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INTERNATIONAL ASSOCIATION OF SCIENTIFIC, TECHNICAL & MEDICAL PUBLISHERS
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Copyright Review
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Submission on the Consultation Paper "Copyright and Innovation"
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 environment[i], 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 literature[ii], 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 user[iii].

Having previously made a submission to the Copyright Review Committee (see CRC submission no 43), we are pleased to respond to the resulting Consultation Paper, with the ultimate aim of improving the current Copyright legislative framework.

General and Cross-cutting Remarks

Our submission will provide a response only to handful of the wide-ranging questions listed in Appendix 3 of the Consultation Paper. More generally, for STM and its members the following points appear to be cross-cutting and essential, for the Copyright Review going forward successfully and in a positive direction:

We continue to disagree with the perception (the premise of this Copyright Review) that certain areas of copyright, or as some voice it, copyright itself, is a barrier to innovation. STM publishers operate in one of the most dynamic and innovative fields, combining scholarly communication and

information technology. The STM industry is therefore an example that well illustrates that there is no contradiction between innovation, growth and intellectual property (copyright) – to the contrary: copyright is the fuel that feeds the fire of creativity.[iv]

Licensing (individually and collectively) and in particular online and automated licensing of copyright works is the 21st century's answer to legal access to copyright-protected works. We would therefore strongly encourage and support the Copyright Review Committee in its effort to create a framework that will allow the development of a Digital Copyright Exchange for Ireland, with the aim of facilitating licensing solutions. Whether or not this would best be achieved through the mechanism of a Copyright Council, STM has no view on.

The real challenge to derive greater growth and innovation and also a greater consumer surplus from the Internet, is to make the Internet safer and transacting on it more predictable. This means to increase consumer trust, but also tackle the issue of enforceability of intellectual property rights (and copyrights in particular) in earnest. The Consultation Paper and a good number of the questions contained in its Annex relate to copyright "immunity" for online and digital intermediaries and even the creation of an immunity regarding a specific online activity, linking, is pondered. In STM's view immunities and enforceability are two sides of the same coin and they ought to be discussed, debated and regulated at the same time and as part of the same consultation. Considering to give greater immunity to one side of stakeholders, when the other side is experiencing massive abuses of their rights in no small part benefitting directly and indirectly the stakeholders seeking greater immunity, will not benefit the smooth circulation of copyright-protected content on the Internet, nor will it in the end benefit legitimate interests of the intermediaries currently seeking immunity.

The Consultation Paper adds to the newly labelled copyright uses of "user-generated content" and "text and data mining" a third and fourth one: "news marshalling" and "non-consumptive use".[v] In STM's view, the re-labelling of activities should not de-tract from what these are: tools and techniques to identify, deliver and use third-party content; they are not aims in or of themselves, but require a clearly delineated public purpose in order to be considered as potentially activities falling under an exception or limitation. Due to particular relevance for STM publishing, we make a more detailed submission regarding text and data mining and what the real challenges and opportunities in this field are (not: exceptions). The comments made in relation to TDM apply also to other forms of crawling, scraping, indexing, re-purposing (whether "consumptive" or "non-consumptive", and any other forms of re-use of copyright-protected content.

Exceptions and limitations (including expansion of fair dealing for education): STM's views expressed on exceptions and limitations are to a large extent informed by STM's own Position Papers. Regarding digital exceptions to advance public interest, the *Position Paper on Digital Copyright Exceptions and Limitations for Scholarly Publications in the Education and Research Communities*[vi], dating from June 2008, stands out as a seminal paper.

Fair dealing vs fair use: In its prior submission (CRC submission no 43) STM has extensively and analytically dealt with and compared "fair use", "fair dealing" and other concepts of exceptions and limitations. In our view, the only sensible conclusion is to remain true to Ireland's tradition and maintain the tried and tested concept of "fair dealing".

Legal deposit for digital publications: STM is for obvious reasons directly concerned with any change in the legal regime applicable to legal deposit for digital and online resources. STM believes that for this highly complex and technical subject and in-depth consultation of its own right need be conducted. STM and its members actively contribute to these discussions and collaborate with national librarians and archives around the world. However, STM respectfully submits that it is a

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topic of considerable magnitude that may well take the Copyright Review Committee into fields well beyond the scope of this consultation.

