

3 July 2018

The Director, Copyright Law Section
Department of Communications and the Arts
GPO Box 2154
Canberra ACT 2601
AUSTRALIA

By email only to copyright.consultation@communications.gov.au

Dear Director

Copyright modernisation consultation – Submission from the International Association of Scientific Technical and Medical Publishers (STM)

STM is the leading global trade association for academic and professional publishers. It has over 120 members in 21 countries, including Australia, 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 and private companies. Its Australian members are CSIRO and the Copyright Agency.

We welcome the opportunity to respond to the Copyright Modernisation Consultation. STM has made submissions in the consultations on copyright managed by the Australian Law Reform Commission (2012-2014) and the Productivity Commission (2015-2017). STM's responses to the specific questions raised in the consultation, informed by the outcome of the roundtable discussions, appear below.

We express our appreciation for the Australian Government's approach to this consultation as one of consensus-building. STM has always held the position that the need for copyright exceptions and their formulation must be determined locally in accordance with local policy considerations, taking into account the role of the industries that create copyright works.

We respond below to the questions in the consultation under the main headings set out in the consultation document.

Flexible exceptions

Question 1

To what extent do you support introducing:

- additional fair dealing exceptions? What additional purposes should be introduced and what factors should be considered in determining fairness?
- a 'fair use' exception? What illustrative purposes should be included and what factors should be considered in determining fairness?

Question 2

What related changes, if any, to other copyright exceptions do you feel are necessary? For example, consider changes to:

- section 200AB
- specific exceptions relating to galleries, libraries, archives and museums.

New 'fair dealing' exceptions

STM has no specific proposals for new 'fair dealing' exceptions. We look forward to seeing proposals from local rightsholders and publishers, such as the Australian Copyright Council, the Copyright Agency and the Australian Publishers Association, which we expect will be local solutions for 'fair dealing' exceptions that meet local policy goals to improve the copyright framework.

Any new exceptions will have to meet the conditions of the Three-Step Test set out in the Berne Convention, the WIPO Copyright Treaty and the Agreement on Trade Related Aspects of Intellectual Property, and thereby do not conflict with the normal exploitation of published works and do not unreasonably prejudice the legitimate interests of rightsholders of published works.

We also point out that STM's members make their products available primarily by way of licensing (as described in our earlier submissions) and note that Australia has a well-developed licensing market, both under its statutory licences and voluntary licenses. Special care will need to be taken in exceptions and contract override provisions so that relationships between publishers and their customers, potential customers, agents, and licensing bodies are not adversely affected. This risk is especially severe in exceptions for education and for libraries

Text and data mining under a 'fair dealing' exception for "incidental and technical uses"

STM does not agree with the idea that text and data mining is an "incidental and technical use" that could be covered by a fair dealing exception for this purpose. On the contrary, access to databases for the purposes of text and data mining is an activity that STM publishers license, both directly and indirectly through vendors.

STM publishers who have signed the *TDM Declaration* have already committed to permit text mining of their content at no additional charge by their academic, not-for-profit customers. Scientists, students and researchers attached to these institutions not only benefit from this gratis grant, STM publishers also enable simultaneous multiple publisher text mining through publisher and industry investments such as *CrossRef Metadata API* (for the academic community) and the Copyright Clearance Centre's *RightFind XLM for Mining* (for the commercial community). Thus, the needs of both academic and commercial customers are already amply addressed and an exception is unnecessary.

The Ernst & Young report *Cost benefit analysis of changes to the Copyright Act 1968*, released by the Department of Communications in December 2016, recognises that STM publishers invest in making data and text mining possible and that the supply of this facility is a nascent market, where business models are still being developed, and that Ernst & Young conclude (at para 3.4.5.5) that it is therefore not clear whether an exception will pose a risk to this market. The ALRC in its Discussion Paper *Copyright and the Digital Economy* (2013), although concluding that certain text and data mining uses should be allowed without permission under the 'fair use'

provision they proposed, found (at para 8.78) that “There is not enough evidence of market failure to warrant a specific exception to deal with data and text mining, and the benefits of the data analytics industry are capable of being maximised through collaboration between researchers and publishers. In particular, the ALRC considers that voluntary licensing should be pursued for commercial uses of data and text mining.”

