

29 August 2014

Commercial and Administrative Law Branch
Attorney-General's Department
3-5 National Circuit
Barton ACT 2600
AUSTRALIA

By post and by e-mail to copyrightconsultation@ag.gov.au

Submission on the Discussion Paper “*Online Copyright Infringement*”

Dear Sirs

Introduction

The International Association of Scientific, Technical and Medical Publishers (“STM”) is the leading global trade association for academic and professional publishers. It has over 120 members in 21 countries, including Australia. Each year our members 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, new starts and established players.

We welcome the opportunity to contribute to the inquiry “Online Copyright Infringement” with the ultimate aim of improving the current legislative framework to enable action against infringements of copyright made online. By way of background, we also participated in the 2012-13 consultation “Copyright and the Digital Economy”.

STM publishers play a key role in the digital economy because they have actively embraced the opportunities of the digital online environment for over a decade now,¹ starting with journal content and other digitally-created products such as software, data and databases, as well as other digital tools. Conversely, STM publishers are exposed to the unauthorised use of their works online, not only in cases which could be described as straightforward piracy, but also in many cases of unpaid use in furtherance of business models of for-profit entities.

Both STM and its individual members respond to infringements of their copyright content found online. Even though the originator of the literary work which finds itself in a published journal or e-book is the author, it is the publisher who is called on to act, at its cost, to enforce copyright in cases of infringement, which is something that an individual author would likely not have the resources to accomplish. In the case of STM, the Association works through one of its committees, the Enforcement Task Force, where joint and co-

¹ A useful catalogue of the digital changes in scholarly publishing can be found in the STM report (2012) “An Overview of Scientific and Scholarly Publishing” at: http://www.stm-assoc.org/2012_12_11_STM_Report_2012.pdf.

ordinated enforcement against institutions and companies that massively infringe protected content is required.²

Response to proposals in Discussion Paper

STM welcomes the proposals to give real effect to the intentions which underlay Sections 36 and 101 of the Copyright Act by confirming that ISPs have some liability for infringing content on sites hosted by them, in the wake of the judgment in the *Roadshow Films vs iiNet* case, and the introduction of a new remedy allowing the blocking of websites carrying infringing material. However, we would caution against an unguarded extension of the safe harbour in Part V Division 2AA of the Copyright Act. We refer to our detailed answers to Questions 6 and 7 of the Discussion Paper in the annexure to this letter.

Where STM, as an association, acts on cases of copyright content of its members posted online, its efforts are directed at blocking access to the content, so that it cannot be found or accessed by persons seeking to download or otherwise access the infringing content, and finding the infringer. In our experience, finding an infringer who posts copyright content is not always an easy matter, especially considering the anonymising services that are available and the tendency of pirate sites to create mirror sites on other domains and to move infringing content between servers, all the time whilst hiding behind privacy laws which were not intended to protect them in the first place. As a result, tackling infringement online is more difficult than dealing with infringements in the analogue world, and in the circumstances where ISPs are the gatekeepers to reach online infringers, the law has to provide an incentive for rightsholders and ISPs to cooperate to act on infringements. In this regard, the proposal to extend the scope of "authorisation" liability under Sections 36 and 101 and the proposal to create special injunctive relief to block websites which carry infringing content are all welcomed.

The kinds of cases of online infringement in respect of which STM has co-ordinated or supported legal action are, generally speaking, against share hosting services and services which offer copyright content for download or streaming (which sometimes even hold themselves out to be on-line library services). In practice, STM, as an association, has not made use of "graduated response schemes", such as the statutory schemes found in France and New Zealand, against individual subscribers who download copyright content from such services for their own private use. In this submission, we therefore do not comment on the proposals relating to "reasonable steps" to be taken by ISPs inasmuch as they relate to ISPs notifying their respective individual subscribers of illegitimate downloading activity. Having said that, we are aware that graduated response schemes, whether statutory or industry-regulated, are important to rightsholders whose works are reproduced and communicated without permission on website platforms such as peer-to-peer filesharing sites, and the fact that we are not commenting on these schemes should not be taken as not supporting them on terms which are reasonable to rightsholders and proportionate.

Our responses to questions in the Discussion Paper are in the annexure to this letter.

² More information of STM's Enforcement Task Force can be found on its website at <http://www.stm-assoc.org/enforcement/>.

We thank you for this opportunity to contribute to the legislative process and we would be pleased to assist you in your further deliberations.

Yours faithfully,



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Responses to Discussion Paper “Online Copyright Infringement” by the International Association of Scientific, Technical and Medical Publishers (STM)
29 August 2014

Proposal 1—Extended authorisation liability

QUESTION 1: What could constitute ‘reasonable steps’ for ISPs to prevent or avoid copyright infringement?

QUESTION 2: How should the costs of any ‘reasonable steps’ be shared between industry participants?

QUESTION 3: Should the legislation provide further guidance on what would constitute ‘reasonable steps’?

QUESTION 4: Should different ISPs be able to adopt different ‘reasonable steps’ and, if so, what would be required within a legislative framework to accommodate this?

QUESTION 5: What rights should consumers have in response to any scheme or ‘reasonable steps’ taken by ISPs or rights holders? Does the legislative framework need to provide for these rights?

STM believes that ISPs should in principle be responsible for infringements of copyright carried out online by their subscribers on their services, subject to appropriate safe harbours under which the legal remedies against ISPs can be limited to injunctive relief only.