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 Irish Copyright Licensing Agency (ICLA); 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, 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.
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27 June 2012
Yours faithfully,

MICHAEL MABE, CEO, STM

STM ANSWERS TO NUMBERED QUESTIONS CONTAINED IN APPENDIX 3 OF THE CONSULTATIO PAPER "COPYRIGHT AND INNVATION"

Is our broad focus upon the economic and technological aspects of entrepreneurship and innovation the right one for this Review?

The tenor of this Consultation Paper and the questions in its Appendix 3, is the notion that Copyright is antithetical to innovation and growth. In addition, it would appear that the content industries (copyright-based) are cast as incumbents and pitted against a "new" information technology industry (not copyright based). This is a gross simplification and omits the fact that the STM publishing sector is an excellent example of how copyright has enabled a highly innovative industry to grow, develop and deliver enormous benefits to science, education, business and the public in general, precisely, by marrying content and information and communication technology. STM publishers to no small degree have "imagined" the future and in so doing have in effect added

value to the user experience on the Internet by making more information available to more people than at any time before.

Since the inception of the internet, licensing of electronic content has become the very life blood of STM publishing. Licensing as a vehicle is incredibly flexible and able to accommodate all kinds of business models, from outright purchase to rental, whether itemized or as collections, databases, tailor-made for all shapes and sizes of users, be it the scholarly community in a large or small country, in the developed or developing world, or a country or region in transition, or commercial enterprises, whether SMEs or large multi-national corporations. In addition, licensing allows the provision of access to copyright-protected content in a commercial setting and for segmentation to non-commercial or even reduced-rate or nil-rate segments, without needing to fear cross-cannibalisation.

Moreover, STM publishers are engaged in a wide range of access related initiatives not only within the EU[vii], but across the world. Again: the legal vehicle enabling these access initiatives is licensing, and not a reduced level of copyright protection. By leading and/or actively participating in access projects STM's members demonstrate their commitment to delivering the highest level of sustainable access to high quality content to the widest range of stakeholders. If copyright protection is reduced and economic benefits are essentially transferred (for free) to third party participants in the information technology (eg intermediaries), that will reduce the ability of this sector to re-invest in high quality content and easy access to it.

(2) Is there sufficient clarity about the basic principles of Irish copyright law in CRRA and EUCD?

(3) Should any amendments to CRRA arising out of this Review be included in a single piece of legislation consolidating all of the post-2000 amendments to CRRA?

(4) Is the classification of the submissions into six categories – (i) rights-holders; (ii) collection societies; (iii) intermediaries; (iv) users; (v) entrepreneurs; and (vi) heritage institutions – appropriate?

(5) In particular, is this classification unnecessarily over-inclusive, or is there another category or interest where copyright and innovation intersect?

(6) What is the proper balance to be struck between the categories from the perspective of encouraging innovation?

(7) Should a Copyright Council of Ireland (Council) be established?

(8) If so, should it be an entirely private entity, or should it be recognised in some way by the State, or should it be a public body?

(9) Should its subscribing membership be rights-holders and collecting societies; or should it be more broadly-based, extending to the full Irish copyright community?

(10) What should the composition of its Board be?

(11) What should its principal objects and its primary functions be?

(12) How should it be funded?

(13) Should the Council include the establishment of an Irish Digital Copyright Exchange (Exchange)?

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A Digital Copyright Exchange that dove-tails with the EU "linked content coalition" initiative (http://www.linkedcontentcoalition.org/Home_Page.html) and enhances a market place for online and automated licensing opportunities would be very timely. In STM's view, good law finds what is constant over time, in a technology neutral way, but opens the door for new and sustainable market-driven solutions. While in the 18th and 19th century market failures and information disparities may have necessitated more and broader exceptions from copyright protection, the 20th century set the trend for more and more individual and collective licensing. In particular collective licensing is a solution that lends itself to the licensing of (i) low value "mass" transactions", or (ii) licensing situations that can be characterised as "many-to-many" situations. The latter part of the 20th century and the 21st century herald the beginnings of ever more targeted licensing, whether individual direct licensing or licensing through a collective management organisation. The trend therefore is not to broaden exceptions and permit free uses, but rather to allow licensing to close the gap between market supply and market demand at the point of use, faster, smarter and cheaper.

