



13 February 2017

Department of Industry, Innovation and Science
AUSTRALIA

By email only to IP.PCinquiry@industry.gov.au

Dear Sirs

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

STM is the leading global trade association for academic and professional publishers. It has over 120 members in 21 countries, including Australia, who each year collectively publish nearly 66% of all journal articles and tens of thousands of monographs and reference works. STM members include learned societies, university presses and private companies.

STM welcomes an economic framework for the debate on the direction of policy on intellectual property. However, as with its draft, we continue to be of concern that much in the Productivity Commission’s Report released for comment in December 2016 takes issue with established publishing industry practices in a way that is based on misunderstandings and incorrect assumptions. Indeed, the study seems to derive from a bias against creative industries, including the publishing industry, not only with its throw-away comments like “Copy(not)right” appearing in both the draft and the final reports, but with substantive recommendations for major changes to the copyright system based on one-sided demands from certain user groups.

We do not intend repeating the points from our submission in response to the draft report (dated 2 June 2016), by which we stand notwithstanding the Productivity Commission’s final report. In this submission, we will deal with some new issues raised which impact on the academic publishing industry, including issues raised in the Ernst & Young report *Cost benefit analysis of changes to the Copyright Act 1968*, released by the Department of Communications in December 2016 and to which the final Report refers with approval in a number of respects.

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Recommendation to make unenforceable any part of an agreement restricting or preventing a use of copyright material that is permitted by a copyright exception (Recommendations 5.1 and 5.2)

This recommendation by the Productivity Commission appears to have its origin, insofar as publishing is concerned, with part of the submission of the Australian Libraries Copyright Committee to the effect “that 79% of digital products (e-books, databases, aggregator licences) purchased by the [National Library of Australia] prohibited document supply.” We find it surprising that the Productivity Commission then chose to recommend a blanket ban on contractual terms that have an impact on copyright exceptions without soliciting the views of the publishing industry and not taking into account our submission (on pp 5-6) addressing precisely this point. In our submission in response to the draft report, we countered the notion that publishers’ licenses with libraries go about explicitly undoing copyright exceptions, with reference to an in-house study undertaken by STM, and we stated the view that the example relied upon by the Productivity Commission was poorly analysed.

The overriding of contractual terms between copyright owners and the consumers of their products may well have a place in specific exceptions, but these need to be analysed on a case-by case basis and it is surely a last resort as it sets a dangerous precedent for commercial agreements of all sorts. Similarly, there may be circumstances in which, measures against unfair contract terms under consumer protection legislation may be appropriate in relation to transactions for copyright works, as they are in all consumer transactions.

STM, however, takes issue with the Productivity Commission having arrived at such a far-reaching recommendation, for a blanket ban on overriding of all contract terms that encroach on exceptions, based only on a small sample of anecdotal examples in submissions from organisations representing users of copyright material.

We expect that a statutory override of contractual terms coupled with the introduction of US-style ‘fair use’ (without the counterbalance of statutory damages that exists in the United States) will in practice undo much of what the Productivity Commission forecasts, such as the maintenance of the statutory licence for the reproduction of content from educational works.

Our comments above apply equally to the proposal in the same recommendation to allow the circumvention of technological protection measures.

Open Access policies for publicly-funded research (Recommendation 16.1)

The Productivity Commission seems to have revised its views on Open Access policies for publicly-funded research, but nevertheless makes a recommendation of a maximum 12-month delay period pending availability of journal articles under an Open Access licence, making this recommendation without consulting the publishing industry, but instead referring to the practices of individual funders.

Authors for STM publications can publish via the ‘Gold Open Access’ route, where the costs of publication are recovered up front by the author or on their behalf. Authors also have the option to make versions of their work available after a time delay, in a model which sees subscriptions continue to support journal publication.

STM considers a 12-month time delay period for STM literature to be unsustainably low, in the sense that such a short period will not allow publishers to recoup their investment in the publication before it becomes available to the public free of charge. STM wishes to be consulted when Government debates a suitable Open Access policy for public institutions in Australia.

