



INTERNATIONAL ASSOCIATION OF SCIENTIFIC, TECHNICAL & MEDICAL PUBLISHERS

8 March 2007

Clerk of the Committee
Commerce Committee
Select Committee Office
Parliament Buildings
WELLINGTON

Dear Sirs/Mesdames

**Re: New Zealand –Copyright (New Technologies and Performers’ Rights)
Amendment Bill – exceptions for private study, educational institutions and
libraries – technological protection measures**

The International Association of Scientific, Technical and Medical Publishers ("STM") includes approximately 90 publishers, collectively responsible for more than 60% of the global annual output of research articles and publications of tens of thousands of print and electronic books, references works and databases.

The works of STM publishers are sold and licensed electronically widely to academic and corporate libraries and educational institutions, and the electronic or other delivery of individual copies of articles, including for use by libraries, educational institutions and their patrons, is an important source of revenue for scholarly publishers. Thus, selling and licensing, including to not-for-profit organizations, is and continues to be one of the major markets for STM publishers.

We are making this submission to you, as STM and its members are seriously concerned about some of the provisions of the Copyright (New Technologies and Performers’ Rights) Amendment Bill 2006 (“the Bill”). If enacted, the provisions discussed below would seriously prejudice STM publishing. The said provisions would stifle innovation and investment in research tools for the knowledge economy. Moreover, these provisions, if enacted, would violate New Zealand’s international obligations.

1. Clause 22 of the Bill - Section 46 – overbroad “fair dealing” extension

The Bill seeks to extend the application of the current “fair dealing” exception to the reproduction right, section 46, to the communication right. At the same time, the wording of the exception is currently very wide, not excluding commercial research, nor unequivocally excluding multiple copying (“copying on one occasion” is interpreted by some as not excluding systematic or concerted copying of a work at substantially the same time, for substantially the same purpose and/or for persons connected in a course of study).

Certainly in a digital and networked environment, such a wide exception is incompatible with Art. 9 of the Berne Convention three-step test and also incompatible with Art. 13 of the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS). The said provision states that all exceptions have to be confined to:

(i) certain special cases (ii) that do not conflict with the normal exploitation of the work and (iii) do not unreasonably prejudice the legitimate interests of the rightsholder.

STM urges the New Zealand lawmakers to reconsider the wide negative impact of this extension of the fair dealing provision and to narrow the exception down to non-commercial research and prohibiting multiple copying.

2. Clause 36 – new sections 56A, 56B and 56C – copying and supply of copying and access by libraries

This clause seeks to introduce and extend a whole range of exceptions into the digital and online world, but fails to take into account significant differences between the digital online market place and the print/analogue market place for copyrighted works:

2.1 Section 56A provides for on-site and remote access to digitally subscribed content. In our view, there is absolutely no need for this provision, as the types of access rights that are permitted by law are the typical rights that are granted by virtue of a licensing agreement. To the extent that section 56A purports to remove the need for licence agreements, it clearly violates the three-step test. Section 56A (4) seems to recognize this by stating that the exception depends on the purchase of a site licence or access rights for the required number of simultaneous users. Thus, the relevance of the section merely restricts the negotiation of other conditions in licensing agreements, effectively eroding subscription licensing as a business model and providing the platform for a “licence to hack” through digital rights management systems (see further below para. 4 regarding clause 89 and section 226D).

Moreover, licensing content in customized fashion allows tailor-made formatting and definition of user rights. A licensing approach benefits both rightsholders and users and thus is superior to the static copyright exception that is a one-size-fits all. In our view, therefore, section 56A should simply be deleted.

- 2.2 In the digital world, rightsholders – and particularly many members of STM – offer individual article journals and individual chapters of books to readers for access or download. This changes the focus of what use amounts to a “conflict with the normal exploitation” of a work (see above under para. 1 regarding step (ii) of the three-step test). Section 56B forecloses an entire market, namely the market for individual article downloads by exempting the supply of individual articles from any requirement of permission or payment to the rightsholder. The conditions under which a supply is legitimate merely seek to establish a test as to the intention of the user to use the work for private or research purposes. By permitting this use, an exclusive right is taken from rightsholders who as a result lack an incentive to develop electronic resources.

In our view the provision needs to be narrowed down in two ways:

- (i) the exception may only apply to cases where the rightsholder does not offer the work individually for electronic access or download;
- (ii) the exception may only apply where no licensing scheme is in place that would enable those rightsholders, who do not offer the resources individually electronically, to be remunerated. We note in this regard the submission to the Commerce Committee by CLL.

- 2.3 Section 56C extends the supply of a copy by one library to another into the digital world. What the section is missing, is a quantitative restriction on the number of copies to be supplied during a particular time period. This is important as section 56C effectively opens the door for libraries to cancel subscriptions and to satisfy the demand for published works by relying on other libraries. This is highly detrimental to the subscription business model which relies on a fair number of subscriptions and not only one subscription per country.

3. Clause 24 – section 44(1), 44(3) and 44(4) – copying at educational institutions

STM fully endorses the submission made by the Book Publishers Association of New Zealand and the International Publishers Association regarding this section 44. The said section allows the copying of works and educational resources and re-use on digital networks, such as intranets at educational institutions. The section will directly affect the market for tailor-made educational content that has no other market, but the educational market.

Moreover, the section does actively discourage investment in accessible, navigable and searchable high quality information provided at the right time which would be a key requirement to develop a knowledge economy. Without strong exclusive rights that are broad in scope and have few exceptions, rightsholders lack the incentive to invest, ultimately also to the detriment of users.

4. Clause 89 – section 226D – “licence to hack” through Technological Protection Measures

Section 226D effectively grants a licence to hack through digital rights management (DRM) tools and also to supply “TPM spoiling devices”. Read together with the new exceptions discussed above, in particular also with section 56A, section 226D raises concern for publishers offering subscriptions for password-protected and electronically accessible resources. Particularly electronic databases and electronic subscriptions for remote access are vulnerable enough and should not be made the target of legitimized hack attacks.

We urge the New Zealand lawmakers to consider the broad impact an unqualified “licence to hack” has and to consider alternative methods of ensuring that beneficiaries of exceptions can enjoy them, for example the right to apply to an ombudsman or other consumer watchdog that can engage with the rightsholder, before invalidating an entire DRM system by permitting to hack through a TPM.

5. Conclusion

STM considers that the above elements of the Bill detract from New Zealand's creativity-friendly legislative environment. STM urges the Commerce Committee and New Zealand lawmakers to consider the negative implications of the proposed sections of the Bill. STM is grateful for the opportunity to being able to make this submission and stands ready to amplify or otherwise assist in any way that would be appropriate and conducive to a sound New Zealand copyright legislation.

Very truly yours,

A handwritten signature in black ink, appearing to read "Michael Mabe", with a long horizontal flourish extending to the right.

Michael Mabe,
Chief Executive Officer
STM Association

Cc: Ana Maria Cabanellas, President, IPA
Jens Bammel, Secretary General, IPA

Michael Moynahan, President,
Book Publishers' Association of New Zealand