

02 June 2016

Intellectual Property Arrangements
Productivity Commission
GPO Box 1428
Canberra City ACT 2601
AUSTRALIA

Dear Sirs

Comments by the International Association of Scientific Technical and Medical Publishers (STM) to the Productivity Commission Draft Report “Intellectual Property Arrangements”

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. STM members include learned societies, university presses and private companies.¹

STM would welcome an economic framework for the debate on the direction of policy on intellectual property. However, it is of some concern to us that much in the Productivity Commission’s Draft Report released for comment in April 2016 takes issue with practices that are established in the publishing industry, based on misunderstandings and incorrect assumptions, and that there is no proper consideration of the impact of its recommendations so far as the publishing industry is concerned.

In this submission, we are only commenting on certain aspects of the Draft Report insofar as it relates to copyright and the academic publishing industry. The International Publishers Association is submitting more extensive comments, which we support.

Introductory remarks

Although we appreciate that the improvement of the “overall wellbeing of Australian society”² is an overriding goal, it seems to us that this objective has been conflated with the scope of the inquiry about incentives provided by the intellectual property system into an argument about the balance in

¹ See STM’s website at <http://www.stm-assoc.org/>.

² Page v of the Draft Report

intellectual property laws between intellectual property rights owners and users (“IP arrangements ... [creating] winners and losers”³).

In a paper entitled “How Copyright Drives Innovation in Scholarly Publishing” (2013),⁴ Prof. Adam Mossoff, Professor of Law at George Mason University School of Law and a member of the Copyright Alliance Academic Advisory Board, wrote:

“Today, copyright policy is framed solely in terms of a trade-off between the benefits of incentivizing authors to create new works and the losses from restricting access to those works. This is a mistake that has distorted the policy and legal debates concerning the fundamental role of copyright within scholarly publishing, as the incentive-to-create conventional wisdom asserts that copyright is unnecessary for researchers who are motivated for non-pecuniary reasons. As a result, commentators and legal decision-makers dismiss the substantial investments and productive labors of scholarly publishers as irrelevant to copyright policy.”

The mission of publishers is to maximise the dissemination of knowledge through economically self-sustaining business models.⁵ Publishers invest considerable sums of money in their products, both in technology and in employment of people having the necessary skills, and thereby add considerable value to the creative input and its dissemination. Publishing books and journals means assuming commercial risk, such as the estimation of the size of the market for the work and the resultant structuring of the production of the work, as well as royalty arrangements with the authors. Also, it is publishers who are called on to act, at their cost, to enforce copyright in cases of infringement, which is something that an individual author would likely not have the resources to accomplish. Publishers add value to the finished article containing the creative work, and rely on a solid and certain framework of copyright law to enable them to earn a return on their investment.

Seen from this perspective, the question about whether the intellectual property system balances the rights of rights owners and users becomes moot.

Against this background, we comment on some specific recommendations and information requests in the Draft report.

The proposal to introduce “fair use” into Australian law: Draft recommendation 5.3

STM advises against the introduction of fair use, a doctrine foreign to Australia’s legal tradition. We also consider the premise underlying the Draft Report’s proposals for extended fair use, namely that

³ Draft Report p.51.

⁴ Available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2243264 with an introduction at <https://copyrightalliance.org/2013/04/how-copyright-drives-innovation-scholarly-publishing#.VknXaL-HcZN>.

⁵ STM Brussels Declaration at <http://www.stm-assoc.org/public-affairs/resources/brussels-declaration/>.

the copyright term as being too long, as misinformed and in any event a recommendation that clashes with Australia's treaty obligations under the Berne Convention.

Consequence of increased litigation

The risk of the fair use defence will rest on copyright owners, when enforcing rights against a defendant who raises a fair use defence. In the United States, this risk in disputes is balanced out by the prospect of the rights owner being able to claim statutory damages if infringement is found. The cost of litigation could hardly be described as productive and cannot be simply be waved away as "not a compelling reason".⁶ Forecasts of this cost to Australian society will have to feature prominently in any decision whether to import fair use or not.

Copyright management organisations (collecting societies) often are fully engaged in fair use cases in the United States where a fair use defence is asserted against uses of copyright works which are ordinarily licensed by means of collective licensing. The same has happened in Canada, where AccessCopyright has had no option but to declare formal disputes with educational authorities in the light of the fair dealing exception for education. We submit that the uncertainty created by fair use in relation to uses which have heretofore been licensed in Australia and cost of litigation could impact on the distributions by Australian copyright management agencies, compared to the figures given in the Draft Report,⁷ undermining the efficiency desired by the Commission.