A viable and sustainable ecology for scholarly communications 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 Research for Life (Combining initiatives known as Hinari, OARE, and Agora) 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. 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.

(14) What other practical and legislative changes are necessary to Irish copyright licensing under CRRA?

(15) Should the Council include the establishment of a Copyright Alternative Dispute Resolution Service (ADR Service)?

(16) How much of this Council/Exchange/ADR Service architecture should be legislatively prescribed?

(17) Given the wide range of intellectual property functions exercised by the Controller, should that office be renamed, and what should the powers of that office be?

(18) Should the statutory licence in section 38 CRRA be amended to cover categories of work other than "sound recordings"?

See STM's response to question 13 above. Deliberations as part of the setting up of a Digital Copyright Exchange may or may not reveal a need for additional statutory licences. In STM's view, market solutions and the long tradition of voluntary licensing in Ireland should always be seen as the preferred route and a statutory licence should not pre-empt the emergence of voluntary licensing models. Collective and mandatory licensing should only be considered where rightsholders acting alone cannot establish a licensing market place.

As to process, STM proposes that the better approach is for a Digital Copyright Exchange to wait for the EU directive of orphan works to be adopted, and to take into account the draft directive on Collective Management Organisations and music licensing, so as to avoid incompatibility of any

Irish legislative measure with the provisions or principles to be set out in the said directive/ draft directive under consideration.

STM could support an extended collective licensing of orphan works especially to the extent that this model entails safeguards for returning rightsholders and works erroneously classified as orphan works. STM supports the basic premise of devising a system that will make orphan works that have previously been published available, provided there is a documented diligent search in the first place to confirm the status of a work as truly orphan.

STM supports the de-criminalisation of the use of orphan works where a diligent search has been conducted, even if the use is made by commercial enterprises. STM would support classifying such uses as "innocent infringements" for purposes of assessing civil damages.[viii]

STM would oppose, however, the introduction of an extended collective licensing system in Ireland. STM believes that the Irish tried-and-tested approach to licensing is a voluntary one and that this method should be given a chance as less invasive of copyright holders' exclusive rights.

In any event, STM opposes extended collective licensing systems that do not take into account rightsholders' legitimate preference for individual licensing, as we believe that such systems would not be compliant with requirements of the Berne Convention (BC), notably the rule against formalities (Art. 5.2 BC), and the three-step test (Art. 9.2 BC, Art. 13 TRIPS, Art. 5.5 Directive 29/2001).

(19) Furthermore, what should the inter-relationship between the Controller and the ADR Service be?

(20) Should there be a small claims copyright (or even intellectual property) jurisdiction in the District Court, and what legislative changes would be necessary to bring this about?

(21) Should there be a specialist copyright (or even intellectual property) jurisdiction in the Circuit Court, and what legislative changes would be necessary to bring this about?

(22) Whatever the answer to the previous questions, what reforms are necessary to encourage routine copyright claims to be brought in the Circuit Court, and what legislative changes would be necessary to bring this about?

(23) Is there any economic evidence that the basic structures of current Irish copyright law fail to get the balance right as between the monopoly afforded to rights-holders and the public interest in diversity?

(24) Is there, in particular, any evidence on how current Irish copyright law in fact encourages or discourages innovation and on how changes could encourage innovation?

(25) Is there, more specifically, any evidence that copyright law either over- or under- compensates rights holders, especially in the digital environment, thereby stifling innovation either way?

(26) From the perspective of innovation, should the definition of "originality" be amended to protect only works which are the author's own intellectual creation?

(27) Should the sound track accompanying a film be treated as part of that film?

(28) Should section 24(1) CRRA be amended to remove an unintended perpetual copyright in certain unpublished works?

