INTERNATIONAL ASSOCIATION OF SCIENTIFIC, TECHNICAL & MEDICAL PUBLISHERS
www.stm-assoc.org

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The Executive Director
Australian Law Reform Commission
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Sydney NSW 2001
AUSTRALIA

By post and by e-mail to copyright@alrc.gov.au

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**Submission on the Issues Paper "*Copyright and the Digital Economy*"**

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Dear Sirs

## Introduction

The International Association of Scientific, Technical and Medical Publishers ("STM") is the leading global trade association for academic and professional publishers. It has over 120 members in 21 countries, including Australia, 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.

We welcome the opportunity to contribute to the inquiry on "*Copyright and the Digital Economy*" and are pleased to make this submission, with the ultimate aim of improving the current legislative framework for copyright in the digital environment. STM also welcomes the opportunity to continue contributing to the debate after making this submission.

## STM Publishers' contribution to the digital economy

STM publishers have actively embraced the opportunities of the digital online environment[1], starting with journal content and other digitally-created 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

[1] A useful catalogue of the digital changes in scholarly publishing can be found in the STM report (2009) "An Overview of Scientific and Scholarly Publishing" at http://www.stm-assoc.org/2009_10_13_MWC_STM_Report.pdf.

include published information, links between references in the literature[2], 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[3].

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 one segment taking sales from another.

A viable and sustainable ecology for scholarly communication has also supported information philanthropy initiatives from the STM publisher community. This includes programmes in the developing world coordinated through agencies of the United Nations such as HINARI, OARE, AGORA and ARDI,[4] by which 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.[5] 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.

Moreover, STM publishers are engaged in a wide range of initiatives around the world to facilitate access to STM content in new ways which are copyright compliant. Examples include:

- The licensing of digital document delivery by the document delivery consortium of German universities, Subito[6], the International Non-Commercial Document Delivery Service of the British Library[7] and the French Government's scientific and technical research information service INIST[8].
- The development of a contractual clause facilitating data and text mining with the pharmaceutical industry[9].

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[2] For information on the embedded linking of references within STM journal articles, see http://www.crossref.org/01company/16fastfacts.html.

[3] 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.

[4] See the Research4Life web site at http://www.research4life.org/. Research4Life is the collective name for the four programmes, and is a public-private partnership of the WHO, FAO, UNEP, WIPO, Cornell and Yale Universities and STM.

[5] For more information see http://www.inasp.info/file/3d034b8bae0a3f7e1381979aedc356a9/about-inasp.html

[6] http://www.stm-assoc.org/2008_10_01_Subito_Settlement_Press_Release.pdf

[7] http://www.bl.uk/incd and http://www.stm-assoc.org/2011_09_08_Press_Release_STM_PA_BL_Doc_Del_Agreement.pdf

[8] http://www.stm-assoc.org/2012_10_04_INIST_CNRS_STM_Press_Release.pdf

[9] http://www.stm-assoc.org/2012_09_12_PDR_ALPSP_STM_Text_Mining_Press_Release.pdf

The legal vehicle enabling these access initiatives is licensing, as opposed to reduced level of copyright protection by way of exceptions or limitations. 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 sector (eg intermediaries), the effect will be to reduce the ability of this sector to re-invest in high quality content and access.

## General and Cross-cutting Remarks

Our submission will provide a response only to a handful of the questions listed in the Issues Paper. More generally, for STM and its members the following points appear to be cross-cutting and essential:

1. 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.[10]

2. Licensing (individually and collectively) is the 21st century's answer to legal access to copyright-protected works. The United Kingdom is at present considering a Digital Copyright Exchange, which, if implemented, could automate licences and permissions, thereby increasing efficiency. [11]

   While technology is ever changing and affects the specifics of supply and demand, human nature and the need for sustainable market-driven solutions remain the same. 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.[12]

3. We disagree with the perception, which is reflected in some of the commentary recounted in the Issues Paper, 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

[10] Although STM can contribute to the discussion around the enforcement of intellectual property rights, this falls outside the scope of the Issues Paper.

[11] See the UK Intellectual Property Office's report called "Copyright Works" (commonly referred to as the "Hooper report") at http://www.ipo.gov.uk/dce-report-phase2.pdf. A cross-media project that will create the framework for a fully interoperable and fully connected standards-based communications infrastructure so that businesses and individuals can manage and communicate their rights more effectively online is being carried out in Europe by the Linked Content Coalition, more information on which can be found at http://www.linkedcontentcoalition.org/#.

[12] See the list of thousands of journals from which articles are available for 24-hour period rentals at http://www.deepdyve.com/browse/journals.

is no contradiction between innovation, growth and intellectual property (copyright) – to the contrary: copyright is the fuel that feeds the fire of creativity.[13]

4. The Issues Paper raises newly labelled copyright uses of "user-generated content" (under "Online use for social, private or domestic purposes") and "data and text mining". In STM's view, the re-labelling of activities should not detract from what these are: tools and techniques to identify, deliver and use third-party content. They are not aims in or of themselves. In order to be considered as activities falling under an exception or limitation, they need to have a clearly delineated public purpose. Due to particular relevance for STM publishing, we make a more detailed submission regarding data and text mining, identifying the real challenges and opportunities in this field and showing that simply applying exceptions to this activity will not achieve the desired result. The comments made in relation to data and text mining apply also to indexing and other forms of re-purposing (whether "commercial" or "non-commercial") and any other re-use of copyright-protected content.

5. STM's views on exceptions and limitations in the digital economy are informed by STM's own Position Papers, particularly its *Position Paper on Digital Copyright Exceptions and Limitations for Scholarly Publications in the Education and Research Communities*[14], dating from June 2008. All of the issues dealt with in this Position Paper are raised in the Issues Paper, and we have therefore taken the liberty of attaching a copy of the Position Paper to this submission.

6. 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 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 professional practitioners, Government could most usefully contribute to innovation and growth in Australia by bolstering the copyright industries broadly and publishing in particular.

   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.

With this background, 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. As mentioned before, there is the notion that copyright is antithetical to innovation and growth. Underlying this notion, copyright-based content industries are cast as incumbents pitted against a "new" information technology industry, which are 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.

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[13] Statement attributed to Abraham Lincoln, a patent lawyer (and US president), in relation to patent law, but here adapted for copyright.

[14] http://www.stm-assoc.org/2008_06_01_STM_Position_on_Digital_Copyright_Exceptions.pdf

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.

Yours faithfully,

Michael Mabe
Chief Executive Officer
STM, International Association of Scientific, Technical and Medical Publishers

## Digital copyright exceptions and limitations for scholarly publications in the education and research communities (Position paper of the STM association)

Introduction

There are few copyright exceptions & limitations specific to education and research in the digital environment, but it is likely that over time more exceptions will be considered.[i] Any possible future exceptions or limitation must of course be developed in the context of the Berne Convention's 3-step test, which requires that any exception must be confined to a certain special case that does not interfere with the normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the rights-holder.[ii]

What should be the guiding principles in considering or developing exceptions? What pitfalls should be avoided? STM publishers have valuable input and wish to contribute to this debate.