Fair use in the United States now allows mass reproduction of entire works

The greatest concern, however, is that over recent years, fair use in the United States has mutated from a defence for "follow-on creators" to a sanctioning, in the words of noted American copyright lawyer Jon Baumgarten, of "regular, concerted, systematic, commercially purposed, 100% complete, uncompensated, copying, without permission, day in-day out, of millions of copyrighted books"⁸ following the decisions of the second Circuit Court of Appeals in the *Google Books*⁹ and *Hathi Trust*¹⁰ cases – a necessary implication of fair use allowing "[a]n Internet search engine publishes thumbnail images of websites in its search results"¹¹.

The fact that mass reproduction of entire works is now allowed under fair use in the United States is not mentioned in the Draft Report. When considering the extent of fair use litigation in the United States, it will be important not only to consider the numbers of cases – which, as indicated above and

⁶ Draft Report p. 147

⁷ Draft Report p.136

⁸ "Global trends in Copyright: Fair Use and Beyond", presentation at the International Publishers Association Congress, 10 April 2016, at http://www.internationalpublishers.org/images/events/ipa-congresses-events/2016_London/Jon_Baumgarten.pdf.

⁹ *The Authors Guild Inc., et al. v. Google, Inc.*, decision of the United States 2nd Circuit Court of Appeals, 16 October 2015.

¹⁰ *Authors Guild v. HathiTrust*, decision of the United States 2nd Circuit Court of Appeals, 10 June 2014.

¹¹ Draft Report p.143

in the comments by the IPA and others, by far exceed the number of cases in fair dealing in Australia and other common law jurisdictions like the United Kingdom, but also on the trends – the most recent trend being cases finding reproductions of entire works by technology companies for purposes considered to be in the public benefit as transformative, and therefore fair, use. The effect of these cases is to transfer economic benefit of published works to technology companies without authorisation or remuneration.

This mutation of fair use in the United States illustrates that the application of fair use is not just a case of “Courts interpret[ing] the application of legislative principles”¹², but rather a case of the Courts taking over the legislative role from Parliament. The same objection applies to the guidelines being suggested, which would come from an administrative body and the binding nature of which will no doubt be questioned in a Court action.

It has been questioned, by Baumgarten and others, whether the defence of fair use, as it has developed over recent years, is compliant with the “three-step test” for exceptions under the Berne Convention and TRIPS.

Introduction or proposed introduction of fair use in other countries

As has been noted in the Draft Report, fair use was not adopted in the United Kingdom, nor, in the final instance, was it proposed in the Hargreaves Review, and the fair dealing copyright exceptions were reviewed instead. The supposed benefits of adopting fair use in other countries have been questioned. The Lisbon Council report recommending a “flexible exception” in the European Union¹³ has been criticized as “junk science”,¹⁴ as has the analysis pointing to the supposed benefits of the introduction of fair use in Singapore, where the conclusion is reached that economic benefits have flowed could just as well show a large effect on industries that manufacture goods useful for private copying of copyrighted works and no effect on the copyright industries.¹⁵

Orphan works and out-of-commerce works

The Draft Report goes on to suggest that the proposed adoption of fair use should also extend to orphan works and out-of-commerce works. We consider this to be a simplistic solution that risks unforeseen consequences.

¹² Draft Report p.147

¹³ Referred to at p.146 of the Draft Report.

¹⁴ “The Lisbon Council’s 2015 Intellectual Property and Economic Growth Index: A Showcase of Methodological Blunder” by Dr. George S. Ford available at <http://www.phoenix-center.org/perspectives/Perspective15-03Final.pdf>.

¹⁵ “The Economic Impact of Expanding Fair Use in Singapore: More Junk Science for Copyright Reform” by Dr. George S. Ford available at <http://www.phoenix-center.org/perspectives/Perspective16-01Final.pdf>.

There are licensing solutions for resolving the issue relating to orphan and out-of-commerce works. The opportunity should be given for newly introduced schemes, like the ones in the European Union and the United Kingdom, to develop before an exception should even be considered.

To allow a fair use defence or an exception to apply to orphan and out-of-commerce works would amount to an extreme form of a “use it or lose it” solution imposed on the owners of copyright works – extreme in the sense that the loss of the rights to the work due to the exception would be perpetual, dispossessing the owner of the ability to re-introduce the work to the market on a commercial basis.

Amendments to the Copyright Act to preserve exceptions for digital material: Information request 5.1

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 wrong to generalise what exceptions are really over-ridden by licensing terms and/or relevant to users.

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

- a) 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 digital products available.
- b) 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 rightsholders over the scope and reach of exceptions. For instance, some users may feel that a contractual provision limits an exception, when the copyright owner believes the use does not fall within the scope of an exception. This situation would be exacerbated if Australia were to import the “fair use” defence. In such a scenario, the contract would actually reduce the risk of misunderstanding and provide legal certainty where an exception cannot.
- c) 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.

