



INTERNATIONAL ASSOCIATION OF SCIENTIFIC, TECHNICAL & MEDICAL PUBLISHERS

Oxford, England
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**Comment on US copyright law dealing with library and archival exceptions,
Section 108, and Study Group on such exceptions**

Mary Rasenberger
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National Digital Information Infrastructure and Preservation Program
Office of Strategic Initiatives
Library of Congress

Dear Ms. Rasenberger,

The International Association of Scientific, Technical & Medical Publishers ("STM"), with its principal office in Oxford, England, represents nearly 100 publishers of academic and scholarly journals, books and databases. STM members collectively provide around 60% of the global output of scientific and medical research articles, tens of thousands of books and reference works in print and electronic form, as well as many important scientific databases. STM members include not-for-profit organizations such as learned societies as well as commercial publishers, largely based in the US and the EU. STM is the only international association in this field that represents the entire spectrum of such publishers. Please see our web site for further information <http://www.stm-assoc.org/>. We confine our comments to the "interlibrary loan" issues outlined in Topic A as noted in the Section 108 Study Group announcement published on 4 December 2006 (The "Study Group Announcement")¹.

Technical innovations and investments in scientific and medical publishing

Scientific and medical publishing has embraced technology and innovation more than any other publishing sector and more than most copyright industry sectors. An enormous number of journal articles are now available online and downloading, for purchase or access through subscription licences, and the most recent annual study (the "PSP Survey") indicated that the number of STM journal articles downloaded or accessed online rose by 30% from 2004 to close to 400 million articles in 2005.² This

¹ 71 F.R. 232, December 4, 2006

² See <http://www.publishers.org/industry/index.cfm> for Association of American Publishers study which included (chapter 4) section on scholarly journal publishing, supported also by the STM association, and which covered most of the major publishers. Note that one STM member, Elsevier, reported almost

demonstrates that a new "primary" market has developed over the past several years for individual article transactions, in addition to the previously established subscription models. A 2005 survey by ALPSP (the "ALPSP Online Publishing Survey") also found that over 90% of publishers surveyed offer "back-files" for their journal content (meaning that they have digitized previously published print journal issues, often going back to the first issue of the respective journals).³

This rich online journal and individual download environment is further supported through initiatives such as CrossRef, a collaborative effort of publishers through which references in one journal article (recorded as a DOI or Digital Object Identifier) can be immediately linked to another article. As of January 2007, CrossRef has over 2,300 publishers and societies with publishing programmes and over 15,500 journals participating in the linking system, with more than 24 million registered DOIs of articles, and linking resolutions of more than 13m per month.⁴

Publishers have also invested in navigation and awareness services, online submission and editorial and peer review support systems⁵, online usage reporting systems (Project Counter⁶), and have organised and licensed organisations such as the Royal Library of the Netherlands (The Hague) and Portico to provide digital archival support for researchers and library customers.⁷

These investments and innovations have been the response of the STM publishing community to the promise made in the international digital WIPO treaty of 1996 and the implementing legislation in various countries, including the Digital Millennium Copyright Act (the "DMCA") for the US, that such rights-holder initiatives aimed to enrich the digital environment would be rewarded with the assurance of copyright protection in that environment. This concept was expressed in the Senate report on the DMCA that the DMCA "is designed to facilitate the robust development and worldwide expansion of electronic commerce, communications, research, development, and education in the digital age..." and in a footnote to that report that "the law must adapt in order to make digital networks safe places to disseminate and exploit copyrighted materials."⁸

Any recommendations made by the Library of Congress for significant changes in US copyright law must be scrutinized objectively and critically to ensure consistency with

300m articles downloaded in 2006, which suggests that the PSP study figure for 2005 probably underestimates this activity.

³ Association of Learned and Professional Society Publishers (alpsp.org) survey "Scholarly Publishing Practice: academic journal publishers' policies and practices in online publishing" by John Cox Associates Ltd

⁴ <http://www.crossref.org/>

⁵ See ALPSP Online Publishing Survey

⁶ <http://www.projectcounter.org/index.html>

⁷ <http://www.kb.nl/dnp/e-depot/dm/inleiding-en.html>; http://www.portico.org/about/part_publishers.html

⁸ Senate Report 105-190, 1998.

international treaty obligations and the essence of the "copyright bargain" noted above. In this regard it is useful to note that the EU directive of 2001 implementing the WIPO treaty included specific concerns about library exceptions and online deliveries.⁹

STM notes that discussions in Germany between the local associations of publishers (Börsenverein des Deutschen Buchhandels) and libraries (Deutscher Bibliotheken Verband) have resulted in a useful protocol (the "Joint Statement") which will be presented to the German legislature on the question of digital exceptions and library document delivery and interlibrary-loan.¹⁰ The Joint Statement provides for a digitisation right for print materials unavailable electronically for viewing within a library (the so-called "on the spot" exception), and notes that license arrangements are required for digital delivery including interlibrary-loan. In the case of interlibrary-loan between non-commercial libraries for non-commercial purposes, this will be managed as a statutory license, but other uses will require direct rights-holder licenses, all of which will provide for a fee to rights-holders (although a fairly modest fee for ILL activity). Protective conditions include DRM requirements and reporting of statistics on deliveries. This is generally consistent with the publisher arrangements for international deliveries through the German-based Subito consortium.¹¹

STM would encourage a similarly active discussion and negotiation process through an agency such as the CCC for a licensed fee-based solution to digital ILL needs in the US.