(29) Should the definition of "broadcast" in section 2 CRRA (as amended by section 183(a) of the Broadcasting Act, 2009) be amended to become platform-neutral?

(30) Are any other changes necessary to make CRRA platform-neutral, medium-neutral or technology-neutral?

(31) Should sections 103 and 251 CRRA be retained in their current form, confined only to cable operators in the strict sense, extended to web-based streaming services, or amended in some other way?

(32) Is there any evidence that it is necessary to modify remedies (such as by extending criminal sanctions or graduating civil sanctions) to support innovation?

(33) Is there any evidence that strengthening the provisions relating to technological protection measures and rights management information would have a net beneficial effect on innovation?

(34) How can infringements of copyright in photographs be prevented in the first place and properly remedied if they occur?

(35) Should the special position for photographs in section 51(2) CRRA be retained?

(36) If so, should a similar exemption for photographs be provided for in any new copyright exceptions which might be introduced into Irish law on foot of the present Review?

(37) Is it to Ireland's economic advantage that it does not have a system of private copying levies; and, if not, should such a system be introduced?

(38) If the copyright community does not establish a Council, or if it is not to be in a position to resolve issues relating to copyright licensing and collecting societies, what other practical mechanisms might resolve those issues?

(39) Are there any issues relating to copyright licensing and collecting societies which were not addressed in chapter 2 but which can be resolved by amendments to CRRA?

See STM's answers to questions 13 and 18 above.

(40) Has the case for the caching, hosting and conduit immunities been strengthened or weakened by technological advances, including in particular the emerging architecture of the mobile internet?

In STM's view the topic of re-casting existing or opting for new "immunities" of intermediaries cannot be dealt with adequately if divorced from the need for greater enforcement of IPRs, including copyright. In STM's view "safe harbours", immunities and the like are merely the other side of the coin of enforceability of copyrights. In STM's view a stakeholder dialogue should be feasible in a country such as Ireland, with a great debating culture and a circumscribed number of intermediary actors.

Whilst this Consultation Paper does not call for evidence or information on enforcement issues, it is clear that a broadening of the licensing market could most easily be achieved if there were greater incentives to clear rights and if legally offered content on the web were more readily

discoverable than illegal content. Piracy is an obstacle to more licensing: a 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.

A recent report by Envisional (prepared for NBC Universal) on infringing use of the Internet 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 goal of the publishing industry in these enforcement efforts is to disrupt and disable organisations which intentionally use the Internet as a means to facilitate unauthorised copying and posting of content for commercial gain, or which responsible filtering and policing could have identified 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).

The STM association is actively engaged with enforcement efforts on behalf of the digital publishers, usually in a co-ordinating role. STM members have been engaged in the enforcement actions against the peer-to-peer file sharing sites, RapidShare a "cyber-locker", as well as the medical "free" e-book pirate site Pharmatext.org. The industry is also attempting to provide a healthy 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 the UK. STM members also promote a trustworthy 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.

(41) If there is a case for such immunities, has technology developed to such an extent that other technological processes should qualify for similar immunities?

(42) If there is a case for such immunities, to which remedies should the immunities provide defences?

(43) Does the definition of intermediary (a provider of a "relevant service", as defined in section 2 of the E-Commerce Regulations, and referring to a definition in an earlier - 1998 - Directive) capture the full range of modern intermediaries, and is it sufficiently technology-neutral to be reasonably future-proof?

(44) If the answers to these questions should lead to possible amendments to the CRRA, are they required or precluded by the ECommerce Directive, EUCD, or some other applicable principle of EU law?

(45) Is there any good reason why a link to copyright material, of itself and without more, ought to constitute either a primary or a secondary infringement of that copyright?

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In STM's view linking is an essential part of a communication to the public. As such it may indeed constitute an act restricted by copyright or a contributory infringement to such act. It is not possible but also not useful to describe a link as a per se legally problematic or unproblematic activity, as much as it would be impossible to describe an advertisement in a newspaper or the act of writing, recording or filming as per se legal or illegal.

(46) If not, should Irish law provide that linking, of itself and without more, does not constitute an infringement of copyright?

See STM's answer to question 45.

