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Copyright Review

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Consultation on the Review of the Copyright and Related Rights Act 2000

Introduction

The International Association of Scientific, Technical and Medical Publishers (“STM”) is the leading trade association for academic and professional publishers. It has over 110 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. EU-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 €3b contribution to the EU’s balance of trade. STM publishers have actively embraced the opportunities of the digital online environmentⁱ, starting with journal content and other “native” digital products such as software, data and databases, as well as other digital tools. For more than ten years now, science and medical researchers, along with medical practitioners, have had ubiquitous access to online tools that include published information, links between references in the literatureⁱⁱ, data sets and software that can be manipulated by the user, and visual supplemental information such as video and three-dimensional illustrations that can be viewed from different perspectives by the userⁱⁱⁱ.

We are pleased to submit our views to the Copyright Review Committee for inclusion in its review to examine and, where appropriate and feasible, improve the current Copyright legislative framework. Our submission will focus on paragraphs 3 and 4 of the Terms of Reference. Regarding paragraphs 1 and 2, we disagree with the perception that certain areas of copyright, or as some voice it, copyright itself, is a barrier to innovation. We state emphatically the opposite, based on our experience as a trade association of publishers that have embraced, advanced and transformed the internet experience of academic and professional researchers and decision-makers. As the information age hurtles forward, and in order to meet the needs of creators and producers in a changing environment, the copyright system does require adaptations and updating. One example to illustrate this is the EU IPR Strategy^{iv}, which must be commended for its vision to combine an effort to renew and invigorate the fight against piracy and infringement, combined with sensible rules on orphan works and open and transparent collective licensing standards.

However, STM wishes to place on record that the copyright system as it currently exists is far from a broken system and has enabled STM publishers to invest hundreds of millions of Euros in the

technologies and programmes described herein, resulting in scientific knowledge and information being available to the broadest audience in history, including in Ireland and the EU.

1. Digital Technologies and Current Copyright Regulations

The Copyright, Designs and Patents Act of 1988 contemplated that copyright would be media- and technology-neutral, consistent with the development of copyright law over the past century in dealing with technological innovations such as photography, sound recordings and the photocopier. The WIPO digital copyright treaty of 1996, the EU information society directive of 2001, and the US implementation of the Treaty through the Digital Millennium Copyright Act or DMCA^v, all noted that it is good public policy to ensure strong digital copyright protection in order to incentivise and encourage authors, musicians, producers and publishers to make their works and information available in new digital and online forms, and to support the development of new online markets and new forms of marketing, licensing and selling, utilising the direct-to-customer aspects of the Internet. The possibility that digital content could be made available without authorisation or remuneration to creators and producers was regarded in these charter documents as inimical to the creation of a vibrant “information society”, and it was understood and accepted at this time that diminishing incentives for creators could result only in the diminution of creative works, to the detriment of society.

2. STM publishers’ investment in Digital Technologies and Innovation

Since the late 1990’s, STM publishers have invested hundreds of millions of Pounds in electronic systems to facilitate usage, access and improved speed in processing and reviewing content,^{vi} embracing the technological capacities and pent-up consumer demand for digital information, relying on the adoption of changes or clarifications of the copyright laws and treaties noted above (clarifications that in our view were intended to encourage such investments). The STM sector has engaged in precisely the kind of innovation that the Government should celebrate, promote and protect, and the sector has done so working with and relying on strong copyright protection.

Virtually all STM journal content is available and accessible online, as noted, and e-book content is becoming equally common. STM publishers recognised early on that the digital environment supported and indeed required standards and programmes to encourage interoperability, linking, access, and discovery.^{vii} Creative licensing programmes including consortium licensing, national licenses (of all users in a given country), “pay-per-view” systems to enable transactional access to articles from non-subscribed journal titles, and improved permissions and rights-clearances systems^{viii}, have resulted in a wealth of content availability for researchers and practitioners and have significantly improved productivity.^{ix} Scientific and institutional customers have many choices and options in obtaining such licences, including by working through collective management organisations such as the Copyright Licensing Agency. STM publishers have worked actively with search engine services such as Google and Bing to make meta-data, “information about information”, broadly available to all users (whether or not they are subscribers), and to ensure that users at subscriber institutions can access the full-text of STM content through a variety of online means, including by starting their research with the public search engines and linking through to publisher-operated online sites for the full-text of such content.