It is notable that in the *Roadshow Films vs. iiNet* judgment, the complainants were not able to determine the ISP’s liability under the “authorisation” principle due to the inability to show the ISP’s “power to prevent” the infringing act, despite its conduct in response to their complaints (described by Justice Emmett in the Federal Court judgment as “dismissive and, indeed, contumelious, attitude to the complaints of infringement by the use of its services”), but that it was remarked *obiter* in the Federal Court decision that the ISP would not have qualified for the safe harbour protection.³

By way of comparison, we would like to refer you to the German law principle of *Störerhaftung*, which could be described as the equivalent of the common law tort of nuisance, under which ISPs and Internet platforms in Germany can be held liable for the conduct that they allow their subscribers to carry out by using their services, if the infringing actions are noticeable to the operator of the platform, if it is legally and factually possible and also reasonable for the platform operator to prevent the immediate infringement, and if the platform operator has failed to carry out reasonable examination of the alleged infringement. The most recent leading cases on these obligations of Internet platform operators are the decisions against share hoster Rapidshare, ending with a decision of the Federal Court of Justice in August 2013.⁴ The obligations of platform operators still remain subject to the provisions under the legislation importing a safe harbour for service providers that a service provider has no obligation to monitor the information transmitted or stored by their subscribers.⁵

³ *Roadshow Films Pty. Ltd vs. iiNet Limited* [2011] FCAFC 23.

⁴ Case I ZR 79/12 dated 15 August 2013 at [http://juris.bundesgerichtshof.de/cgi-](http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&nr=65240&pos=0&anz=1)

[bin/rechtsprechung/document.py?Gericht=bgh&Art=en&nr=65240&pos=0&anz=1](http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&nr=65240&pos=0&anz=1) (in German).

⁵ Section 7(2) of the German Telemedia Act, which implements Article 15 European Union Directive 2000/31/EC on electronic commerce which prohibits Member States from legislating general obligations on service providers to monitor information stored on their services.

STM therefore welcomes the proposal to amend Sections 36 and 101 of the Copyright Act to remove the “power to prevent” as a *sine qua non* for founding authorisation liability. However, considering the observation by the majority in the High Court judgment in *Roadshow Films vs. iiNet* that authorisation liability is not ‘readily suited’ to combating peer-to-peer copyright infringement, it needs to be carefully considered whether the Courts will give effect to the intentions expressed in the Discussion Paper when interpreting the amended sections.

Proposal 2—Extended injunctive relief

QUESTION 6: What matters should the Court consider when determining whether to grant an injunction to block access to a particular website?

STM would welcome a provision akin to that in Section 97A of the United Kingdom’s Copyright Designs and Patents Act, 1988, to compel ISPs to block access to websites which infringe copyright.

We have the following observations:

- “Actual knowledge” on the part of the ISP should not be required, and under no circumstances should be a Court be obliged to evaluate whether the ISP has actual knowledge of every specific instance of infringement taking place through its service, as had been argued by the respondent ISPs in the *Newsbin2* case.⁶ This wording originates in European legislation for conditions for service providers to benefit from safe harbours, so there is no compelling reason to use this wording in legislation enabling blocking orders, especially if it would lead to a different interpretation than what is intended.
- An evaluation by a Court as to whether the “dominant purpose” of the website complained of is to infringe copyright, could create loopholes for infringers, allowing an application for a blocking order to be defeated if “enough” legitimate content appears on the website. The wording of the UK Section 97A, referring to “another person using their service to infringe copyright”, is preferred.
- A Court should give a blocking order not only against the infringing website at the domain address known at the time, but also against all mirror sites and replacement sites.

We wish to emphasise that STM and its members do not consider blocking orders to constitute censorship or even blocking access to STM content. As mentioned in our general comments above, STM content is readily available online already. Legislation allowing blocking orders supports legitimate copyright industries.

Proposal 3—Extended safe harbour scheme

QUESTION 7: Would the proposed definition adequately and appropriately expand the safe harbour scheme?

STM cautions against an open-ended extension of the safe harbour scheme. We accept that a safe harbour scheme should apply to telecommunication carriage service providers, but we question to what extent it should apply to website platform operators simply because they carry out the four categories of activity listed in Sections 116AC to 116AF.

⁶ *Twentieth Century Fox Film Corporation & Ors v British Telecommunications plc* [2011] EWHC 1981.

Platform operators which build business models on giving unauthorised access to copyright content uploaded by their subscribers or users should not be able to hide behind a safe harbour, even if they carry out the listed activities.⁷ In its enforcement activities, STM has encountered operators of website platforms, specifically share hosting and social network-type services, which allow, even encourage and solicit, the uploading of copyright content for general dissemination as part of their business models, sometimes even while giving lip service to the protection of copyright, which they do by simply passing on exclusive responsibility by means of standard terms of use, to their subscribers / users. We submit that operators of such platforms should not qualify for safe harbour protection.

An expansion of the safe harbour should be carefully considered by identifying categories of service providers which are, firstly, intermediaries, and secondly, whose services merit such protection by weighing up the nature of their intermediary services, including their business models, against the risk of claims for monetary damages against the infringing use by their subscribers / users of their services.

We note that the service providers which currently benefit from the safe harbour are entities whose services are regulated by specific legislation, in this case the Telecommunications Act, 1997. Perhaps a similar consideration, namely the existence of specific regulation of service providers who should qualify for the safe harbour, could be taken into account in deciding the best approach.

QUESTION 10: What regulatory impacts will the proposals have on you or your organisation?

The proposals will not have any regulatory impact on our organisation so far as we are aware.

QUESTION 11: Do the proposals have unintended implications, or create additional burdens for entities other than rights holders and ISPs?

See the answer to Question 7.

⁷ Chapter 1 of the 2011 book *Free Ride* by Robert Levine (<http://freeridethebook.wordpress.com/>) describes how the safe harbour provisions under the US Digital Millennium Copyright Act had the unintended consequence of creating “a perverse incentive for sites to do as little as possible to prevent copyright infringement.”