Innovations in electronic licensing options

A recently concluded survey of a number of the larger scholarly publishers (the "PSP Qualitative Survey")¹², including most of the major US-based houses, notes that virtually all of the publishers surveyed offered a variety of licensing options to library customers. The PSP Qualitative Survey identifies a number of licensing options offered, noting that most publishers offered access both on a title-by-title basis and via special collections of titles at a discount. Similarly, the ALPSP Online Publishing Survey found that the majority of publisher licenses provide for electronic course-packs and electronic reserve, with more than 30% of such licenses providing for interlibrary loan support.¹³ Most of the major publishers provide for all three elements in their licenses.

⁹ EU directive 2001/29/EC, 22 May 2001, in recital 40 on library exceptions: "Such an exception or limitation should not cover uses made in the context of on-line delivery of protected works or other subject-matter."

¹⁰ The German press release can be seen at http://www.boersenverein.de/de/137391?skip_val=&list_id=64641&jahr=&aktuell=yes

¹¹ See our announcement at <http://www.stm-assoc.org/home/subito-and-21-publishers-reach-agreement-on-international-document-delivery.html>

¹² AAP-PSP survey, also supported by the STM association, April 2006, qualitative survey

¹³ If this survey were replicated in 2007 the percentage would likely be well over 50%, and more importantly if the number of journals covered under such licenses were included the percentage would be closer to 80% of the journals covered in ISI.

A key question in the transition of academic libraries from purchasing primarily print publications and the use of such content under traditional copyright law, to an online or electronic environment where digital content is accessed under licensed terms and conditions, has been whether those licensed terms and conditions are sufficiently accepting of the traditional and new needs of academic researchers and other users of such content. Important questions have been raised about the use of licensed content for so-called "interlibrary loan" ("ILL"), for archiving purposes, as well as for general usage of the content in the authorized user community (and beyond). STM publishers are well aware that their success in negotiating licenses for STM content in the academic community will be linked to their ability to proactively accommodate such concerns, while recognizing the "digital difference" (as described so accurately in the Study Group Announcement on page 70437). Often those licenses provide greater latitude to libraries for ILL deliveries than might be provided under a strict interpretation of existing US copyright law.

The field of academic publishing and electronic licensing terms is obviously new, and survey instruments have not been designed yet to accurately capture the entirety of publisher options and alternatives. However, as noted above, for much of the STM licensed content, STM member publishers are offering "scholarship-friendly" license options including provisions dealing with the use of licensed content for course-packs, for electronic reserves, walk-in use, and for ILL. This is further reflected in the NESLI national model license for the UK which includes such provisions, and the participation in NESLI of those STM member publishers that publish the vast majority of scholarly journals¹⁴.

Finally, as discussed briefly above, it must be recognized that almost all STM members involved in online and electronic publishing and access offer "pay per view" or more accurately "pay per download" options, or they authorize other third party services to offer such services, to better serve the academic market. There is strong recognition that not all users need to have a subscription to an entire journal, and that publishers can and should efficiently serve such needs and develop market-oriented solutions. Many STM members have also enabled organisations such as the Copyright Clearance Center to authorise the copying of published content, both in print and in digital form (including through scanning licenses), in "pay per download" transactional and academic use settings. In considering the current limitations of interlibrary loan practices as codified in the CONTU Guidelines¹⁵, much was made of the need to protect traditional subscription business models for journals. STM posits that with the increased focus on the individual article transaction market, due consideration must be given in any discussions with respect to changes to current practices and law to the potential impact on this rapidly developing transactional market.

¹⁴ <http://www.nesli2.ac.uk/index.htm>

¹⁵ As published in the 1976 Copyright Act Conference Report, HR 94-1733

Existing problems in copyright law exceptions

STM has indicated, in a general policy position on the differences between traditional “interlibrary loan” practices and commercial document supply¹⁶, that the extension of such principles without regard for market realities runs the risk of being contrary to core Berne Convention principles and will in the end be counter-productive. In the digital environment which now exists for STM content, the amount of research content available for researchers and other users has increased at a phenomenal rate—there is no demonstrated need for changes in copyright law to facilitate access on a “scarcity” model. Search engines and search engine providers such as Yahoo, Microsoft and Google enable STM content to be highly visible.