Virtually all the journal content of STM publisher-members that has been published over the past several decades is available and accessible online (much of this content was “born digitally” in any event), and archival print content has been digitised retroactively so that historic journal issues and content are also accessible, available and indexed in search engines, even when that content was originally published back in the 19th century. Additionally, the STM publishing community has worked actively to establish digital preservation standards, including the EU Parse project, and publishers

have supported the creation of important archives through library initiatives such as the eDepot project at the Koninklijke Bibliotheek (in the Hague), the Portico project, and LOCKSS.^x

A viable and sustainable ecology for scholarly communication has also supported information philanthropy initiatives from the STM publisher community, including programmes in the developing world coordinated through agencies of the United Nations such as Hinari, OARE, and Agora,^{xi} countries and institutions in which we are now seeing significant increases in research and publication output. Many STM publishers are also involved in INASP, the International Network for the Availability of Scientific Publications.^{xii} Revenue from scholarly publications support such programmes, and support scholarly research generally by providing scientific and medical societies with the means to fund scholarship programmes and research initiatives.

3. The role of Copyright exceptions generally

Virtually all jurisdictions including Ireland have some copyright exceptions and limitations for purposes that have been determined by such jurisdictions to be socially vital while not unduly limiting the incentivising aspects of copyright protection or destabilising a well-functioning market. Such exceptions commonly include scholarly, journalistic and educational purposes. Exceptions must be measured against the so-called Berne “three-step” test, e.g. special cases that are narrowly crafted to minimise conflict with the normal exploitation of rights, and must ensure minimal prejudice to the scope of rights granted by copyright law.

4. “Fair Dealing” and “Fair Use”

Ireland is not substantially different in its emphasis on “fair dealing” purposes such as criticism, journalism or research (which as we argue further below should read “non-commercial research”) than are other jurisdictions, including the US. Indeed “fair dealing” and the US “fair use” principles have much in common: they both derive from common-law principles that have evolved to take into account changes in the perceptions of uses that might be socially beneficial; and they both encourage the discovery and discussion of ideas, developments and news, while discouraging the copying of the entirety or substantial parts of copyright works for commercial purposes.

Although the Irish fair dealing doctrine (itself part of a broader common-law tradition of findings by courts that certain uses are “fair” and reasonable) and the US fair use doctrine have the same common-law parentage and orientation, the legal environments are quite different. The US legal environment involves more risk and uncertainty, demonstrated in part by the higher volume of US litigation generally, and significant expense for both plaintiff and defendant, and thus an environment that may favour the well-financed Internet-based risk-taker.

A large number of copyright infringement cases are brought and decided in the US, and our analysis shows^{xiii} that the substantial volume of decisions in the US has not necessarily led to great clarity about fair use analysis—in fact there is greater uncertainty about the legal analysis and resulting implications for US businesses (including for the publishing community) than might be commonly perceived. US commentators and advisers constantly warn their clients and stakeholders that there are no “bright line” rules in fair use analysis, even in educational environments (even though educational purposes is considered an important fair use context).^{xiv}

Judicial decision-making on fair use, although currently codified in Section 107 of the US Copyright Act,^{xv} is always understood to be a balancing of interests and factors, and over time the interpretation of and emphasis on certain factors has changed.^{xvi} US courts struggle in fair use cases to determine whether the use in question provides new information (or entertainment) in a fashion that transforms and transcends the original work, which has an important societal benefit, in the

categories noted above, and which will not supplant the rights-holder's ability to maintain a market, or develop new markets, for their works.

Litigation costs are another element of uncertainty in US copyright cases, especially in matters that will involve significant evidence-taking and discovery, inevitable in legal analysis involving inherently fact-based issues such as fair use, and in matters with the complexity usually found in fair use cases. In the (expected) settlement of the case brought against Google in 2005 by publishers and authors concerning the library book scanning project,^{xvii} Google is paying out US\$125m to the rights-holder class, including approximately US\$30m for litigation and legal costs. Such a level of legal cost is far from typical for copyright cases, but in this case understandable given the complex class action and precedent-setting settlement structure. Even less complex cases can easily involve many hundreds of thousands of dollars in costs, and importantly it is generally the case in the US that each of the parties bears its own costs (rather than being borne by the losing party as in Ireland).