Interest groups representing technology companies pushing for text and data mining to be covered by an exception seem to indicate that publishers making content available for licensed text and data mining is not a legitimate market for publishers. If this is what is meant, it is a position that STM strongly contests, pointing to its *Text and Data Mining Declaration* and the work that its members have undertaken in this field. Adopting such an approach would have the unsupportable outcome that copyright owners cannot make their works available through new technologies if they do not design those technologies first. To illustrate this point, we refer to the observation by the US Court of Appeals for the Federal Circuit in its opinion in *Oracle v. Google* (27 March 2018) in which a similar circumstance was described: “*Even if we ... assume that Oracle was not already licensing Java SE in the smartphone context, smartphones were undoubtedly a potential market. Android’s release effectively replaced Java SE as the supplier of Oracle’s copyrighted works and prevented Oracle from participating in developing markets. This superseding use is inherently unfair.*” We therefore submit that an ill-conceived exception allowing text and data mining of publishers’ content, where such uses could be licensed, will unreasonably prejudice copyright owners and could conflict with the Three-Step Test.

‘Fair dealing’ exception for Government uses

In principle, STM supports the existing Copyright Agency Government licence as an efficient and cost-effective mechanism to support Government’s needs for re-uses of copyright works.

STM would like clarity as to the scope of the rights of communication to the public that Government wishes to obtain under a new ‘fair dealing’ exception for Government uses. Whereas there is no objection to on-site consultation and/or inspection, any rights of reproduction or communication under a ‘fair dealing’ exception should not result in copyright works kept by public administration bodies to be used as “master copies” to serve beneficiaries of other exceptions, fair dealing or otherwise, or to permit the works to be made available to the general public. (STM holds a similar position with regard to preservation and archival copies made by libraries and archives.)

Factors determining ‘fairness’ in ‘fair dealing’ exceptions

STM accepts that the five-factor test as currently set out in the exception for research and private study is, in general, appropriate for determining ‘fairness’ in allowing third parties to undertake acts in respect of copyright works that would otherwise be subject to the exclusive rights of the copyright owner.

‘Fair use’

STM stands by its position, also stated in its submissions in response to the consultation of the Australian Law Reform Commission and the Productivity Commission, that it advises against the introduction of ‘fair use’ in Australia.

Specific exceptions regarding libraries and other cultural institutions

We have noted the discussion around simplifying the record-keeping around the exceptions in favour of libraries in Sections 49 and 50. In principle, STM would have no objection to a simplification of the administrative requirements governing record-keeping of activities under the exceptions, noting the following reservations:

1. The existing requirement to destroy electronic copies of collection material made under existing exceptions for providing a patron with a copy of a document and for inter-library loan must be retained.

This requirement is in fact a substantive requirement, not an administrative one, since once the delivery is made, there is no rationale for retaining the copy. A copy retained on this basis will result in the copy becoming a permanent part of the collection of the library, substituting for a purchase, thereby clearly conflicting with the normal exploitation of published works.

2. it must be made clear that the exceptions permit deliveries of reproductions to library patrons in Australia and other public libraries in Australia.

One of the simplifications may be the removal of special rules for patrons of libraries who are in "remote" locations, since the availability of Internet connectivity no longer justifies these rules. The term "remote" is understood to relate to patrons in remote locations in Australia (the Australian Law Reform Commission Discussion Paper at para 11.124 has the same understanding). However, STM has had the experience that the leniency in respect of the administrative procedures for patrons in "remote" locations has been used to interpret the exception in Section 49 to cover deliveries outside Australia. It therefore needs to be confirmed that the references to remote locations mean remote locations in Australia.