A. Basic Principles

STM publishers prepare and distribute their materials (scholarly and scientific journals, books and databases) for and into the research and education communities, communities that therefore constitute their most significant audiences and markets.

It is often stated that because education and research are in the public interest, they constitute a "certain special case" on which any copyright exception is premised (first step under the Berne Convention). Moreover, the presumed non-commercial nature of many educational and research activities is frequently cited as a strong indicator that the use should be legitimised under an exception and does not "interfere with the normal exploitation", ie *the market*, of the rights-holder (the second step), or is not "unreasonably prejudicial" to his/her interests (the third step).

The public interest of research and education is best served by encouraging the creation of new publications and information services with these audiences and markets in mind. For example, journal articles, academic treatises and textbooks are published by STM publishers for the very purpose of contributing to scholarly communication and education. Libraries for non-commercial research or non-commercial educational institutions are the primary purchasers of (or licensees for) STM publisher materials and services. Offering publications and information services

[i] Note that for purposes of this discussion, we do not address commercial researchers or companies doing research, nor does this Position Paper address materials published by educational publishers directly for use in teaching.

[ii] Art. 9(2) Berne Convention, Art. 13 TRIPS, Art. 10 WIPO Copyright Treaty.

to these non-commercial communities, eg by way of subscription or individual journal article supply, is the very essence of "normal exploitation" which must be left free of exceptions that prejudice the legitimate interests of rights-holders unreasonably.

Further, STM publishers have embraced digital technology and offer much of their material online or in digital form (almost all journal and database content, and an increasingly large number of books) and provide online services such as individual article purchase and access. Publishers have entered the digital environment, recognising both the new opportunities for distribution it presents, and also the significant risk for widespread unauthorised downloading.

STM publishers are also actively engaged with other agents and distributors to distribute or provide access to or copies of such materials.

Clearly any exceptions and limitations for education and research dealing with STM materials would need to be carefully and cautiously crafted to minimise any potential distortion of this vital and well-functioning system for scholarly communication. Given that STM materials are prepared specifically for the educational and research context, this context does not constitute a "certain special case" (1st step under Berne Convention) in relation to STM materials. An unqualified exception that includes all STM materials would also interfere with the normal exploitation of the work (2nd step under the Berne Convention). Recognising this, a number of copyright laws with digital exceptions and limitations pertaining to research and education exclude STM materials designed for such markets, i.e. an "exception from a more general exception", as one of a number of specific qualifiers the exception or limitation. [iii] Further, any exception or limitation newly introduced would also fully need to take into account the amplified risks of the digital environment (in this sense, "digital is different"). Finally, it must also be recognised that different circumstances will apply in different countries, consistent with local legal traditions and experience.

STM publishers are aware of the information needs of researchers and educators, the general contributions that such scholars make towards society, and the role that specialized libraries play in the dissemination of knowledge.

[iii] See also the annex listing a number of exceptions contained in copyright laws of EU Member States and comparing them to §52a of the German Copyright Act. §52a of the German Copyright Act contains a carve-out in favour of school book publishers who would be prejudiced where a trade publisher may not suffer equally under an exception. §52a is too widely worded in other ways and, importantly, fails to provide a similarly warranted carve-out for publications serving the academic market. Art. 122(5)(e) of the French Intellectual Property Code does contains such a carve-out in favour of academic textbooks and related materials. Section 32(2) of the Spanish Copyright Act provides for a general exception in favour of teachers who use small parts of in-copyright works for illustration in the class room. Importantly, section 32(2) also provides a carve-out from that exception for school and university books. Section 110 of the US Copyright Act has a similar provision (an exception to the "TEACH Act" exception that notes that works that are "produced or marketed primarily for performance or display as part of mediated instructional activities" must still be purchased or licensed through normal market means).

STM therefore recognises that some exceptions and limitations remain relevant in the digital environment and supports those exceptions and limitations noted herein, and believes that these principles, if carefully applied[iv], will not erode or interfere with the market for scholarly communication.

We distinguish between those activities that could be an **exception** to relevant copyright law, with no requirement for direct rights-holder authorisations or collective licenses (whether voluntary or mandatory), and those activities that are suitable for a **limitation**, areas of use that have more of a potential to impact the market for STM materials and thus require direct authorisation or a collective licence approach. STM supports direct voluntary rights-holder licensing and permission-granting, and voluntary collective efforts as well. Mandatory collective licences should be considered only in the most rare and circumscribed circumstances where voluntary collective solutions would be impossible to organise administratively.

## B. Exceptions in the digital environment for non-commercial research and educational institutional libraries

### *1. Archiving needs (libraries)*

Libraries for non-commercial research or educational institutions should be able to create and use a digitized archival copy to replace lost or damaged originals in the public or "circulating" collection of the institution (or in restricted collections for scholarly use), if new originals or authorised copies are not available commercially or if the library cannot obtain access to an archival copy through the mechanisms identified in their licence or subscription access agreements.

Many STM publishers provide for archiving in their licence or subscription access agreements.

Libraries should also be able to "refresh" the archive by creating new digital copies from time to time (to accommodate technological changes in areas such as formatting or digital storage requirements). More than one copy at a time can be made as may be necessary to ensure that replacement archival copies can be made in the future.

This exception should be limited to *replacement* and not for the creation of further copies or generally for access outside the institutions' user community.

### *2. Technological support for access by blind and visually disabled (libraries)*

Libraries for non-commercial research or educational institutions should be able to create a digitized copy of a print original, or a digital copy of a digital original, to enable access by those with visual disabilities (e.g. blindness or inability to read small print) for STM materials that are not already made available for these purposes. The

[iv] Any exception would have to comply with the three-step test and be "state-of-the-art", ie narrowly tailored by way of describing the use accurately (eg "for the sole purpose of illustration …"), the persons who may rely on the exceptions (eg "teachers in public schools") and the extent (eg "excerpts or small parts of works"), see Art. 5(3)(a) of the EU Copyright Directive 29/2001 and national implementing legislation in EU Member States.

library may use specialised formatting of the digital copy to enable the copy to have an enhanced visual display or sound capability. In order to obtain such copies, users with visual disabilities should register with or otherwise be certified by relevant local or national authorities or organisations that specialise in such disabilities.

STM publishers also encourage government and foundation grants and funding, and cooperation amongst libraries and such organisations, to ensure appropriate technological standards are developed and made more accessible, in part to encourage and incentivise publishers to develop new products for such users.

*3. Interlibrary copying*

The traditional underlying reason for library copying exceptions has been that, in an environment dependent on print production and distribution, a given library would not necessarily subscribe to or purchase all relevant materials, but would rely instead on the collections of other institutions (perhaps more specialized institutions) to fulfil the library's patrons' needs. This would be especially applicable for materials not deemed to be central or essential for that particular library's collection. It is understood in most jurisdictions where this legal and procedural tradition has developed for such "lending-and-borrowing", that an essential issue would be to ensure that such lending-and-borrowing would not be likely to substitute for the potential purchase of such material.