Search engine companies such as Google have been at the centre of a number of copyright infringement cases concerning the republishing of copyright works available on commercial Internet sites that have paying access requirements (paid subscriptions or memberships). The Perfect 10 case (508 F.3rd 1146, 9th Circuit, 2007) is an example of this, with Google displaying "thumbnail" (reduced size) images from a membership site which included "risqué" photographs. The 9th Circuit found in this case that there was no market for reduced-size images, and no practical method for Google to eliminate such display in its indexing of Internet sites (although the case was remanded in part), reasonably consistent with its decision in Kelly v Arriba Soft (336 F.3rd 811, 2003), and upheld Google's fair use defence.

Courts do recognise the ability of site owners to "fence off" content and indicate that some content should not be indexed^{xviii}, and the copyright legal bar is awaiting the outcome of the Viacom v YouTube case in the 2nd Circuit, where questions have been raised about the scope of the "safe harbour" provided under section 512 of US copyright law concerning notice and takedown responses in light of strong evidence that substantial amounts of infringing content was posted on the site. It should be noted that in such cases, US copyright law assumes the infringing nature of such activity when done by an intermediary without authorisation, and provides the intermediary with a statutory "safe harbour" from available remedies if the intermediary complies with certain required steps. These decisions do not rely on fair use but instead specific statutory exceptions available under the law or affirmative, commonly accepted procedures that the copyright owner has taken to permit an intermediary to make his works available.

STM would be gravely concerned by any characterisation of "fair use" that would permit, for example, the digitisation of entire collections of printed works without permission or payment. That was the situation in the Google book search case noted above. Google and its supporters relied on the "thumbnail" cases from the 9th Circuit in its briefings and public positioning,^{xix} and made the argument that the copying of the entirety of print works was a fair use given that it was only displaying "snippets" of such works online, and that in any event it responded to rights-holders' requests for takedowns. Supporters of the Google project argued that the scanning and indexing was more transformative than exploitative, and indeed that the project would create a new market for older content not yet available digitally. None of the US cases that have found a fair use defence, however, have ever involved such massive copying, and it is our view that the assertion that such copying for commercial purposes could be fair use would represent such a distortion of the doctrine as to eviscerate it.

5. Does "Fair Use" Promote Business Growth more than "Fair Dealing"?

Are “fair use” principles of US copyright law superior to the Irish “fair dealing” in enabling businesses to launch and succeed? Given the significant uncertainties in copyright litigation, the differences in interpretation and doctrinal splits among US circuit courts, and the fact that the US Supreme Court only rarely takes on copyright cases, it is difficult to see how such a conclusion can be reached. For every Google, there are one or more Napsters, and their spectacular success or failure has more to do with dynamics that include their value proposition, organisational infrastructure and management expertise, capital availability, debt-to-equity ratio, public-private partnerships, tax structure and the encouragement and support of local and city government, than whether “fair use” or “fair dealing” principles apply.

6. Comparisons of industry sectors (copyright industries in the US and Europe)

Making concrete comparisons of industry sectors, their market development, and measures of innovation are difficult. Yet we believe that it is important to note that the copyright industries (publishing & entertainment) are sizeable sectors that contribute significantly to GDP in both in the EU and the US, and that they offer significant high-value “knowledge worker” employment comparable to that offered by the telecommunications and technology industries. Ireland over the past decades has successfully developed a tradition of attracting such high-value employment and should evaluate its positioning accordingly also with respect to a sound copyright environment. In our view Ireland’s potential further to attract companies, employees of companies in the creative sector and talent is entirely intact and its relative position and share of the EU market could be increased, including by maintaining a sound intellectual property legal framework favouring legal certainty and predictability.