Our position is that, as a rule, deliveries by libraries to persons and libraries outside Australia should be licensed. However, STM does support permission-free and deliveries to institutions in UN-defined Least Developed Countries, in which regard we refer to the signatory *STM Statement on Document Delivery to Qualifying Institutions under the Research4Life Programme In United Nations-Designated Least Developed Countries* permitting public library institutions to deliver STM journal articles to Least Developed Countries free of permission.

Contracting out of exceptions

Question 3

Which current and proposed copyright exceptions should be protected against contracting out?

Question 4

To what extent do you support amending the Copyright Act to make unenforceable contracting out of:

- only prescribed purpose copyright exceptions?
- all copyright exceptions?

Freedom to contract is a key principle that allows copyright owners to make their works accessible to the public. This principle is even more important in the context of works made in digital format, where licensing is the usual route to the market for publishers.

Contracting out of exceptions should therefore only be banned in relation to 'prescribed purpose copyright exceptions' where specific policy considerations warrant it, such as for free speech in respect of, say, the exception for criticism and review.

The reason for our position is that we do not consider that a case has been made out for many of the proposed bans on contracting out. Insofar as STM publishing is concerned:

1. The recommendations to this effect by the Productivity Commission (Recommendations 5.1 and 5.2) appear to have their origin with the submission of the Australian Libraries Copyright Committee "that 79% of digital products (e-books, databases, aggregator licences) purchased by the [National Library of Australia] prohibited document supply." The reference to "document supply" could mean "document delivery", a systemised service of delivering copies of documents, mostly of journal articles, that requires a licence and which is not authorised by the library exceptions in the Copyright Act. (For example, the British Library's *On Demand* service is a licensed service). On the other hand, STM publishers' subscription agreements with libraries allow inter-library loans as a matter of routine. This one example is therefore poorly analysed.
2. Text and data mining (described more fully above) is an activity that is actively licensed by STM publishers and their licensed vendors, and any exception covering that activity with a blanket ban on contracting out or a ban on contracting out for this purpose will conflict with STM publishers' legitimate exploitation of their works.

From the arguments underlying the suggestion for ban on contracting out, one gets the notion that copyright owners go about specifically countering exceptions in their agreements with their customers. This notion conflicts with our experience in the STM publishing industry, and these submissions need to be further investigated in order to avoid unwarranted legislative intrusions into the freedom of contract.

STM opposes banning contracting out of all copyright exceptions across the board without considering the need for it or policy considerations that would justify it in relation to each exception. STM also opposes a ban on contracting out in respect of the very open exception in Section 200AB for the uncertainty that would cause.

Access to orphan works

Question 5

To what extent do you support each option and why?

- statutory exception
- limitation of remedies
- a combination of the above.

Question 6

In terms of limitation of remedies for the use of orphan works, what do you consider is the best way to limit liability? Suggested options include:

- restricting liability to a right to injunctive relief and reasonable compensation in lieu of damages (such as for non-commercial uses)

- capping liability to a standard commercial licence fee
- allowing for an account of profits for commercial use.

Question 7

Do you support a separate approach for collecting and cultural institutions, including a direct exception or other mechanism to legalise the non-commercial use of orphaned material by this sector?

STM's existing voluntary position under its signatory statement *Safe Harbor Provisions for the Use of Orphan Works* is a limitation on remedies for the event that an orphan work turns out to have been misidentified as orphan, ie where the rightsholder appears.

We would not support an exception, noting that limiting an exception to “non-commercial uses” would be fraught with difficulty, an exercise which we believe would be unnecessary in the light of other preferable options to cover legitimate uses.

In principle, STM agrees that in these circumstances, the copyright owners of works misidentified as orphan works, should only be entitled to reasonable compensation for the past use, but we see no reason why the copyright owner, once it has identified itself to the person that has carried out the restricted act in respect of that work, should not be entitled to injunctive relief in the future.

STM would also support a licensed solution for public libraries' digitization of works considered to be orphan works.

Yours sincerely



Michael Mabe
Chief Executive Officer
mabe@stm-assoc.org