We note that, as described above, and with the advent of the Internet and STM publisher's innovations, the availability of digital STM content is ubiquitous in a world that is by now close to borderless. Moreover, STM journal content is now not only available to potential journal subscribers, but to everyone: individual articles are instantly and globally available for purchase and access. Our view is that the rationale for permitting interlibrary copying and supply is thus much reduced, almost to the point of being irrelevant, in the digital environment.

STM does accept that there may be a scholarly need for a non-commercial and educational library to make a digital copy of unique and rare scholarly material for another non-commercial and educational institution, but for in-copyright works this must be limited to material which is not commercially available in the geographic territory of the "requesting" institution. Such copying cannot be done systematically for the purpose of substituting for the normal purchase or licence of STM material (including the supply of individual journal articles) for the requesting library's collection. Libraries should be obliged to keep records of materials copied for such purposes and their requests from other libraries for such copies.

C. <u>Limitations in the digital environment for non-commercial research and education needs</u>

*1. "On-the-spot consultation" on dedicated terminals within library premises*

Libraries of non-commercial research or educational institutions should be able to offer access to works acquired in print for a library's permanent collection on

terminals situated within the library premises[v]. Digitisation and display may be permissible under an exception for research and private study within a publicly accessible library (a library with no direct or indirect commercial purpose) on dedicated electronic reading places. The displayed digitised extra copy and any print-out copies of the work made by researchers and students under exceptions available to them should be permissible to the extent that a royalty fee is paid either under licence to the publisher concerned or to a collective licensing society acting as a clearing house.

However, as far as digital versions or electronically accessible works are concerned re-scanning or display on any terminals, whether dedicated or not, remains a matter of licensing terms and conditions. Moreover, where display on dedicated reading places is permissible, not more copies of a work that is still in-print and available at a reasonable commercial price may be made available or displayed simultaneously than have been made part of the print collection. Where the library or educational institution wishes to display additional copies simultaneously, further royalty fees should be payable either to the rights-holder or the collective licensing society the rights-holder is affiliated with.

### *2. Course-packs*

Course-packs and their digital equivalent "Electronic Reserves" constitute an area where rights-holders and user communities are best served by electronically facilitated rights-clearance that can take various shapes and forms. Terms and conditions (licence or subscription agreements) for born-digital content may provide an all-in fee that permits the use of these electronic resources in the generation of Course-packs and/or Electronic Reserves. However, for some content this may not be available and a separate electronic rights clearance may be appropriate. Moreover, many Course-packs and Electronic Reserve items combine items that are from born-digital sources subscribed to by the library or institution, legitimately digitised resources and print resources. In such cases a licence from a clearing house such as a properly mandated collective licensing society represents a win-win solution. In this regard, STM endorses and subscribes to the approach taken by the American Association of Publishers and Cornell University – and more recently Hofstra University and others.[vi]

### *3. Orphan works*

Orphan works are copyrighted works for which the user is unable to identify, locate and/or contact the legitimate holder of the relevant rights ("copyright owner") for the purpose of obtaining permission to use her/his works. Such "orphan works" risk exclusion from the cycle of creation and exploitation, as copyright compliant users may prefer non-use over the risk of liability for infringement. For this reason, and in order to avoid such outcome, STM has developed a Position on Orphan Works in December 2006, followed by a Position Paper in November 2007 on a "Safe Harbour", providing some guidelines as to what constitutes a "diligent search" in

[v] For en example of such an exception, see newly enacted §52b of the German Copyright Act, implementing Art. 5(3)(n) of the EU Copyright Directive 29/2001.
[vi] See http://www.publishers.org/main/PressCenter/CollegeCopyrightGuidelinesRelease.htm

relation to a potentially orphaned work. In June 2008, STM, together with 24 other stakeholder organisations, signed a Memorandum of Understanding on Diligent Search Guidelines for Orphan Works. This complements a declaration subscribed to by a growing list of STM members outlining their position in case of use of orphan works in the field of scientific, medical and technical literature. These documents are available on the STM web site:

- STM Position on Orphan Works (December 2006):[vii]
- STM/ALPSP/PSP Position On Use of Orphan Works in Scientific, Medical and Technical Literature (November 2007):[viii] and
- Press Release MoU on EU Diligent Search Guidelines For Orphan Works:[ix]

It has been suggested that the need for a "diligent search" may be obviated in the case of so-called "mass-digitisation" exercises. STM remains of the view that whilst users and rights-holders should collaborate in an effort to streamline and facilitate diligent searching, there is no substitute for a diligent search even in cases of mass-digitisation.

*4. Interlibrary copying*

While our view is that in the digital environment there should be only a very limited exception for interlibrary copying (see paragraph A.3 above), due to the significant availability of STM material in electronic form, we do accept that collective licensing might be useful for digital copying and/or delivery of material for the education and research markets. Such licensing must not disrupt existing market functions and should be in the context of voluntary collective licensing schemes on a competitive basis.

D. Restrictions

None of the areas identified in this Position Paper for copyright exceptions and limitations contemplate distribution by the library or institution to users or consumers who are not affiliated with the institution or authorised by the institution to access and use its collection (with the exception of the discussion above on "interlibrary copying"). Any expansion of the user community would inevitably impact and distort the underlying market for STM materials.

We also believe it is vital for all the exceptions noted herein, that any reproduction be made in a manner consistent with and faithful to the original, and should not in any way injure the moral rights of the author nor obscure any information provided by the publisher.

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[vii] See http://www.stm-assoc.org/documents-statements-public-co/2006-documents-statements-public-correspondence/

[viii] See http://www.stm-assoc.org/documents-statements-public-co/2007.11%20Safe%20Harbor%20Provisions%20for%20the%20Use%20of%20Orphan%20Works%20Nov2007%20Ver%201.1.doc

[ix] See http://www.stm-assoc.org/home/stm-and-other-stakeholders-sign-memorandum-of-understanding.html

STM believes that many of these principles could be set out in STM publisher licence or subscription access agreements, and notes that such negotiated agreements should take precedence over inherent copyright law.

June 2008

**STM ANSWERS TO NUMBERED QUESTIONS CONTAINED IN THE ISSUES PAPER "*COPYRIGHT AND THE DIGITAL ECONOMY*"**

# The Inquiry

**Question 1.** The ALRC is interested in evidence of how Australia's copyright law is affecting participation in the digital economy. For example, is there evidence about how copyright law:

(a) affects the ability of creators to earn a living, including through access to new revenue streams and new digital goods and services;

(b) affects the introduction of new or innovative business models;

(c) imposes unnecessary costs or inefficiencies on creators or those wanting to access or make use of copyright material; or

(d) places Australia at a competitive disadvantage internationally.

