

March 31, 2016

United States Copyright Office  
Section 1201 Study Comment Submission

**Section 1201 Study on the triennial rulemaking process to adopt exemptions to the prohibition against circumvention of technological measures that control access to copyrighted works  
Reply comment by the International Association of Scientific Technical and Medical Publishers (STM)**

Dear Sirs

The International Association of Scientific Technical and Medical Publishers (STM) welcomes this opportunity to submit reply comments in the Section 1201 Study. In this submission, we only propose to deal with a limited number of individual points raised by various contributors to the Study.

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, including many members who are either based or have places of business in the United States. STM members include learned societies, university presses, private companies, new starts and established players. The primary interest of STM and its members lies in published works intended for the academic and research markets.

*Reply to submission in opposing changes that would discourage innovation by copyright owners*

STM joins AAP, MPAA and RIAA<sup>1</sup> in submitting that the Copyright Office and Congress should proceed with great caution when considering whether to adopt exemptions to the prohibition against circumvention of technological protection measures and that it should oppose changes that would diminish the effectiveness of technological protection measures broadly and discourage innovation by copyright owners and their authorized licensees. STM affirms the cases cited in this submission about how technological protection measures create new models for the dissemination of published works.<sup>2</sup>

*Reply to submissions advocating exemptions where licensed solutions for access already exist*

We have noted some submissions advocating broad exemptions to technological protection measures to facilitate the reproduction and making available of copyrighted works that are protected by those measures, even in cases where there is no authorization from the copyright

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<sup>1</sup> AAP, MPAA and RIAA submission at <http://www.regulations.gov/#!documentDetail;D=COLC-2015-0012-0045>, p.3.

<sup>2</sup> AAP, MPAA and RIAA submission referred to above, at pp.6-8.

owner.<sup>3</sup> In so far as these proposals relate to libraries and archives, the copyrighted works concerned would include publications by STM's members and, as such, this proposal for exemptions must be read as being in addition to access to STM members' copyrighted publications which is already afforded to libraries and archives under their respective subscription and license agreements with publishers or their vendors.

One of the aforementioned submissions<sup>4</sup> speaks of exemptions allowing the reproduction for copyright works for use by MOOCs ("massive open online courses"). We point out that publishers, service providers and reproduction rights organizations already provide licensed solutions for the use of copyrighted materials in MOOCs.<sup>5</sup> This point illustrates the need for careful consideration in the rulemaking process relating to exemptions, which must include ascertaining whether there is an existing solution in commerce to the circumstance being postulated in the request for an exemption.

*Reply to submissions advocating broad exemptions relying on claims that uses are allowed by fair use and other exceptions*

We wish to draw your attention to a recent case of breaching of security measures to reproduce and make available copyrighted content, and claiming justification as an illustration, to support STM's contention that the rulemaking process for considering exemptions should be limited to specifically crafted situations which are then carefully considered.

STM publishers have noted various methods by unauthorized persons to extract journal articles and illicit creations from journal articles from secured sources and to reproduce them in a way that makes them available to the public in circumstances which do not constitute fair use and/or which are not justifiable by any other exception to the exclusive rights of copyright.

The most recent case in the United States to which we would like to draw your attention is the decision of the New York District Court in *Elsevier v. Sci-Hub.org and LibGen.org et al.*<sup>6</sup> Elsevier, a prominent publisher and a member of STM, took action to hamper the online unauthorized offers by online platforms Sci-Hub and LibGen, facilitated by persons unknown, who had compromised the secure online platforms of publishers and of university library subscribers to their publications in order to reproduce journal articles which they make available on the Sci-Hub and LibGen platforms.

The technical methodology of accomplishing this was something not previously encountered by publishers, and is described in an article in *Scholarly Kitchen*:

"[Sci-Hub] works in concert with a repository of pirated material called Library Genesis (LibGen)... If you go to the current location of Sci-Hub ... and input a DOI or article url Sci-Hub will set you a captcha to complete ... It then searches LibGen to see if it can find an existing copy of the item in question. If it does, it delivers that copy to the user... If Sci-Hub

<sup>3</sup> By way of example, the submissions by the American Association of Law Libraries at <http://www.regulations.gov/#!documentDetail;D=COLC-2015-0012-0027>, p.1, MIT at <http://www.regulations.gov/#!documentDetail;D=COLC-2015-0012-0024>, p.5, and the Society of American Archivists at <http://www.regulations.gov/#!documentDetail;D=COLC-2015-0012-0016>, p.5, proposing that there should be a general exemption if the use is considered to be fair use.

<sup>4</sup> MIT referred to above at p.1-2.

<sup>5</sup> For example, ProQuest's Coursera and SIPX (<http://www.sipx.com/coursera-sipx/>), the Copyright Clearance Center's MOOCs Content Licensing Solution (<http://www.copyright.com/academia/moocs/>). Both are members of STM.

<sup>6</sup> No. 1:2015cv04282 - Document 53 (S.D.N.Y. 2015), available at <http://cases.justia.com/federal/district-courts/new-york/nysdce/1:2015cv04282/442951/53/0.pdf?ts=1446304631>.

cannot locate a copy in LibGen, it then uses multiple institutional access systems to search across publisher platforms, bypassing any access control barriers, and it retrieves a copy of the item. It then does two things. One, it delivers a copy back to the user who requested it; two it stores a copy in LibGen so that it is easier to serve up when the next request comes in... The access credentials appear to be username/password combinations that have been acquired by Sci-Hub and which enable access to institutional subscriptions.”<sup>7</sup>

The judge, recognizing that the scholarly publishing ecosystem depends on payment for content to sustain the production of high quality journals, described how copyright protection for scientific publications serves the public interest:

“It cannot be denied that there is a compelling public interest in fostering scientific achievement, and that ensuring broad access to scientific research is an important component of that effort. ... [Sci-Hub’s representative’s] solution to the problems she identifies, simply making copyrighted content available for free via a foreign web site, disservices the public interest. As the plaintiffs have established, there is a ‘delicate ecosystem which supports scientific research worldwide’ . . . and copyright law plays a critical function within that system. ‘Inadequate protection for copyright owners can threaten the very store of knowledge to be accessed; encouraging the production of creative work thus ultimately serves the public interest in promoting the accessibility of such works.’ ... Given the importance of scientific research and the critical role that copyright plays in promoting it, the public interest weighs in favor of an injunction.”  
(Citations omitted.)

We thank you for this opportunity to contribute to the Section 1201 Study and we would be pleased to assist you in your further deliberations.

Yours faithfully,



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<sup>7</sup> Posting by David Smith in *Scholarly Kitchen* “Sci-Hub: How does it work?” at <http://scholarlykitchen.sspnet.org/2016/02/25/sci-hub-how-does-it-work/>.