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**Technical review of draft legislation on copyright exceptions
Comment on proposed new disability exceptions published 31 July 2013**

Introduction

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

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

STM and its members have a direct interest in facilitating access by disabled persons to published works, which STM believes can be accomplished not only by exceptions, but also by working with the disabled community such as in projects like TIGAR, which facilitates access to printed publications by visually impaired persons (<http://www.visionip.org/tigar/en/>). STM, together with the International Publishers Association, participated in the negotiation of the recently concluded Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled.

Disability exceptions

STM welcomes the concept of a single set of exceptions to facilitate access by disabled persons to copyright works, which STM had suggested in the consultations leading up to the Gower report in 2006. STM also welcomes the principles underlying the proposed exceptions that they will only apply to copies made from works to which the beneficiaries have lawful access and if accessible copies are not commercially available on reasonable terms, provided that the term “reasonable terms” is understood to mean terms which are not unfair contract terms, as meant by the Unfair Contract Terms Act, 1977, and the Unfair Contract Terms in Consumer Contracts Regulations, 1999.

Our principal objection to the proposed legislation relates to the blanket approach in respect of contract override provisions, and we also question whether the definition of “disabled person” meets the Government’s policy objectives and whether it would not create uncertainty.

Contract override (Questions 11 and 17)

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.

This is particularly so in the case of the disability exceptions, where, on the one hand, it is provided in proposed sections 31A(1)(c) and 31B(1)(c) that the exceptions will not apply where the work is “commercially available on reasonable terms”, yet on the other hand contract terms purporting to restrict or to do any act allowed by the exception will be unenforceable under proposed sections 31A(7) and 31B(12). Since ordinary licensing terms licensing the use of the accessible copy made available by the licensor are, one would expect, reasonable terms, the contract override provisions make these two sections, each seen as a whole, self-contradictory and, as a result, our answer to Questions 11 and 17 is that the contract override provisions will not achieve the policy aim of only having the exceptions apply when there is no commercial offer available on reasonable terms.

With the transition of published content to digital from paper, content will be 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. This is just one illustration how 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 works published by them.

Background

STM opposes the across-the-board insertion of contract override clauses in copyright exceptions, as it has done in relation to each of the other proposed draft Statutory Instruments being reviewed, and as a matter of 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.

Choice of law in cross-border contracts

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.

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.

Question as to the capacity and the need to introduce contract override provisions across the board in Statutory Instruments

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.

The Directive on the harmonisation of certain aspects of copyright and related rights in the information, we submit, 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 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.

Contract override provisions on the disability exceptions

Turning again to the specific proposals for the disability exceptions, a term which is considered reasonable, such as an ordinary licence of accessible content, could still be considered as a restriction or prevention of the doing of a permitted act, and therefore become unenforceable, which is self-contradictory.

In addition, STM anticipates that the "absence of reasonable terms" precondition for the operation of the exception, will, as a result of the contract override provisions, open up any licence of accessible format content to dispute, especially if it is not clear what "reasonable terms" are. We submit that terms that are considered not reasonable must be limited to unfair contract terms, as meant by the Unfair Contract Terms Act, 1977, and the Unfair Contract Terms in Consumer Contracts Regulations, 1999, and that other terms, such as prices determined by the free market, warranties, and nuanced usage rights should be considered as "reasonable."

As mentioned above, licensing is part of the normal exploitation of a copyright work. The approach in the past has been to give preference to licensing solutions, and it is therefore disappointing that the proposed Statutory Instrument intends to remove section 31D from the Copyright Patents and Designs Act, thereby removing the basis for the Copyright Licensing Agency's Print Disability Licence, which, to

our understanding, has presented a workable and low-cost (if not gratis) solution for providing licensed access for visually impaired persons to written content.

In conclusion, STM submits that both contract override provisions must be withdrawn and that the legislation must make it clear that reasonable terms are terms which are not unfair under consumer protection legislation.

Definition of “disabled person” (Questions 5 and 12)

STM submits that the definition of “disabled person/s” in sections 31A(1)(b) and 31B(1)(b) do not contribute to meeting the Government’s policy aim since the definition is couched in relative terms, namely relative to the abilities of others, which in turn opens the entire exceptions to misinterpretation and, potentially, abuse of the good intentions underlying these exceptions.

STM submits that “disabled person/s” can only be defined in these exceptions by reference to absolute terms, such as is currently the case in Section 31F(9) of the Copyright Patents and Designs Act. We submit that Section 31F should be retained for the purpose of defining visually impaired persons as disabled persons in the same manner as it has up to now, and to use the same approach in identifying other disabilities which would hamper disabled persons from access to the copyright works.

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