**Since the late 1990's, STM publishers have invested heavily in electronic systems to facilitate usage, access and improved speed in processing and reviewing content,[1] embracing the technological capacities and pent-up consumer demand for digital information, relying on the adoption of changes or clarifications of the copyright laws and treaties noted above (clarifications that in our view were intended to encourage such investments). The STM sector has engaged in precisely the introduction of new and innovative business models contemplated by the Issues Paper, and has done so working with, and relying on, strong copyright protection.**

**Virtually all STM journal content is available and accessible online, as noted, and e-book content is becoming equally common. STM publishers recognised early on that the digital environment supported and indeed required standards and programmes to encourage interoperability, linking, access, and discovery.[2] Creative licensing programmes including consortium licensing, national licenses (of all users in a given country), "pay-per-view" systems to enable transactional access to articles from non-subscribed journal titles, and improved permissions and rights-clearances systems,[3] have resulted in a wealth of content availability for researches and professional practitioners and have significantly improved productivity.[4] Scientific and institutional customers have many choices and options in obtaining such licences, including by**

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[1] 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. Recent presentations on innovations in online information and presentation can be found on the STM web site in connection with the "Innovations" conference held 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

[2] For a recent summary of developments in technology and information on levels of access, see the STM Report (2009) at http://www.stm-assoc.org/2009_10_13_MWC_STM_Report.pdf.

[3] See the information about the Australian Copyright Agency's rights permissions system RightsPortal at http://rightsportal.copyright.com.au/Pages/HomePage.aspx, creative user-oriented information provided by the United Kingdom's Copyright Licensing Agency (CLA) at http://www.cla.co.uk/licences/excluded_works/ and information about the CCC's automated rights permissions system Rightslink at http://www.copyright.com/media/swfs/Rightslink-Publisher.swf.

[4] See the Publishing Research Consortium 2006 report on productivity at http://www.publishingresearch.net/journals_scientific.htm.

**working through collective management organisations such as the Copyright Agency Limited.**

## Guiding principles for reform

**Question 2.** What guiding principles would best inform the ALRC's approach to the Inquiry and, in particular, help it to evaluate whether exceptions and statutory licences in the *Copyright Act 1968* (Cth) are adequate and appropriate in the digital environment or new exceptions are desirable?

**To quote from STM's position paper "*Digital copyright exceptions and limitations for scholarly publications in the education and research communities*" (2008, the full text of which accompanies this submission):**

**"The public interest of research and education is best served by encouraging the creation of new publications and information services with [research and education communities] in mind. For example, journal articles, academic treatises and textbooks are published by STM publishers for the very purpose of contributing to scholarly communication and education. Libraries for non-commercial research or non-commercial educational institutions are the primary purchasers of (or licensees for) STM publisher materials and services. Offering publications and information services to these non-commercial communities, eg by way of subscription or individual journal article supply, is the very essence of "normal exploitation" which must be left free of exceptions that prejudice the legitimate interests of rights-holders unreasonably."**

**"Clearly any exceptions and limitations for education and research dealing with STM materials would need to be carefully and cautiously crafted to minimise any potential distortion of this vital and well-functioning system for scholarly communication. Given that STM materials are prepared specifically for the educational and research context, this context does not constitute a "certain special case" (1st step under [the Berne Convention 'three-step test')) in relation to STM materials. An unqualified exception that includes all STM materials would also interfere with the normal exploitation of the work (2nd step under the Berne Convention). Recognising this, a number of copyright laws with digital exceptions and limitations pertaining to research and education exclude STM materials designed for such markets, i.e. an "exception from a more general exception", as one of a number of specific qualifiers the exception or limitation. Further, any exception or limitation newly introduced would also fully need to take into account the amplified risks of the digital environment (in this sense, "digital is different"). Finally, it must also be recognised that different circumstances will apply in different countries, consistent with local legal traditions and experience."**

**STM respectfully disagrees with the notion reflected in paras 30 and 31 of the Issues Paper that there is "too much intellectual property protection" and that intellectual property is a barrier to innovation.**

## Caching, indexing and other internet functions

**Question 3.** What kinds of internet-related functions, for example caching and indexing, are being impeded by Australia's copyright law?

**Question 4.** Should the *Copyright Act 1968* (Cth) be amended to provide for one or more exceptions for the use of copyright material for caching, indexing or other uses related to the functioning of the internet? If so, how should such exceptions be framed?

## Cloud computing

**Question 5.** Is Australian copyright law impeding the development or delivery of cloud computing services?

**Question 6.** Should exceptions in the *Copyright Act 1968* (Cth) be amended, or new exceptions created, to account for new cloud computing services, and if so, how?

## Copying for private use

**Question 7.** Should the copying of legally acquired copyright material, including broadcast material, for private and domestic use be more freely permitted?

**Question 8.** The format shifting exceptions in the *Copyright Act 1968* (Cth) allow users to make copies of certain copyright material, in a new (eg, electronic) form, for their own private or domestic use. Should these exceptions be amended, and if so, how? For example, should the exceptions cover the copying of other types of copyright material, such as digital film content (digital-to-digital)? Should the four separate exceptions be replaced with a single format shifting exception, with common restrictions?

**Question 9.** The time shifting exception in s 111 of the *Copyright Act 1968* (Cth) allows users to record copies of free-to-air broadcast material for their own private or domestic use, so they may watch or listen to the material at a more convenient time. Should this exception be amended, and if so, how? For example:

(a) should it matter who makes the recording, if the recording is only for private or domestic use; and

(b) should the exception apply to content made available using the internet or internet protocol television?

**Question 10.** Should the *Copyright Act 1968* (Cth) be amended to clarify that making copies of copyright material for the purpose of back-up or data recovery does not infringe copyright, and if so, how?

## Online use for social, private or domestic purposes

**Question 11.** How are copyright materials being used for social, private or domestic purposes—for example, in social networking contexts?

**Question 12.** Should some online uses of copyright materials for social, private or domestic purposes be more freely permitted? Should the *Copyright Act 1968* (Cth) be amended to provide that such use of copyright materials does not constitute an infringement of copyright? If so, how should such an exception be framed?

**STM is of the view that exceptions on their own will not deliver the potential benefits since authors' moral rights are a factor here too. Further exceptions would expose copyright-protected works to greater risks of piracy and abuse.**

**Question 13.** How should any exception for online use of copyright materials for social, private or domestic purposes be confined? For example, should the exception apply only to (a) non-commercial use; or (b) use that does not conflict with normal exploitation of the copyright material and does not unreasonably prejudice the legitimate interests of the owner of the copyright?

**Arising out of Australia's international obligations, STM submits that any exceptions must comply with the "three-step test" prescribed by Article 9(2) of the Berne Convention, namely that if the circumstance concerned can be determined as a "special case", use under the exception must not conflict with the normal exploitation of the copyright material and not unreasonably prejudice the legitimate interests of the copyright owner.**

## Transformative use

**Question 14.** How are copyright materials being used in transformative and collaborative ways—for example, in 'sampling', 'remixes' and 'mashups'. For what purposes—for example, commercial purposes, in creating cultural works or as individual self-expression?

**Question 15.** Should the use of copyright materials in transformative uses be more freely permitted? Should the *Copyright Act 1968* (Cth) be amended to provide that transformative use does not constitute an infringement of copyright? If so, how should such an exception be framed?