(47) If so, should it be a stand-alone provision, or should it be an immunity alongside the existing conduit, caching and hosting exceptions?

See STM's answer to question 45.

(48) Does copyright law inhibit the work of innovation intermediaries?

See STM's answer to question 1 above. This question nicely illustrates the point made in our answer to question 1.

(49) Should there be an exception for photographs in any revised and expanded section 51(2) CRRA?

(50) Is there a case that there would be a net gain in innovation if the marshalling of news and other content were not to be an infringement of copyright?

STM is unfamiliar with the precise definition of "marshalling" but concerned its contours are sufficiently unclear to allow free-riding by third parties seeking to benefit from the creation of others. The notion that this could affect content other than mere items of the press such as purely factual agency reports, "news of the day" (STM has no view on the desirability of such an exception in relation to news of the day) makes a "marshalling exception" also a threat to STM content. STM believes that for marshalling licensing may be the obvious answer, such as may be illustrated in a court case in the United Kingdom: NLA vs Meltwater, where Meltwater has been ordered to pay for its unlawful use of copyright-protected content, even if only snippets are copied and links provided.

In this regard, STM's answer to Question 74 on text and data mining refers. The considerations expressed are of equal force regarding the issue of "marshalling".

(51) If so, what is the best blend of responses to the questions raised about the compatibility of marshalling of content with copyright law?

(52) In particular, should Irish law provide for a specific marshalling immunity alongside the existing conduit, caching and hosting exceptions?

See STM's answer to question 39.

(53) If so, what exactly should it provide?

(54) Does copyright law pose other problems for intermediaries' emerging business models?

See STM's answer to question 1.

(55) Should the definition of "fair dealing" in section 50(4) and section 221(2) CRRA be amended by replacing "means" with "includes"?

See STM's answer to question 57, in particular the last paragraph of that answer.

(56) Should all of the exceptions permitted by EUCD be incorporated into Irish law, including:

See STM's answer to question 1. In STM's view exceptions are exceptions and not the rule. Therefore, it should be out of the question to consider importing all possible exceptions. The need to provide for an exception should be grounded in a well-founded aspect of Irish business or social life and not an aim in or of itself.

In any event, if "all" non-mandatory exceptions of the EUCD were transposed into Irish law, Article 5.5 of EUCD, the three-step test, should also be included verbatim in an amended CRRA and qualify any such exceptions.

(a) reproduction on paper for private use

(b) reproduction for format-shifting or backing-up for private use

(c) reproduction or communication for the sole purpose of illustration for education, teaching or scientific research

(d) reproduction for persons with disabilities

(e) reporting administrative, parliamentary or judicial proceedings

(f) religious or official celebrations

(g) advertising the exhibition or sale of artistic works,

(h) demonstration or repair of equipment, and

(i) fair dealing for the purposes of caricature, parody, pastiche, or satire, or for similar purposes?

(57) Should CRRA references to "research and private study" be extended to include "education"?

STM believes that the relevant provision is unclear and should be amended to reflect that commercial uses, in no event can constitute an instance of fair dealing , eg commercial research (whether as the sole or related direct or indirect purpose).

Journal articles, academic treatises and textbooks are published by educational, academic and STM publishers for the very purpose of contributing to education and scholarly communication. Universities and libraries for non-commercial research or non-commercial educational institutions are the primary purchasers of, and licensees for, these publications and services. They are therefore as much a supply to an educational institution of products or services as any other expense associated with information technology or expenses on training academic and teaching staff.

Copyright works that are available for sale or under license for education or to educational institutions must not be reproduced or made available under exceptions free of charge, as this

would constitute interference and a conflict with the normal exploitation of these works. The educational market as a whole, for such works, cannot constitute a “special case”, as it is one of the main, if not sole market for these types of works.

The Consultation Paper does also not seem to view that licensing is nowadays firmly part of “normal exploitation” of a copyright-protected work, but ancillary to the use of such work. In the digital world, licensing forms part of the primary use of a copyright-protected work and under-cutting income streams from licensing (whether collectively or individually undertaken) by way of exceptions, is not compatible with the normal exploitation.