Introduction of 'fair use' (Recommendation 6.1)

STM stands by its position, also stated in the submission in response to the draft report, advising against the introduction of US-style fair use in Australia. We consider the findings and recommendations of the Productivity Commission in this regard are unsupported by the experiences of the publishing industry.

In this submission, we would like to deal with two aspects covered by the Ernst & Young report *Cost benefit analysis of changes to the Copyright Act 1968*, which are of specific application to STM publishing, to point out certain possible misunderstandings of publishing practice, namely in relation to quotations used for academic publication and data and text mining.

Quotations for academic publication

The Ernst & Young report posits that the introduction of a 'fair use' defence will cut down on the need for obtaining permissions for academic purposes falling outside uses that are not of 'substantial' parts of pre-existing works or which are for research or study, criticism or review, etc. The report refers to STM's *Permissions Guidelines*¹ and the *Guidelines for Quotations and other Academic Uses of Excerpts from Journal Articles*² of STM and the American Association of Publishers.

The report seems to contemplate that the permissions transactions are invariably for cases where quotations are for publishing of academic research³ and, by extension, fair, qualifying for free use under an exception.

On the contrary, permission transactions where a fee is charged relate to the re-publication of parts of these works, for instance the published results of a researcher appearing in a journal, which could include diagrams and tables, in other works consisting mainly of non-original material, such as educational textbooks. The need to obtain permissions for this purpose are entirely legitimate, following that reproduction without permission in such cases, even with attribution of the author, prejudice the rightsholder's legitimate interests and cannot be considered fair.

It therefore cannot be deduced from the limited information available relating to permissions requests and the assumptions underlying the estimate of 7,000 permissions per year that

¹ Accessible at STM's website at <http://www.stm-assoc.org/copyright-legal-affairs/permissions/permissions-guidelines/>.

² At http://www.stm-assoc.org/2016_01_05_Guidelines_for_Quotation_From_Journal_Articles.pdf.

³ In para 3.1.5.3 of the Ernst & Young report: "The group most likely to seek permission for quoting copyright content is authors / publishers and, of this group, academics and other scholars." The analysis continues in para 3.1.5.7 to estimate 7,000 permissions requests in relation to academic works.

permissions granted free of charge is “common practice in the industry”⁴, and the conclusion reached by the Ernst & Young report is, in this respect, mistaken. It is precisely for this reason that the STM *Permissions Guidelines*, which allow for gratis and automated permissions between participating publishers, specifically do not extend to so-called secondary and tertiary publications, which are described as publications where less than 70% of the total publication consists of original material.

Data and Text Mining

STM appreciates that the Ernst & Young report recognises that STM publishers invest in making data and text mining possible and that the supply of this facility is a nascent market, where business models are still being developed, and that Ernst & Young conclude that it is therefore not clear whether an exception will pose a risk to this market.⁵

We also appreciate the fact that Ernst & Young have noted the signatory statement by STM publishers “setting out their commitment to facilitate DTM for non-commercial, scientific research.”⁶ The STM Text and Data Mining Declaration has now been signed by 20 publishers,⁷ up from the 16 publishers from the version consulted by Ernst & Young for their report. It is important to note that this commitment includes *a commitment to access to high-quality content* – which we submit is not possible to guarantee for uses under an exception.

Inasmuch as the benefits of an exception for data and text mining are considered as being an argument to support a ‘fair use’ exception on the grounds of its flexibility,⁸ we point out that it is not settled under US law whether the ‘fair use’ exception there in fact covers all the kinds of copyright uses that may be undertaken for this purpose. Whether a given instance of text and data mining is fair use or not has to be adjudicated on its own facts and judged against the four factors in the fair use test.

Conclusion

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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⁴ Para 3.1.5.7 of the Ernst & Young report.

⁵ Para 3.4.5.5 of the Ernst & Young report.

⁶ Para 3.4.5.2 of the Ernst & Young report.

⁷ The most recent list of signatories can be found at http://www.stm-assoc.org/2015_11_10_Text_and_Data_Mining_Declaration.pdf.

⁸ See for instance p.27 of the Productivity Commission report.