**The concept of the free use of transformative uses of copyright works has become an element under the fair use defence in US copyright litigation. STM's full response to the question of fair use, in which reference is also made to cases of transformative use, is set out in that context in the answer to Question 52.**

**With respect to the use of literary works such as STM publications, the research community and literary critics have long-established processes and guidelines over the re-use of quotations, over the use of factual information from scholarly articles (not a copyright infringement provided proper attribution is used), and the like. Concepts such as "sampling" or "remixes" would not be relevant for literary material, and the key question with respect to academic and scientific material relates to text and data mining uses, which we discuss in our answer to Question 25.**

**In general, STM views the notion of an exception allowing transformative use with concern, primarily because it would be difficult to define and therefore difficult to anticipate its impact on literary markets. If we analogise from some of the US case-law, transformative uses, such as scanning print material to make such content accessible, would in our view likely interfere with rightsholders' legitimate interests. Specifically, STM is of the view that such exceptions on their own will not deliver significant potential benefits, given existing quotation arrangements and market conditions for text and data mining, but exceptions would expose copyright-protected works to greater risks of piracy and abuse. In particular, even if a user creates an independent work which contains a reproduction of, or is an adaptation of, a copyright work (such as private editing or a "mash-up") outside the existing exceptions of parody and satire, there is no sound policy reason why the rights in the original work, i.e. both the copyright and moral rights, should be abrogated.**

**The meaning of the term "transformative use" for the purpose of the fair use defence has recently (since release of the Issues Paper) been broadened in the US in a trial court decision the HathiTrust case (the decision of the US District Court for the Southern District of New York, The Authors Guild, Inc et al v. HathiTrust el al, handed down on 10 October 2012) to cases where nothing new is added by the unauthorised reproduction of the work, but only that "the copies serve an entirely different purpose than the original works: the purpose is superior search capabilities rather than actual access to copyrighted material" and where "the use of digital copies ... facilitate access for print-disabled persons." Although we are hopeful that an appellate court review will correct this significant expansion of "fair use" concepts in US jurisprudence, it is indicative of the problems that unclear definitions and reliance on broad principles can create. It also illustrates a meaning of the term "fair use" which has not been contemplated in the Issues Paper.**

**Question 16.** How should transformative use be defined for the purposes of any exception? For example, should any use of a publicly available work in the creation of a new work be considered transformative?

**See the answer to Question 15.**

**Question 17.** Should a transformative use exception apply only to: (a) non-commercial use; or (b) use that does not conflict with a normal exploitation of the copyright material and does not unreasonably prejudice the legitimate interests of the owner of the copyright?

**See the answer to Question 15.**

**Question 18.** The *Copyright Act 1968* (Cth) provides authors with three 'moral rights': a right of attribution; a right against false attribution; and a right of integrity. What amendments to provisions of the Act dealing with moral rights may be desirable to respond to new exceptions allowing transformative or collaborative uses of copyright material?

**STM does not believe that there should be changes to the moral rights provisions. See also the answer to Question 15.**

## Libraries, archives and digitisation

**Question 19.** What kinds of practices occurring in the digital environment are being impeded by the current libraries and archives exceptions?

**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. For this reason, the carve-outs to the library exceptions in sections 49(5AB)(c) and 50(7B)(e)(ii), (iii) and (iv) of the Copyright Act 1968 will invariably apply to STM content.**

**That notwithstanding, STM has learnt of incidents where certain libraries in Australia are using the privileges available to "remote" patrons in section 49(2A)(b)(iii) of the Copyright Act 1968 to justify the delivery of copies made by the library to beyond the borders of Australia. Subject to any changes to limit the scope of the library exceptions,[5] STM submits that it should be made clear that the exceptions in sections 49 and 50 should only apply to patrons and libraries in Australia and its external territories.**

**Question 20.** Is s 200AB of the *Copyright Act 1968* (Cth) working adequately and appropriately for libraries and archives in Australia? If not, what are the problems with its current operation?

[5] It has already been suggested that the special arrangements prescribed for "remote" patrons in Section 49(2A) are redundant in the modern digital world. See S. Ricketson, "The three-step test, deemed quantities, libraries and closed exceptions" at p. 104: "Given the wide availability now of facsimile and email communications, subsections 49(2A)–(2C) seem redundant: it is difficult to envisage remote users who would not have access to one of those forms of communication once they had access to a telephone line. If this is so, they will be able to comply with the requirement under subsection 49(1) for the making of a request and declaration in writing."

**Question 21.** Should the *Copyright Act 1968* (Cth) be amended to allow greater digitisation and communication of works by public and cultural institutions? If so, what amendments are needed?

**STM supports the ability of libraries and archives to being able to make preservation and archival copies and to shift the format of items forming part of the library's or archive's permanent collection for these purposes where it is not reasonably practical to buy a replacement copy.**

**However, STM opposes the view that preservation copies may be used as "master copies" to serve beneficiaries of fair dealing exceptions or under any other exception, or to permit access on an insecure online platform, which could well distort the market. For preservation and archival copies to retain their legitimacy they must not become the source of further uses other than on-site consultation and/or inspection.**

**The STM publishing community has worked actively to establish digital preservation standards, including the European Union's *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, Netherlands, the *Portico* project, and *LOCKSS*.[6]**

**Question 22.** What copyright issues may arise from the digitisation of Indigenous works by libraries and archives?

## Orphan works

**Question 23.** How does the legal treatment of orphan works affect the use, access to and dissemination of copyright works in Australia?

**See the answer to Question 24.**

**Question 24.** Should the *Copyright Act 1968* (Cth) be amended to create a new exception or collective licensing scheme for use of orphan works? How should such an exception or collective licensing scheme be framed?

**"Orphan works" risk exclusion from the cycle of creation and exploitation, as copyright compliant users may prefer non-use over the risk of liability for infringement. To counter this risk, STM strongly supports efforts aimed at enabling the use of orphan works. As both producers of copyrighted works and users of orphan works, STM publishers have experience with the issues from both sides.**

**To this end STM, together with other trade associations in the publishing business, released a Position Statement on 23 October 2007 setting out "safe harbour" policy for persons wishing to use content from orphan works, in which it may subsequently transpire that participating publishers are the rightsholders, in new works, course packs and compilations.[7] This "safe harbour" policy was in turn based on STM's Position Paper on orphan works issued on 1 December 2006.[8] It is possible that STM will issue a revised position paper on this topic in 2013 in the light of the development**

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[6] See the STM site at http://www.stm-assoc.org/eu-project-parse/# 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/en/expertise/e-depot-and-digital-preservation, the Portico project at http://www.portico.org/digital-preservation/ and the LOCKSS initiative at http://lockss.stanford.edu/lockss/Home.

[7] "Orphan Works Safe Harbor STM ALPSP PSP" dated 23/10/2007, link from http://www.stm-assoc.org/document-library/.