STM publishers reject the notion implied by the Information Request 5.1¹⁶ that publishers’ subscription licences with libraries and archives explicitly go about to undo copyright exceptions.

The Draft Report gives only one example, namely the alleged limitation in licences on document supply. We submit that this is a poor example and it is not a case where contracts purport to undo exceptions. “Document supply” could mean services that are undertaken commercially by publishers

¹⁶ Draft Report pp.38, 125-126

and commercial entities to commercial users,¹⁷ which is not authorised by the library exceptions in the Copyright Act, 1968¹⁸. 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.

Recommendation that Australian public institutions should implement Open Access policies for publicly funded research: Draft Recommendation 15.1

STM publishers welcome sustainable Open Access as a legitimate alternative to the traditional subscription model, and many STM members publish on an Open Access basis only.¹⁹

However, the analysis of the Draft Report, that culminates in the proposal for all publicly-funded research to be mandatory published under an Open Access, seems to be rooted in the statement that “the role of (and costs borne by) publishers in marketing copyrighted works in fiction, music and video content to consumers are not as obvious in the academic journal arena.”²⁰

It is also not clear from the Draft Report whether it is advocating the publication of research in Open Access journals or simply placing research in institutional repositories. There are fundamental differences between the two which are not touched upon in the Draft Report, which thereby makes no contribution on the manner in which Open Access publication of research is to be funded.

STM would welcome the opportunity to illustrate the role of publishers in the academic publishing field. In short, they are an indispensable link in the chain of registering, certifying, formalising, improving, disseminating, preserving, and using scientific information – making long-term investments in publications around which emerging, and established scientific communities coalesce and evolve. Global access to scientific information for investigators at research institutions is easy and widespread due in no small part to the entrepreneurial efforts of STM publishers to successfully convert paper-based to online dissemination. These are described in more detail in STM's 2008 “Position Paper on Scientific, Technical and Medical Publishing.”²¹

The academic publishing industry has actively contributed in many initiatives to enable the cross-linkage and discoverability of scholarly publications and their authors in the digital world. These

¹⁷ Examples are Get-it-Now and subito, aimed at the academic market, and Infotrieve and Ingenta Connect aimed at the commercial market.

¹⁸ Sections 49 and 50.

¹⁹ See the STM signature statement “Publishers Support Sustainable Open Access” at <http://www.stm-assoc.org/public-affairs/resources/publishers-support-sustainable-open-access/>.

²⁰ Draft Report p.406.

²¹ Available at http://www.stm-assoc.org/2008_04_01_Overview_of_STM_Publishing_Value_to_Research.pdf. A comprehensive periodic study on the STM industry, which includes the latest developments on Open Access, is the STM Study, the 2015 edition of which is at http://www.stm-assoc.org/2015_02_20_STM_Report_2015.pdf. Also of interest might be “96 Things Publishers Do” by Kent Anderson at <https://scholarlykitchen.sspnet.org/2016/02/01/guest-post-kent-anderson-updated-96-things-publishers-do-2016-edition/>.

include the Document Object Identifier (DOI) for scholarly papers used by Crossref²² and the ORCID digital identifier²³ for researchers. In addition, in response to demand by funding organisations, STM publishers support the Open Funder Registry, a service by CrossRef, which provides a common taxonomy with over 11,000 funding body names to report funding sources for published scholarly research.

Considering the scope of these activities, there is no publishing “for free” in the sense of “free of cost”. Publishing for the digital environment has some of the same costs as found in print publishing – editing, proofreading, styling, art and illustration handling, layout and composition designing, as well as plagiarism detection – and it also has costs not found in print publishing – such as XML generation, Document Type Definitions Migration (DTD) and format migrations, DOI registration, integration and tracking metrics, and the development and maintenance of platforms, content enrichment, content tagging and search engine optimisation. The costs to deliver both, which still is the case with a number of journals (like the top medical journals *New England Journal of Medicine* and *The Lancet*) are higher than for print or electronic only. Publishing costs remain, whether funded by supply-side (producer-pays) or demand-side (consumer-pays) models.

We disagree with the conclusion reached in the Draft Report on Open Access and the assumptions and analysis underlying them. Open Access is not “cost free access.” An academic work (or any literary work, for that matter) is Open Access if its copyright owner licenses it as such under one of the many available Open Access licences. The terms of an Open Access licence will deal with issues like proper attribution, whether commercial re-use is allowed or not, and many others. In this sense, Open Access depends on copyright.