The seminal report on the US copyright industry is published by the *International Intellectual Property Alliance (IIPA)* every 5 years, and the most recent report dates from 2007^{xx}, and shows a steady increase in revenue/contribution from US\$ 700b in 2003 to US\$889b in 2007, representing around 6.4% of total GDP. The IIPA report distinguishes between “core” and “total” copyright industries.

A study prepared for the Commission in 2000 estimated that EU copyright based industries provided nearly 5.3% of total value added in the EU and 3.1% of total employment^{xxi}; according to the same study, copyright industries contributed less than EU-average 2.5 per cent of the total value added produced in Ireland, but Ireland was able to attract a higher than EU-average share of 3.4 per cent of national employment.

A more recent study^{xxii} on the situation in the EU placed the cultural and creative industries at 2.6% of GDP in 2003 and 3.1% of total employment in 2004. A further study^{xxiii} estimated the contribution of creative industries to the EU GDP was 4.5% (core creative industries) and 6.9% (core plus non-core creative industries), respectively 3.8% and 6.5% of employment, in 2008.

Finally, according to the European Competitiveness Report 2010^{xxiv}, creative industries accounted for 3.3% of total EU GDP (2006) and 3% of employment (2008).

7. “Fair Dealing” or “Fair Use” in Ireland – and the EU?

We take the opportunity to request the Government consider clarifying the fair dealing provision of the Irish Copyright Act of 2000 to explicitly state that any personal and private use and private study exceptions are confined to non-commercial uses as required by the EU Directive on the Harmonisation of Certain Aspects of Copyright in the Information Society (Directive EC 2001/29) The UK Statutory Instrument implementing the abovementioned Directive has made this very clear and we believe that the Irish Copyright Act of 2000 would benefit from a similar clarification. STM

understands from its members that the absence of the word “non-commercial” is frequently misunderstood in the market to suggest that the Irish Copyright Act permits something the UK legislation does not, when both norms are in fact subject to the same EU Directive and requirements.

The wider question, whether it would be possible under the current *Acquis Communautaire* of the EU in the field of copyright to opt for a fair-use style exception, must be answered in the negative. The above-mentioned Directive makes it very clear that only two exceptions are mandatory and the rest are optional no other exceptions or “open-ends” are legally permissible, except in the case of certain “grandfathered” exceptions confined to the offline and analogue world.

For all the reasons we have brought forward in this paper, STM does not think that a switch to fair use would be desirable for Ireland at this time – especially given that the substantial volume of copyright infringement cases in the US seems to have led to greater uncertainty about what is “fair use” with resulting complications for US businesses.

8. Enforcement challenges

The IIPA in its recently released report on global piracy for copyright industries, estimated that ^{xxv} piracy losses in music, movies and software likely ranges between US\$ 30b-75b. Reversing only 1% of those losses would result in a US\$ 300m-750m boost to the economy.

In some countries, IIPA estimates the local markets have more than 90% unauthorised content. E-book piracy for commercial purposes is rising dramatically, worryingly for publishers who are rapidly expanding their e-book catalogues. A recent report by *Envisional* (prepared for *NBC Universal*) on infringing use of the Internet^{xxvi} estimates that around 24% of all traffic on the Internet globally is infringing (the analysis excludes content considered pornographic), and that a significant amount of book content was being downloaded without authorisation (along with film, television content, video games, music and software).

The STM association is actively engaged with enforcement efforts on behalf of the digital publishers, usually in a coordinating role. STM members have been engaged in the enforcement actions against the peer-to-peer file sharing site RapidShare, as well as the medical “free” e-book pirate site Pharmatext.org. The industry is also attempting to provide a clean environment for the offerings of legitimate digital companies by supporting investigations into issues as complex as password sharing sites (for unauthorised access to subscription sites), and unauthorised document delivery services, involving the copying and provision of digital copies of journal articles, in countries such as China, Germany, Switzerland, the US and also in Ireland. STM members also promote a clean digital environment by sending out “notice and takedown” requests to sites with unauthorised posted content, normally as individual actions rather than collective action, although many members are utilising the UK’s Publishing Association online piracy site for such work.