STM notes in this regard, that CRRA only refers to the third step of the famed Berne Convention three-step test (ie, the exhortation not to engage in acts that unreasonably prejudice the rightsholder) when defining “fair dealing”. In our view, the CRC may wish to consider the need to amend the definition to make it clear that no fair dealing can be a substitute for normal exploitation or for a use that is not considered a certain special case (the other two steps of the three-step test).

(58) Should the education exceptions extend to the (a) provision of distance learning, and the (b) utilisation of work available through the internet?

See STM answer to question 57.

(59) Should broadcasters be able to permit archival recordings to be done by other persons acting on the broadcasters’ behalf?

(60) Should the exceptions for social institutions be repealed, retained or extended?

(61) Should there be a specific exception for non-commercial user-generated content?

In this regard, STM’s answers to Question 74 on text and data mining. The considerations expressed there are in our view equally valid regarding the issue of “user-generated content” or other “mash-up” exceptions.

(62) Should section 2(10) be strengthened by rendering void any term or condition in an agreement which purports to prohibit or restrict than an act permitted by CRRA?

In the 21st century, STM believes that licensing has become the vehicle of choice for users and rights holders to agree on uses. A Digital Copyright Exchange may be the correct forum to explore these and other issues (See also STM’s answer to question 13 above).

To the extent that Irish law reduces the ability of users and rightsholders legally to agree on permitted uses or create doubt over the enforceability of contractually agreed terms and conditions, Irish law becomes less attractive for rightsholders and users. Moreover, Ireland may become less attractive as a hub for business.

STM believes that the following are key issues to consider on the relationship of contract and copyright:

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. This allows competition to play and does not force those whose business models permits liberal licensing to press ahead, while

those who wish to develop their own software and, for instance, text and data mining tools to add value to their content.

In some cases there may rather be a fundamental disagreement between users and rightsholders over the scope and reach of exceptions. For instance, some users may feel that a contractual provision limits an exception, when the rightsholder believes the use does not fall within the scope of an exception. In this scenario, the contract actually reduces the risk of misunderstanding and provides legal certainty where an exception could not.

Licensing of copyright-protected materials covers a range of diverse content, eg 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. However, subjecting Irish contract law to Irish exceptions will only exacerbate the drive to rely on foreign law as the proper law of a licensing contract.

Wishing to create simplicity for Irish users of licensed products and services is a valid goal, but should not come at the expense of greater legal uncertainty for Ireland-based rightsholders. Moreover, diversity of offerings in the market is generally indicative of an active competitive market and a diversity of licensing contracts contributes to this effect.

Where a limited market exists, eg only one or few significant users, STM and other trade associations have agreed to co-operate to creating standard terms and conditions or framework agreements that simplify the life of licensees, eg the framework agreement endorsed by STM, the PA and the British Library for the overseas supply of copyright-protected works via libraries to non-commercial users.

(63) When, if ever, is innovation a sufficient public policy to require that works that might otherwise be protected by copyright nevertheless not achieve copyright protection at all so as to be readily available to the public?

(64) When, if ever, is innovation a sufficient public policy to require that there should nevertheless be exceptions for certain uses, even where works are protected by copyright?

(65) When, if ever, is innovation a sufficient public policy to require that copyright-protected works should be made available by means of compulsory licences?

(66) Should there be a specialist copyright exception for innovation? In particular, are there examples of business models which could take advantage of any such exception?

(67) Should there be an exception permitting format-shifting for archival purposes for heritage institutions?

(68) Should the occasions in section 66(1) CRRA on which a librarian or archivist may make a copy of a work in the permanent collection without infringing any copyright in the work be extended to permit publication of such a copy in a catalogue relating to an exhibition?

(69) Should the fair dealing provisions of CRRA be extended to permit the display on dedicated terminals of reproductions of works in the permanent collection of a heritage institution?

(70) Should the fair dealing provisions of CRRA be extended to permit the brief and limited display of a reproduction of an artistic work during a public lecture in a heritage institution?

(71) How, if at all, should legal deposit obligations extend to digital publications?

