



INTERNATIONAL ASSOCIATION OF SCIENTIFIC, TECHNICAL & MEDICAL PUBLISHERS

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Attorney-General's Department
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Dear Sirs/Mesdames

Re: Australia –Copyright Amendment Bill 2006 –Exceptions – Review Process

The International Association of Scientific, Technical and Medical Publishers ("STM") includes approximately 90 publishers, collectively responsible for more than 60% of the global annual output of research articles and publications of tens of thousands of print and electronic books, references works and databases. These publishers are based in 23 countries, including 8 branches or head-offices in Australia.

The works of STM publishers are sold and licensed electronically widely to academic and corporate libraries and educational institutions, and the electronic or other delivery of individual copies of articles, including for use by libraries, educational institutions and their patrons, is an important source of revenue for scholarly publishers. Thus, selling and licensing, including to not-for-profit organizations is and continues to be one of the major markets for STM publishers.

We are making this submission to you, as STM and its members are seriously concerned that the Copyright Amendment Bill 2006 ("the Bill"), if enacted, would seriously, prejudice STM publishing. The Bill would stifle innovation and investment in research tools for the knowledge economy. Moreover, the Bill, if enacted, would violate Australia's international obligations.

1. Digital is different

The Bill seeks to introduce and extend a whole range of exceptions into the digital and online world, but fails sufficiently to take into account significant differences between the digital online market place and the print/analogue market place for copyrighted works:

- In the digital world, rightsholders offer individual article journals and individual chapters of books to readers for access or download. This changes the focus of what is to be considered a “reasonable portion” (or “insubstantial copy”) of a work and of what use amounts to a “conflict with the normal exploitation” of a work (for further detail see below under para 2).
- Accessible, navigable and searchable high quality information provided at the right time becomes a key requirement to develop a knowledge economy. Without strong exclusive rights that are broad in scope and have few exceptions, rightsholders lack the incentive to invest.
- Licensing content in customized fashion allows tailor-made formatting and definition of user rights. Licensing approach benefits both rightsholders and users and thus is superior to the static copyright exception that is a one-size-fits all.

As stated further below, in STM’s view, the current Bill, if enacted, would violate a whole range of Australia’s international convention and treaty obligations. Perhaps equally if not more importantly, in STM’s view, ***the current version of the Bill fails to accommodate the innate characteristics of the digital and online world*** and instead seeks to graft rules developed for the analogue world onto a digital market place.

The effect would be seriously to undermine the necessary continuous investment and development into a major building block of the knowledge economy: imaginative new tools to disseminate innovation and creativity.

2. The Bill’s Schedule 6, Schedule 7 and Schedule 8 violate Australia’s international obligations relating to copyright

STM is concerned about the following proposed exceptions and their extension into the digital world:

- 2.1 In terms of the so-called Berne Convention three step test (see Article 13 Trade-Related Aspects of Intellectual Property Rights Agreement, “TRIPS”, Article 10 WIPO Copyright Treaty (WCT) and Article 9II Berne Convention), exceptions and limitations are only permissible in national legislation (i) in certain special cases that (ii) do not conflict with the normal exploitation of the work and that (iii) do not unreasonably prejudice the legitimate interests of the rightsholder. This three-step test embodies the balance between rightsholders and the public (the users). It is effectively the agreed *social contract* that represents the optimal point between incentivising creativity, innovation and its dissemination, with public access.

Australia has ratified both the Berne Convention and the TRIPS Agreement. Moreover, ratifying the WCT is one of the stated aims of the present Bill.

However, Section 200AB of the Bill, and in particular sub-section 6, purport to incorporate the three-step test into national law in Australia, but subject to other exceptions and potentially only applicable to Schedule 6 exceptions. This is not in keeping with the above-mentioned treaty provisions and with their rationale which demand that ***all exceptions be subject to the three-step test.***

- 2.2 Private copying – time and format shifting: In the digital world more so than in the analogue world, it is for the rightsholder to determine what formats and re-formatting rights are sold with an electronic version. To allow unremunerated format changes, especially where other formats are commercially available and/or licensable is a violation of the exclusive rights of the rightsholder and will in many instances preclude the development of attractive commercial offerings, including for all-in-fees where commercially possible.
- 2.3 The existing provisions in the Copyright Act 1968 and those proposed in the Bill dealing with “insubstantial copying” and “reasonable “ portion fail to take into account that in the digital world, individual articles and portions of books (eg chapters) are licensed and offered for download individually.
- 2.4 “Active caching” and reduction of the scope of the communication right – the proposed measures will permit educational institutions, which are in many instances the primary market for educational and scientific publishing materials, to store copyrighted works in a way that amounts to free intranet use. At the same time, the clicking of a hyper-link and accessing that information by the end-user, the reader, is to be considered an act not subject to copyright.

This is not in keeping with the introduction of a strong and sufficiently broad communication to the public right as contemplated under the WCT. Both exceptions read together will seriously undermine the incentive to create web-based research tools and allow educational institutions, as well as commercial libraries participating in inter-library loan to free-ride on the investments of the rightsholders.

- 2.5 Definition of “library” - The exceptions discussed under 2.4 above read together with the definition of “library” will seriously undermine the incentive to create web-based research tools and allow educational institutions, as well as commercial libraries participating in inter-library loan to free-ride on the investments of the rightsholders.
- 2.6 Judges are not well-placed to determine the “right price” for individual transactions – The Bill provides potentially that any and all licensing schemes become subject to the jurisdiction of the Copyright Tribunal. While this may be appropriate for collective licensing schemes that apply to situations of comprehensive licensing without measurement of individual usage (frequency, purpose, price), it is not appropriate for collectively or individually administered transactional licensing schemes, where each rightsholders sets a price individually. Given the innate characteristics of the digital and networked world, it is the transactional model that will gain traction for a substantial segment of tailor-made access to individual copyrighted works. Handling the transactional model collectively, amounts to the creation of a portal, or “book shop” for licensable uses. It is unclear why such a digital book shop should be subject to a judicial price-setting. The market should be left to calibrate “right” pricing.

3. Conclusion

STM considers that the above elements of the Bill detract from Australia’s creativity-friendly legislative environment. STM urges the Attorney General and Australian lawmakers to consider the negative implications of the proposed Bill. STM is grateful for the opportunity to being able to make this submission. STM’s officers, including its legal counsel Carlo Scollo Lavizzari, stand ready to amplify or otherwise assist in any way that would be appropriate and conducive to a sound Australian copyright legislation.

Very truly yours,



Michael Mabe,
Chief Executive Officer