[8] http://www.stm-assoc.org/2006_12_01_STM_Position_Orphan_Works.pdf

**of the debate on orphan works, such as the passage of the recent Orphan Works Directive in the European Union,[9] and we will inform you if such a revised position paper is issued.**

**The question is whether orphan works should be dealt with as a matter of a copyright exception, a reduction in copyright penalties once a "parent" is located, or a blanket collective license. The view of STM is that private market solutions are almost always to be preferred, since they are the most likely to provide tangible beneficial results.**

**STM believes that the following should be addressed in any regulatory initiative in this area:**

**1. Reasonably diligent, good faith search for the copyright owner:**

- **The potential user of orphan works should be required to conduct a thorough search in good faith, with a view to identifying, locating and/or contacting the copyright owner, prior to using the orphan work.**
- **The reasonably diligent search should necessitate a high level of care. However worded, the search standard prescribed should require the potential user not only to research the identity/location of the current copyright owner, but also to inform her-/himself about the possible sources where such information could be found.**
- **Any regulative initiative should refrain from prescribing minimum search steps or information sources to be consulted. Only a flexible approach will ensure an adequate solution dealing with the individual circumstances of each orphan work, as well as rapidly changing information sources and search techniques.**
- **Stakeholders should be encouraged to develop standards and guidance on what they consider a reasonably diligent search. These must be flexible as resources available change and improve.**
- **The user of an orphan work should bear the burden of proving that her/his search was reasonably diligent, and must maintain records of his/her efforts to meet that burden.**

**2. Clear and adequate attribution**

**The user of orphan works should be required to provide attribution to the copyright owner(s) throughout her/his use of the orphan work as clearly and adequately as possible in the circumstances. For example, where a copyright notice is present in the orphan work, credit should be given in a manner which reflects the notice.**

**3. Adequate remuneration of copyright owner and/or appropriate restitution:**

- **Any regulative system should provide that a reappearing copyright owner is to be offered full remedies in an appropriate and reasonable manner, taking into account also the legitimate interests of the user in her/his continued exploitation of the previously orphaned work.**
- **The appropriate reinstatement of the exclusive rights of the copyright owner should include an entitlement to adequate remuneration for the user's use of the previously orphaned work. Adequate remuneration should generally be defined as the equivalent of a licence fee for the entire use term as it would have been**

[9] Directive 2012/28/EU, at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:299:0005:0012:EN:PDF.

**negotiated between copyright owner and user prior to the commencement of the use.**

- **It is our view that remuneration should be negotiated between the parties, with recourse to the courts where such negotiations fail. Where consistent with local rules, court costs and fee shifting should be available to the prevailing party. For example, if the user offers a fee which the proprietor deems unreasonable, the proprietor should pay legal fees where the Court awards a fee equal to or less than the user's offer, and the user should pay a fee if the Court awards a greater sum.**

**4. Limitation on injunctive relief:**

**Any possibility of injunctive relief against the continued and future use of a previously orphaned work should be sufficiently flexible to take into account the efforts and investment made by a good faith user.**

**5. Non-exclusivity of use:**

**The use of orphan works is non-exclusive. A user of orphan works can only intervene against further uses of the same orphan work where the further use would infringe her/his new rights in derivative works (e.g. translations, adaptations).**

**STM's position does not affect the right of copyright owners to ignore or refuse requests for licences for subsequent uses of the orphan works, including derivatives thereof.**

**6. "Orphan work" defined:**

**Care needs to be taken to ensure that works that are not "in print" but are still "in copyright" and have identifiable owners are outside of the definition of orphan works.**

## Data and text mining

**Question 25.** Are uses of data and text mining tools being impeded by the *Copyright Act 1968* (Cth)? What evidence, if any, is there of the value of data mining to the digital economy?

**At present, no uniform understanding exists amongst interested parties as to what data and text mining is and what it is not. This lack of common understanding undermines both agreement and disagreement over the conditions for its acceptability and its permissibility under contract. It also hinders the development of best practices and guidelines.[10] STM has worked with interested parties in industry (particularly the pharmaceutical industry) to come up with solutions for the demands for data and text mining, as appears from the rest of this answer below, and has used the following working definition as a starting point:**

[10] To the extent that data and text mining is about access to raw data alone, it should be borne in mind that it is a fundamental principle of copyright law 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 - Section 14 of the Copyright Act 1986. In this sense, data and text mining is not an issue for copyright law. STM has developed a best practices statement concerning the publishing of data, which is about to be published, and in June 2012 also issued a joint statement with DataCite on best practice recommendations to make research data easier to find, link to, re-use and cite - http://www.stm-assoc.org/2012_06_14_STM_DataCite_Joint_Statement.pdf.

***A computational process whereby text or datasets are crawled by software that recognises entities, relationships and actions.***[11]

**Data and text mining 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. These solutions must be based on collaboration between users and publishers. Value proposals and business models for publishers in the field of data and text mining are only now emerging, and publishers are experimenting with various contractual and operational models. Although difficult to determine now, STM is confident that value to data and text mining will be determined as these projects proceed.**

**Exceptions on their own will not deliver the potential benefit of data and text mining, 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 data and text mining, 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.**

**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 – a precondition to deal with the need for standardisation and normalisation of text formats and data to make data and text mining valuable. What is needed is an open and transparent multi-stakeholder dialogue. Exceptions, on the other hand, will not achieve an environment conducive to collaboration.**

**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 among 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 data and text mining and published journal articles require special consideration. The 2011 report from the Publishing Research Consortium (PRC) entitled "*Content Mining of Journal Articles*" has identified the variety of data and text mining methods and purposes in which journal publishers and other stakeholders are currently engaged.[12] The PRC Report noted that not all data and text mining 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 data and text mining requests.**

**Data and text mining for commercial purposes involves different evaluation criteria, but increasingly STM publishers are providing licensing options and arrangements for such ends.**

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[11] STM Statement on Text and Data Mining at http://www.stm-assoc.org/2012_03_15_STM_Summary_Statement_Text_Data_Mining_final.pdf.

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

**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.[13] 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 data and text mining solutions.**

**Data and text mining 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 data and text mining can be put should affect how data and text mining is perceived and treated.**

- **Data and text mining 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 data and text mining solutions for commercial purposes as well as by engaging in data and text mining themselves to improve products and services that, in turn, more effectively support the advancement of science and the economy.**

- **Data and text mining 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 has already contributed to the practical implementation of data and text mining in collaboration with the pharmaceutical industry by developing a standard clause allowing data and text mining for insertion into licence agreements.[14] By the same token 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.**

**Question 26.** Should the *Copyright Act 1968* (Cth) be amended to provide for an exception for the use of copyright material for text, data mining and other analytical software? If so, how should this exception be framed?

**See the answer to Question 25. To re-iterate the point made, exceptions on their own will not deliver the potential benefit of data and text mining, 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.**

**Question 27.** Are there any alternative solutions that could support the growth of text and data mining technologies and access to them?

**See the answer to Question 25. Data and text mining 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. To the extent that**

[13] See also the STM sample licence available at: http://www.stm-assoc.org/2012_03_15_Sample_Licence_Text_Data_Mining.pdf.
[14] http://www.stm-assoc.org/2012_09_12_PDR_ALPSP_STM_Text_Mining_Press_Release.pdf

**data and text mining is only about raw data, best practices already exist in the STM community for access to research data.[15]**

## Educational institutions

**Question 28.** Is the statutory licensing scheme concerning the copying and communication of broadcasts by educational and other institutions in pt VA of the *Copyright Act 1968* (Cth) adequate and appropriate in the digital environment? If not, how should it be changed? For example, should the use of copyright material by educational institutions be more freely permitted in the digital environment?

**Question 29.** Is the statutory licensing scheme concerning the reproduction and communication of works and periodical articles by educational and other institutions in pt VB of the *Copyright Act 1968* (Cth) adequate and appropriate in the digital environment? If not, how should it be changed?

