under, not only the exceptions being proposed, but under the existing exceptions as well.

Proposal 14: Non-patent literature reproduced in the course of patent applications

STM contends that subjecting published materials that are available for purchase on the open market to the kind of copyright exception contemplated in Proposal 14 is uncalled for. In STM’s view such a broad exception would be in conflict with the normal exploitation of the exclusive rights of the rightsholders under the Berne Convention three-step test.

STM publications would be especially hard hit in their core market, as these publications are among the most read and consulted by scientists, companies, researchers and others involved in the cycle of innovation, development, productivity gain and economic growth.

Under the current practice, we understand that a journal article that is cited in the course of examination of a patent application is notified to the patent applicant or to third parties by reference to the title of the article, its authors and the journal of publication, even by providing a link to the article on the publisher’s platform. By providing the link, it gives the applicant or third party the opportunity to purchase the article, if subscription is required, or to download it for free if it is published under an Open Access licence. For articles available by subscription, STM publishers also license them to be made available in other ways that are less expensive than outright purchase, for example through pay-per-view services like Deepdyve¹⁵ and ReadCube¹⁶.

In the United Kingdom, the situation is now regulated by Section 47 of the Copyright Designs and Patents Act, as amended in 2014,¹⁷ under which a communication of the document open for inspection to the public is limited to cases where the document “is not commercially available to the public by or with the authority of the copyright owner.” We understand that the practice of the UK IPO is not to make available to patent applicants copies of journal articles that are available elsewhere, but rather to provide the patent applicant with a link to the publisher’s website, where the abstract of the cited article appears and a copy of the article could be purchased, if desired.

¹⁵ <https://www.deepdyve.com/>

¹⁶ <https://www.readcube.com/bookmarklet>

¹⁷ Amendment made in terms of Section 2 of The Copyright (Public Administration) Regulations 2014, at <http://www.legislation.gov.uk/uksi/2014/1385/regulation/2/made>.

We note that Singapore's IPOS has recently been appointed as an International Searching Authority under the Patent Cooperation Treaty.¹⁸ We question whether the exception proposed under Proposal 14 is intended to apply to International Search Reports carried out by IPOS, noting that the *PCT International Search and Preliminary Examination Guidelines* only require the citation of a journal article.¹⁹

Conclusion

The comments in this letter are only in response to the issues raised in the Public Consultation Document which are of the most concern to STM, as an international trade association for the scientific publishing industry. As mentioned above, we support the response by the International Publishers Association.

STM is ready to amplify or otherwise assist in any way that would inform the debate on an effective and efficient copyright system.

Yours faithfully



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¹⁸ http://www.wipo.int/about-wipo/en/offices/singapore/news/2015/news_0006.html

¹⁹ Under the heading "Disclosures made on the websites of Trusted Publishers" in para 11.14 of the 2015 edition at <http://www.wipo.int/export/sites/www/pct/en/texts/pdf/ispe.pdf>.