The goal of the publishing industry in these enforcement efforts is to disrupt and disable commercially-oriented organisations which use the Internet as a means to facilitate unauthorised copying and posting of content for commercial gain, which the operators of the site likely understand to be unauthorised, or which responsible filtering and policing could identify as unauthorised. Such sites can, and do, generate massive commercial revenues through “membership” fees and advertising support. Some even have connections to organised crime (we will use the term “piracy” for such commercial activities).

What forms of technological protection measures, and what types of *fora* would be helpful for rights-holders? The simple answer is that Government can do more to disincentivise the commercial digital

pirates through direct Government criminal investigations, in providing for additional civil penalties and strong injunctive relief, and in supporting anti-piracy work abroad. Obviously an Irish- publishing house would be unlikely to invest significantly in expanding its product offerings in countries with minimal respect for copyright law and minimal enforcement mechanisms. These problems are exacerbated if the publishing house is an SME with only modest resources to spend on enforcement and anti-piracy work. Government could also helpfully encourage Internet Service Providers to engage and collaborate with the copyright industries in developing solutions to online piracy. In this regard we note the wise words of Justice Charleton, sitting in the Irish High Court rendering judgment on 11 October 2010, in the case of EMI Records (Ireland) Limited and others v. UPC Communications Ireland Limited, where the judge expressed the view that the wording of the Copyright and Related Rights Act 2000 was unduly constraining in view of the egregious and flagrant infringements taking place including online.

9. Useful steps Government can take to support innovative industries and growth

Digital STM publishing is an innovative industry that fuels innovation and economic growth. Given our significant contribution to the EU's GDP and employment, the industrial growth which depends on high-quality STM research information, and the remarkable digital environment that STM publishers have helped to create for researchers and practitioners, Government could most usefully contribute to innovation and growth in Ireland by bolstering the copyright industries broadly and publishing in particular and by thereby attracting more publishers and publishing houses to set up shop. Positive steps would be to focus on enforcement and anti-piracy work (including strengthening efforts to protect Ireland-based businesses engaged in exports); to encourage rational debate about access and licensing opportunities in collective license negotiations such as through the Copyright Licensing Agency (CLA); and to support and encourage useful voluntary standards for industry to improve long-term archiving and access for the visually impaired.

Because STM also actively supports efforts to solve "orphan works" issues through collective license schemes, we believe that developing better guidelines and guidance on practical issues concerning rights clearances and scholarly uses, is another step that Government could promote. STM could contemplate participating in discussions on specific questions such as the use of certain content on the Internet by technological intermediaries. Finally, we posit that innovation and growth are fostered neither by reducing IP protection nor by the swapping of one set of copyright exceptions for a similar one with potentially higher cost and greater legal uncertainty.

Yours faithfully,



MICHAEL MABE, CEO, STM

ⁱ A useful catalogue of the digital changes in scholarly publishing can be found in the STM report (2006) "Scientific publishing in transition: an overview of current developments" at http://www.stm-assoc.org/2006_09_01_Scientific_Publishing_in_Transition_White_Paper.pdf