**Question 30.** Should any uses of copyright material now covered by the statutory licensing schemes in pts VA and VB of the *Copyright Act 1968* (Cth) be instead covered by a free-use exception? For example, should a wider range of uses of internet material by educational institutions be covered by a free-use exception? Alternatively, should these schemes be extended, so that educational institutions pay licence fees for a wider range of uses of copyright material?

**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.**

**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 normal exploitation.**

**The current Australian provisions give unprecedented access to copyright material at very low cost per student, with minimal transaction costs, and the principal schemes (in Parts VA and VB of the Copyright Act, 1968) are subject to the independent supervision of the Copyright Tribunal. STM is not currently aware of any compelling reason to expand the fair dealing provisions, but is looking forward to considering this further in light of submissions from other parties and in light of any proposals raised by the Inquiry in its Discussion Paper.**

**Question 31.** Should the exceptions in the *Copyright Act 1968* (Cth) concerning use of copyright material by educational institutions, including the statutory licensing schemes in pts VA and VB and the

[15] Joint statement from DataCite and STM on the Linkability and Citability of Research Data - http://www.stm-assoc.org/2012_06_14_STM_DataCite_Joint_Statement.pdf.

free-use exception in s 200AB, be otherwise amended in response to the digital environment, and if so, how?

## Crown use of copyright material

**Question 32.** Is the statutory licensing scheme concerning the use of copyright material for the Crown in div 2 of pt VII of the *Copyright Act 1968* (Cth) adequate and appropriate in the digital environment? If not, how should it be changed?

**Question 33.** How does the *Copyright Act 1968* (Cth) affect government obligations to comply with other regulatory requirements (such as disclosure laws)?

**Question 34.** Should there be an exception in the *Copyright Act 1968* (Cth) to allow certain public uses of copyright material deposited or registered in accordance with statutory obligations under Commonwealth or state law, outside the operation of the statutory licence in s 183?

**STM opposes the view that preservation copies may be used as "master copies" to serve beneficiaries of fair dealing exceptions or under any other exception, or to permit access to the general public. For preservation and archival copies to retain their legitimacy they must not become the source of further uses other than on-site consultation and/or inspection.**

## Retransmission of free-to-air broadcasts

**Question 35.** Should the retransmission of free-to-air broadcasts continue to be allowed without the permission or remuneration of the broadcaster, and if so, in what circumstances?

**Question 36** Should the statutory licensing scheme for the retransmission of free-to-air broadcasts apply in relation to retransmission over the internet, and if so, subject to what conditions—for example, in relation to geoblocking?

**Question 37.** Does the application of the statutory licensing scheme for the retransmission of free-to-air broadcasts to internet protocol television (IPTV) need to be clarified, and if so, how?

**Question 38.** Is this Inquiry the appropriate forum for considering these questions, which raise significant communications and competition policy issues?

**Question 39.** What implications for copyright law reform arise from recommendations of the Convergence Review?

## Statutory licences in the digital environment

**Question 40.** What opportunities does the digital economy present for improving the operation of statutory licensing systems and access to content?

**Question 41.** How can the *Copyright Act 1968* (Cth) be amended to make the statutory licensing schemes operate more effectively in the digital environment—to better facilitate access to copyright material and to give rights holders fair remuneration?

**Question 42.** Should the *Copyright Act 1968* (Cth) be amended to provide for any new statutory licensing schemes, and if so, how?

**Question 43.** Should any of the statutory licensing schemes be simplified or consolidated, perhaps in light of media convergence, and if so, how? Are any of the statutory licensing schemes no longer necessary because, for example, new technology enables rights holders to contract directly with users?

**Question 44.** Should any uses of copyright material now covered by a statutory licence instead be covered by a free-use exception?

## Fair dealing exceptions

**Question 45.** The *Copyright Act 1968* (Cth) provides fair dealing exceptions for the purposes of:

(a) research or study;

(b) criticism or review;

(c) parody or satire;

(d) reporting news; and

(e) a legal practitioner, registered patent attorney or registered trade marks attorney giving professional advice.

What problems, if any, are there with any of these fair dealing exceptions in the digital environment?

**Question 46.** How could the fair dealing exceptions be usefully simplified?

**Question 47.** Should the *Copyright Act 1968* (Cth) provide for any other specific fair dealing exceptions? For example, should there be a fair dealing exception for the purpose of quotation, and if so, how should it apply?

**If a new exception for quotations were to be under consideration, then STM would support an exception for academic use so long as it is a clearly defined, as contemplated by Article 10(1) of the Berne Convention, it meets the second and third steps of the three-step test under the Berne Convention and the author and the rightsholder are properly attributed in use under the exception. However, STM could not support a broad quotation exception which would extend to "sharing" of the whole literary work on social networks or which would undermine the moral rights of the author or for the purpose of transformative use.**

**STM has, together with publishing industry associations ALPSP and PSP, issued a position statement on quotations for academic use16, which states, amongst others, "Copyright or an exclusive publication right is not inherently inconsistent in any event with academic or scholarly debate or discussion of published scholarly content. The principles of ... "fair dealing", and the fact that copyright protection does not extend to the underlying facts or ideas, (but only the expression of them) means that academics and critics are always free to note and comment about research developments by criticizing and quoting published articles (without the necessity of obtaining consent). Of course such quotation should follow generally accepted scholarly principles concerning the quotation of just enough of the original to convey the critical point, and proper citation and crediting."**

## Other free-use exceptions

**Question 48.** What problems, if any, are there with the operation of the other exceptions in the digital environment? If so, how should they be amended?

**Question 49.** Should any specific exceptions be removed from the *Copyright Act 1968* (Cth)?

**Question 50.** Should any other specific exceptions be introduced to the *Copyright Act 1968* (Cth)?

**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**

[16] http://www.stm-assoc.org/2007_05_01_Author_Publisher_Rights_for_Academic_Uses.pdf.

**an exception should be grounded in a well-founded aspect of business or social life in Australia and not an aim in or of itself.**

**In any event, the three-step test prescribed by Article 9(2) of the Berne Convention should also be included verbatim to qualify any such exceptions.**

**Question 51.** How can the free-use exceptions in the *Copyright Act 1968* (Cth) be simplified and better structured?

## Fair use

**Question 52.** Should the *Copyright Act 1968* (Cth) be amended to include a broad, flexible exception? If so, how should this exception be framed? For example, should such an exception be based on 'fairness', 'reasonableness' or something else?