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.[ix]

The adaptation of legal deposit rules and regulations to digital and online resources is not trivial and in any event the coming into force of new rules should be staggered. STM would be happy to participate in a consultation with interested stakeholders, as STM does in other parts of the world. With all due respect, it would appear to us that a full discussion on all aspects of legal deposit legislation and long-term preservation would be beyond the scope of this consultation. STM would be pleased to participate in any consultations and further to comment as appropriate.

(72) Would the good offices of a Copyright Council be sufficient to move towards a resolution of the difficult orphan works issue, or is there something more that can and should be done from a legislative perspective?

(73) Should there be a presumption that where a physical work is donated or bequeathed, the copyright in that work passes with the physical work itself, unless the contrary is expressly stated?

(74) Should there be exceptions to enable scientific and other researchers to use modern text and data mining techniques?

Text and data mining ("TDM") solutions are best found in market-based initiatives, like proactive voluntary licensing, that offer faster and more flexible ways to adapt to changing market needs and preferences.

Ill-defined and national law exceptions will not assist in realising the full potential of TDM techniques and tools. The full potential of such techniques will only be obtained through active co-operation and collaboration among content owners, service providers and (commercial and non-commercial) research organisations, and technical experts. What is needed is an open and transparent multi-stakeholder dialogue. Exceptions, on the other hand, will not achieve an environment conducive to collaboration – a precondition to deal with the need for standardisation and normalisation of text formats and data to make TDM valuable.

STM publishers actively provide products and services aimed at supporting the advancement of science through the dissemination and discovery of essential information and key relationships between that information. STM and its members are currently engaged in evaluating or supporting a variety of initiatives, standards and policy approaches that concern research data and because of STM publishers' heavy involvement in this area they know that issues concerning TDM and published journal articles require special consideration. The 2011 report from the Publishing Research Consortium titled Content Mining of Journal Articles has identified the variety of TDM methods and purposes in which journal publishers and other stakeholders are currently engaged.[x] **The PRC Report noted that not all TDM requests come from the general public – many are from**

abstracting services, commercial entities, and scientific and medical researchers. For researchers and other individuals with a scholarly or non-commercial purpose, it may be indicative that the PRC Report found over 90% of publishing respondents stated that they grant research-focused mining requests.

TDM for commercial purposes involves different evaluation criteria, but increasingly STM publishers are providing licensing options and arrangements for such ends. In any event, a fundamental principle of copyright law is that it only protects the "expression of ideas" and not ideas or facts themselves. Thus, pure facts could be extracted from copyright-protected works, at least manually without infringing copyright and insubstantial parts may be reproduced, as long as these do not in the aggregate amount to a substantial part or involve the creation of unauthorised derivative works.

Publishers and Collective Management Organizations are currently offering a variety of licensing options and permissions, and such offers and solutions should be encouraged and supported.[xi] Changes to current copyright law that would mandate extraordinary "rights", particularly when proposed as copyright exceptions, might not be technically feasible or result in harmful untended consequences such as reducing the incentive for innovation in TDM solutions.

TDM is not an end in itself but a research tool. For this reason, STM publishers call for the public debate to recognize that the uses to which TDM can be put should affect how TDM is perceived and treated. TDM undertaken for commercial purposes should be subject to usual rules of commerce and publishers should be allowed to continue their contribution to a virtuous circle of scientific and economic progress by providing or facilitating customized TDM solutions for commercial purposes as well as by engaging in TDM themselves to improve products and services that, in turn, more effectively support the advancement of science and the economy. TDM done for non-commercial or purely scholarly purposes and in areas of insufficient market demand are different. In these cases publishers as socially responsible organizations understand that such activities often have the potential to advance the public good without causing economic harm and are predisposed to do what they can in support. STM and its members are willing to work with non-commercial research laboratories and institutions to find ways to accommodate the supply of high-quality text and data, where markets are not viable mechanisms.