Also, it does not follow that the fact that a work can be made available online makes it feasible to provide free access.²⁴ Such a statement does not take into account what publishers do to make the academic works they publish available, accessible and discoverable. Indeed, confusing “Open Access” with “free access” and working on the false assumption that publishers make no substantial contribution to academic discourse opens the door to questionable practices which devalues published science.²⁵

The notion that papers can be published without peer review and be “reviewed and ranked” after publication is doubtful and untested, and removes any vestige of responsibility for publication, trusting that it will be resolved by public debate by those who happen to be online and who are interested in doing so. Academic publishers, as an integral part of the scholarly communication process, have a certain responsibility in maintaining the scientific record, and published papers in which a fault is discovered after publication, whether fraud, plagiarism or a simple error, are retracted

²² <http://www.crossref.org/>

²³ <http://orcid.org/>

²⁴ Draft Report p.407.

²⁵ A very recent example in Australia is the bogus “Australian Society for Commerce Industry & Engineering”, which was exposed by Radio Australia – see <http://www.radioaustralia.net.au/international/2015-08-04/bogus-scholarly-society-agrees-to-publish-papers-without-peer-review/1477352>.

or corrected by notice to the public. Academic publishers' compliance with the "Retraction Guidelines" of the Committee on Publication Ethics²⁶ distinguishes, for example, their contribution to the scientific record from uncontrolled postings and comments.

In conclusion, STM's position on publishing,²⁷ Open Access and otherwise, is that:

- Publishers are committed to the wide dissemination of, and unrestricted access to, their content.
- We support any and all sustainable access models that ensure the integrity and permanence of the scholarly record.
- We do not support unfunded mandates that constrain scholarly authors or affect the sustainability of the publishing enterprise.
- Services that publishers provide must be paid for in some way.

In the circumstances, on the basis that Open Access is a voluntary licensing model that is not a part of the legislative intellectual property framework, consideration must be given to the Commission's final report not dealing with Open Access policies for publicly-funded research at all, unless the Commission is prepared to undertake a proper study which corrects the mistaken assumptions underlying the analysis and which considers all relevant facts, including giving proper emphasis to those from the academic publishing industry set out above,

Proposed expansion of the safe harbour scheme: Draft recommendation 18.1

The extension of the safe harbour scheme to entities beyond Australian carriage service providers should not be undertaken lightly. The burgeoning number of take down notices for infringement, the rise of structurally infringing sites (described below), the prevalent use of privacy and other masking services by those who trade off copyright infringement and the restrictive application of notice and take down processes by platforms, as evidenced by the responses to the recent study on the safe harbour in the United States,²⁸ all indicate that an extended safe harbour does not work.

The long-standing problem in the United States stems in part from the broad definition of "service provider" in the Digital Millennium Copyright Act (DMCA), under which any and all types of "service providers" – including online entities that were not anticipated by Congress at that time – would appear to be eligible for safe harbour protections. When the DMCA liability limitations were negotiated, Congress, as reflected by the definition of "service provider" in Section 512(k)(1)(A), primarily had in mind service providers that were "true" common carriers – i.e., telecommunications companies that (like other common carriers) could not choose which communications they would transmit through their networks, and online forums (such as Usenet groups) that merely allowed for intermediate storage of user communications – as is the current situation in Australia.

²⁶ At <http://publicationethics.org/files/retraction%20guidelines.pdf>.

²⁷ See "Access Statement" at <http://www.stm-assoc.org/public-affairs/resources/access-statement/>.

²⁸ US Copyright Office "Section 512 Study" – see <http://copyright.gov/policy/section512/>.

In the course of acting against infringements, publishers have encountered websites that host content and which create business and operational models to work around the safe harbour provisions, enabling them to claim entitlement to safe harbour protection from liability even while incentivizing copyright infringement on a massive scale. These hosting sites are commonly referred to as “structurally infringing sites” because, while their technology is “content neutral” and they generally comply with take down notices to claim the safe harbour protection, their businesses are blatantly structured to encourage an ongoing supply of books and journals without authorization and in a way that infringes their copyrights. These structural infringers also facilitate the infringing supply of all kinds of other copyright works, including music and movies.

Many sites that host infringing content insist that take down notices are sent via dedicated web reporting forms, others by way of application process interfaces. Some have even completely stopped accepting email notices. Some of the web reporting forms are non-standardized, are often updated without warning, often do not work at all or experience downtime, and have varied and complex security checks which limit automation of notice sending.

In the circumstances, we disagree with the proposed blanket extension of the safe harbour.

Conclusion

The comments in this letter are only in response to the issues raised in the Draft Report which are of the most concern to STM, as an international trade association for the publishing industry. As mentioned above, we support the response by the International Publishers Association, and we understand that Australian publishers and others in the copyright industry are making more comprehensive comments.

STM is ready to amplify or otherwise assist in any way that would inform the debate on an effective and efficient copyright system.

Yours faithfully

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