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- ⁱⁱ For information on the embedded linking of references within STM journal articles, see <http://www.crossref.org/01company/16fastfacts.html>
- ⁱⁱⁱ Recent presentations on innovations in online information and presentation can be found on the STM web site in connection with the “Innovations” conference held in London in December 2010, for example the presentation by the Royal Society of Chemistry at http://www.stm-assoc.org/2010_12_03_Innovations_Kidd_ChemSpider_What_do_we_do_first.pdf
- ^{iv} *A Single Market for Intellectual Property Rights Boosting creativity and innovation to provide economic growth, high quality jobs and first class products and services in Europe*, Communication from the EU Commission to the EU Parliament, the Council, the European Social and Economic Committee and the Committee of the Regions, 24 May 2011, see text at: http://ec.europa.eu/internal_market/copyright/docs/ipr_strategy/COM_2011_287_en.pdf.
- ^v See the WIPO treaty text at http://www.wipo.int/treaties/en/ip/wct/trtdocs_wo033.html; the Directive at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32001L0029:EN:HTML> and the US Copyright Office brochure on the DMCA at <http://www.copyright.gov/legislation/dmca.pdf>
- ^{vi} Endnote 1
- ^{vii} For a recent summary of developments in technology and information on levels of access, see the STM Report (2009) at http://www.stm-assoc.org/2009_10_13_MWC_STM_Report.pdf
- ^{viii} See the creative user-oriented information provided by the CLA at http://www.cla.co.uk/licences/excluded_works/ and information about the CCC’s new automated rights permissions system Rightslink at <http://www.copyright.com/media/swfs/Rightslink-Publisher.swf>
- ^{ix} See the Publishing Research Consortium 2006 report on productivity at http://www.publishingresearch.net/journals_scientific.htm
- ^x See the STM site at http://www.stmassoc.org/standards_and_technology_parse.php for details on this important digital preservation standards project, the project at the Royal Library in the Hague as described at <http://www.kb.nl/hrd/dd/index-en.html>, the Portico project at <http://www.portico.org/digital-preservation/> and the LOCKSS initiative at <http://lockss.stanford.edu/lockss/Home>
- ^{xi} See the R4Life web site at <http://www.research4life.org/>
- ^{xii} For more information see <http://www.inasp.info/file/3d034b8bae0a3f7e1381979aedc356a9/about-inasp.html>
- ^{xiii} Legal research has found, from January 1978 to date, a total of 21 “Fair Dealing” cases decided in the UK compared to 223 “Fair Use” cases decided in the US. Thus far in 2011 in the US, twelve copyright cases have been filed in the federal courts in the 2nd Circuit, and thirty-eight cases filed in the 9th Circuit—although these two circuits may not be representative (both represent copyright-heavy industries in publishing, film & entertainment, and software & other technology industries)—this does demonstrate the large number of copyright litigation matters arising in the US every year (listings of cases filed can be found at <http://www.dockets.justia.com>)
- ^{xiv} See for example the “fair use” sections on sites such as the Washington State University and Stanford University that offer extensive guidance (although STM might not agree with all policy points mentioned on such sites, we at least applaud the understanding of complexity) at http://publishing.wsu.edu/copyright/fair_use/ and http://fairuse.stanford.edu/Copyright_and_Fair_Use_Overview/chapter9/index.html
- ^{xv} The statutory language can be found at <http://www.copyright.gov/title17/92chap1.html#107>
- ^{xvi} In the 1985 decision by the Supreme Court, *Harper & Row v Nation* (471 US 539), the Court described the ‘effect on the market’ factor as being the “single most important element of fair use”; while the same Court less than ten years later in 1994 described the four factors as being essentially co-equal in *Campbell v Acuff-Rose* (510 U.S. 569)
- ^{xvii} The Authors Guild maintains a settlement resource site with the relevant documents, filings and agreements, see <http://www.authorsguild.org/advocacy/articles/settlement-resources.html>
- ^{xviii} *Field v Google*, 412 F. Supp. 2nd 1106 (D. Nev. 2006)
- ^{xix} On Google’s blog from 2005 in reaction to the lawsuit, they included a link to the activist scholar Jonathan Band’s article “The Google Print Library Project: A Copyright Analysis” which concluded that Google’s search index function will make book content broadly available and is thus transformative (blog site at <http://googleblog.blogspot.com/2005/09/google-print-and-authors-guild.html>)
- ^{xx} *Copyright Industries in the U.S. Economy: The 2003-2007 Report*, by Stephen E. Siwek, prepared for the IIPA June 2009 (available at <http://www.iipa.com>)

^{xxi} See http://ec.europa.eu/internal_market/copyright/docs/studies/etd2002b53001e34_en.pdf

^{xxii} See http://www.keanet.eu/ecoculture/executive_summary_en.pdf

^{xxiii} See <http://www.iccwbo.org/uploadedFiles/BASCAP/Pages/Building%20a%20Digital%20Economy%20-%20TERA%281%29.pdf>

^{xxiv} See http://ec.europa.eu/enterprise/newsroom/cf/_getdocument.cfm?doc_id=6222

^{xxv} See the press release/cover letter at <http://www.iipa.com/rbc/2011/2011SPEC301COVERLETTER.pdf> and follow through links to the full report

^{xxvi} See the report at http://documents.envisional.com/docs/Envisional-Internet_Usage-Jan2011.pdf