Exceptions on their own will not deliver the potential benefit of TDM, yet they would expose copyright-protected works to greater risks of piracy and abuse, and counter-act the incentive that is copyright for the very same organisations that invest in the creation and dissemination of valuable and innovative content. Access and privacy as well as data and network security are the main issues and, whilst copyright exceptions on their own cannot harness the potential of TDM, these exceptions foment large scale and wholesale copying of entire collections of data and copyright-protected works threatening permanent damage and destruction of incentives carefully crafted by copyright.

(75) Should there be related exceptions to permit computer security assessments?

(76) What is the experience of other countries in relation to the fair use doctrine and how is it relevant to Ireland?

STM's first submission (CRC submission no 43) as part of the Irish Copyright Review dealt with "fair use" vs "fair dealing" vs other European exceptions and limitations *in extenso*. We refer to our submission on record in this regard.

(77) (a) What EU law considerations apply?

(b) In particular, should the Irish government join with either the UK government or the Dutch government in lobbying at EU level, either for a new EUCD exception for non-consumptive uses or more broadly for a fair use doctrine?

See STM's answer to questions 76 and also 74 on "non-consumptive use": the Irish government should take an active role in the EU in shaping copyright, but without in particular seeking a "fair use" clause.

(78) How, if at all, can fair use, either in the abstract or in the draft section 48A CRRA above, encourage innovation?

See STM's answer to questions 1 and 76 above.

(79) How, in fact, does fair use, either in the abstract or in the draft section 48A CRRA above, either subvert the interests of rights holders or accommodate the interests of other parties?

STM refers to its answer to question 76. In addition, section 48A (5) purports to give the Minister the ability to decide what is and is not fair use. This appears to STM as an undesirable solution as any judicial determination should be left to the courts.

(80) How, in fact, does fair use, either in the abstract or in the draft section 48A CRRA above, amount either to an unclear (and thus unwelcome) doctrine or to a flexible (and thus welcome) one?

STM refers to its answer to question 76.

(81) Is the ground covered by the fair use doctrine, either in the abstract or in the draft section 48A CRRA above, sufficiently covered by the CRRA and EUCD exceptions?

STM refers to its answer to question 76.

(82) What empirical evidence and general policy considerations are there in favour of or against the introduction of a fair use doctrine?

(83) (a) If a fair use doctrine is to be introduced into Irish law, what drafting considerations should underpin it?

(b) In particular, how appropriate is the draft section 48A tentatively outlined above?

(84) Should the post-2000 amendments to CRRA which are still in force be consolidated into our proposed Bill?

(85) Should sections 15 to 18 of the European Communities (Directive 2000/31/EC) Regulations, 2003 be consolidated into our proposed Bill (at least insofar as they cover copyright matters)?

(86) What have we missed?

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STM SUBMISSION TO CONSULTATION PAPER "COPYRIGHT AND INNOVATION" ENDNOTES

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[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

[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" conferences held in Washington DC in April 2012, http://www.stm-assoc.org/events/stm-innovations-seminar-2012-us/?presentations, with a great number of new innovative scientific publishing products, or 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] Statement attributed to Abraham Lincoln, a patent lawyer (and US president), in relation to patent law, but here adapted for copyright.

[v] The latter expression stems from a draft Google Book Settlement, an attempted settlement of a copyright suit in relation to which the defendant Google, Inc. claimed to be engaged in fair use.

[vi] http://www.stm-assoc.org/2008_06_01_STM_Position_on_Digital_Copyright_Exceptions.pdf; http://www.stm-assoc.org/2008_06_01_Annex_to_Digital_Copyright_Exceptions_and_Limitations.pdf

[vii] See eg http://www.research4life.org/casestudies.html, http://www.research4life.org/testimonials.html, http://www.research4life.org/competitionbook, http://www.research4life.org/videos.html.

[viii] See STM's statement providing a safe harbour for users of works erroneously deemed orphan: http://www.stm-assoc.org/2007_11_01_Safe_Harbor_Provisions_for_the_Use_of_Orphan_Works.doc

[ix] 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 .

[x] http://www.publishingresearch.net/documents/PRCSmitJAMreport20June2011VersionofRecord.pdf.

[xi] See also the STM sample licence available at: http://www.stm-assoc.org/2012_03_15_Sample_Licence_Text_Data_Mining.pdf

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