**Australia is not substantially different in its emphasis on "fair dealing" purposes such as criticism, journalism or non-commercial research than are other jurisdictions, including the US. Indeed "fair dealing" and the US "fair use" principles have much in common: they both derive from common-law principles that have evolved to take into account changes in the perceptions of uses that might be socially beneficial and do not distort the proper functioning of literary markets; and they both encourage the discovery and discussion of ideas, developments and news, while discouraging the copying of the entirety or substantial parts of copyright works.**

**Although the Australian fair dealing doctrine (itself part of a broader common-law tradition of findings by courts that certain uses are "fair" and reasonable) and the US fair use doctrine have the same common-law parentage and orientation, the legal environments are quite different. The US legal environment involves more risk and uncertainty, demonstrated in part by the higher volume of US litigation generally, and significant expense for both plaintiff and defendant, and thus an environment that may favour well-financed Internet-based companies who are prepared to take more legal risk than others might, and which facilitate insecure online access to the content of others as part of their own business.**

**More copyright infringement cases are brought and decided in the US and our analysis shows ten times the number of "Fair Use" decisions in the US than, for example, "Fair Dealing" decisions in the United Kingdom.[17] The greater volume of decisions in the US has not always led to greater clarity about fair use analysis, however—in fact there is greater uncertainty about the legal analysis and resulting implications for US businesses (including for the publishing community) than might be commonly perceived. US commentators and advisers constantly warn their clients and stakeholders that there are no "bright line" rules in fair use analysis, even in**

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[17] Legal research has found, from January 1978 to the end of 2010, a total of 21 "Fair Dealing" cases decided in the UK compared to 223 "Fair Use" cases decided in the US.
Thus far, by mid-November 2012 in the US, 23 copyright cases have been filed in the federal court of appeal alone in the 2nd Circuit, and 52 cases filed in the court of appeal in the 9th Circuit—although these two circuits may not be representative (both represent copyright-heavy industries in publishing, film & entertainment, and software & other technology industries)—this does demonstrate the large number of copyright litigation matters arising in the US every year. Listings of cases filed can be found at http://www.dockets.justia.com.
The latest available case-by-case information analyzed by the Transactional Records Access Clearinghouse (TRAC) of Syracuse University showed that July 2012 was the fourth straight month where filings have reached close to 300 or more per month — higher than they have been since July 2008. When monthly 2012 civil filings of this type are compared with those of the same period in the previous year, their number was up 41%. TRAC's report can be found at http://trac.syr.edu/tracreports/civil/293/.

**educational environments (even though educational purposes are considered an important fair use context).[18]**

**Judicial decision-making on fair use, although currently codified in Section 107 of the US Copyright Act,[19] is always understood to be a balancing of interests and factors, and over time the interpretation of and emphasis on certain factors has changed.[20] US courts struggle in fair use cases to determine whether the use in question provides new information (or entertainment) in a fashion that transforms and transcends the original work, which has an important societal benefit, in the categories noted above, and which will not supplant the rights-holder's ability to maintain a market, or develop new markets, for their works.**

**To illustrate this difficulty, one can refer to the settlement of the long-running dispute, brought in 2005, between Google and publishers concerning Google's mass scanning of books. Google's defence was to be a fair use defence, but the settlement has avoided a juridical decision on the question as to whether mass reproduction could be fair use.**

**Litigation costs are another element of uncertainty in US copyright cases, especially in matters that will involve significant evidence-taking and discovery, inevitable in legal analysis involving inherently fact-based issues such as fair use, and in matters with the complexity usually found in fair use cases. Even less complex cases can easily involve many hundreds of thousands of dollars in costs, and importantly it is generally the case in the US that each of the parties bears its own costs (rather than being borne by the losing party as in Australia).**

**Search engine companies such as Google have been at the centre of a number of copyright infringement cases brought and decided in the 9th Circuit in the US (the west coast circuit that includes California and thus a number of notable technology industries), concerning the republishing of copyright works available on commercial Internet sites that have paying access requirements (paid subscriptions or memberships). The Perfect 10 case (508 F.3rd 1146, 9th Circuit, 2007) is an example of this, with Google displaying "thumbnail" (reduced size) images from a membership site which included "risqué" photographs. The 9th Circuit found in this case that there was no market for reduced-size images, and no practical method for Google to eliminate such display in its indexing of Internet sites (although the case was remanded in part), reasonably consistent with its decision in Kelly v Arriba Soft (336 F.3rd 811, 2003), and upheld Google's fair use defence. Google has since raised a fair use defence in the copyright infringement case brought against it by the Authors Guild in the New York District Court for the unauthorised scanning of millions of books (the Authors Guild case) on the basis of the "enormous transformative benefit" that its actions will bring.[21]**

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[18] See for example the "fair use" sections on sites such as the Washington State University and Stanford University that offer extensive guidance (although STM might not agree with all policy points mentioned on such sites, we at least applaud the understanding of complexity) at http://publishing.wsu.edu/copyright/fair_use/ and http://fairuse.stanford.edu/Copyright_and_Fair_Use_Overview/chapter9/index.html

[19] The statutory language can be found at http://www.copyright.gov/title17/92chap1.html#107.

[20] In the 1985 decision by the Supreme Court, Harper & Row v Nation (471 US 539), the Court described the 'effect on the market' factor as being the "single most important element of fair use"; while the same Court less than ten years later in 1994 described the four factors as being essentially co-equal in Campbell v Acuff-Rose (510 U.S. 569).

[21] http://www.scribd.com/doc/102019445/Authors-Guild-v-Google-Redacted-Version-Plaintiff-Motion-for-Summary-Judgement-Memorandum-of-Law-in-Support

**STM would be gravely concerned by any characterisation of "fair use" that would permit, for example, the digitisation of entire collections of printed works without permission or payment. That was the situation in the Authors Guild case. Google and its supporters relied on the "thumbnail" cases from the 9th Circuit and made the argument that the copying of the entirety of print works was a fair use given that it was only displaying "snippets" of such works online, and that in any event it responded to rights-holders' requests for takedowns. Supporters of the Google project argued that the scanning and indexing was more transformative than exploitative, and indeed that the project would create a new market for older content not yet available digitally. It is our view that the assertion that such copying for commercial purposes could be fair use would represent such a distortion of the doctrine as to eviscerate it.**

**In the circumstances, STM's view is that a fair use defence will not contribute to the success of the digital economy.**

**Question 53.** Should such a new exception replace all or some existing exceptions or should it be in addition to existing exceptions?

**See the answer to Question 52.**

## Contracting out

**Question 54.** Should agreements which purport to exclude or limit existing or any proposed new copyright exceptions be enforceable?

**STM believes that, in the 21st century, licensing has become the vehicle of choice for users and rights holders to agree on uses.**

**To the extent that Australian 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, Australian law becomes less attractive for rightsholders and users. Moreover, Australia 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:**

**(i) 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. The availability of licensing models 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, data and text mining tools to add value to their content.**

**(ii) 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 rightsholder 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. (See our answer to Question 52 and specifically the recent US decisions extending the previously understood meanings of "transformative use" in the context of 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.**

(iii) **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.**

**(iv) 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.**

**Wishing to create simplicity for Australian users of licensed products and services is a valid goal, but should not come at the expense of greater legal uncertainty for rightsholders in Australia. 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, e.g. 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 rights clearance for licensees, eg the framework agreement endorsed by STM, the UK Publishers Association and the British Library for the overseas supply of copyright-protected works via libraries to non-commercial users. STM is ready to offer such solutions in Australia as well**.

**Question 55.** Should the *Copyright Act 1968* (Cth) be amended to prevent contracting out of copyright exceptions, and if so, which exceptions?

**STM believes that contracting out of copyright exceptions should not be circumscribed. See the answer to Question 54.**