Notwithstanding the innovations in the market by publishers and other rights-holders, certain organisations have in the past several years begun offering content that they subscribe to or have otherwise purchased, to users and institutions outside their organization. The concern of rights-holders, which STM publishers strongly share, about a “non-mediated” system, is noted in the Study Group Announcement. Some librarians advocate the establishment of a highly-efficient, essentially hands-off unmediated system that would allow end users to enter document requests electronically and have those requests routed automatically to a supplying library, where they would be automatically downloaded and sent to the requesting end user. The technology to accomplish this is certainly available and it would permit a handful of libraries to efficiently supply any user located any where. In some cases libraries may offer content to others knowing that their activities are not condoned by US copyright law, but in other cases they appear to be engaged in these activities in the mistaken belief that existing copyright law condones their efforts. This suggests that greater clarification of current limitations as set out for example in the CONTU Guidelines would be helpful.

STM notes the following comments from a number of US university web sites in this regard:

- Academic libraries at several major universities openly acknowledge that they have document delivery services for users outside the academic community, including corporate, professional and international users, even though most of these institutions do not appear to have direct publisher licenses or to report activity and pay copyright fees for this activity to the CCC (often these sites, perhaps confusingly, also make note of US copyright law exceptions)
- Many of these libraries provide digital copies delivered via e-mail directly to the requester (without the mediation of a library at the other end)¹⁷

¹⁶ STM Position on International Document Supply, December 2003, see <http://www.stm-assoc.org/documents-statements-public-co/>

¹⁷ The Study Group Announcement also noted that some libraries are already making digital copies, page 70437.

- Libraries at some universities put the onus on the requesting end-user to certify that their request is in compliance with US copyright law (i.e. the library takes no responsibility as to the legality of its own activities or its monitoring duties, however slight those may currently be)

Furthermore, library associations sometimes assert principles that are far from clear-cut concepts under copyright law. For example, the International Federation of Library Associations (www.ifla.org) has codified a set of principles for international lending and delivery which states in part "Each country has a special responsibility to supply its own national imprints to libraries in other countries..." and further that "...material requested on international ILL may often fall within 'fair use' or 'fair dealing' provision(s)..."¹⁸ The IFLA statement posits that the copyright laws of the lending library will govern an international transaction. [good to include some ALA or ARL cites as well] These are sets of assumptions that STM believes are entirely without support in national copyright laws or international copyright treaties.

The above statements highlight the difficulty of distinguishing properly between ILL as an exception under US copyright law for particular purposes and, under a photocopying regime, with the limits agreed and set out in the CONTU Guidelines, and document delivery activities which should be governed by voluntary licensing direct from rights-holders or through organizations such as the CCC or document delivery services authorized by rights-holders. STM notes that such licenses are readily available at pricing levels publicized by the CCC and the rights-holders directly, in an entirely transparent fashion.

In a digital environment, the risks and escalation of such activity are significant. In particular, the risk of the combination of federated searching (Yahoo, Microsoft, Google etc) and an enhanced legal right to digitize and digitally deliver content would have severe consequences in terms of impact on subscriptions and individual article transaction business models.

STM recommendations on the topic of copyright exceptions for "interlibrary loan" activities (Topic A)

STM does not believe that *significant* changes to US copyright law in connection with the "interlibrary loan" exception (Topic A in the Notice) are required, useful or helpful. At the same time certain clarifications and modest improvements would produce greater certainty for publishers and librarians, and thus ensure that market-based approaches to underlying concerns can thrive, approaches which we believe offer greater choice and access for users of STM content.

STM offers the following core recommendations and comments:

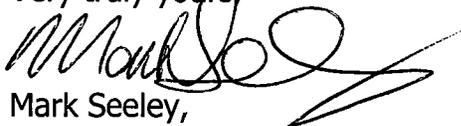
¹⁸ International Lending and Document Delivery: Principles and Guidelines for Procedure (revised 2001), IFLA.

- Digital delivery, by which we mean the delivery of a file or copy in digital form (regardless as to whether the original is in digital form or it is scanned from a print copy) to an end-user (generally through online transmission of some form) should continue to be clearly identified as being outside the scope of Section 108¹⁹;
- Requesting/"borrowing" libraries should have more carefully defined user communities for their ILL requests, which should consist of:
 - Staff, students and faculty in the case of academic libraries,
 - Professional staff in the case of museums or archives, and
 - Community residents in the case of public libraries;
- Objective standards that facilitate measurement and reporting of ILL activity should be implemented as part of Section 108, similar to the CONTU "Rule of 5" guidelines, but extending the record-keeping requirement to "lending" or fulfilling libraries in addition to the current record-keeping requirements on "borrowing" or requesting libraries; and noting that such records (on an anonymous basis to protect privacy) must be made available to rights-holders and the public;
- The maintenance of the principle of "mediation" between requesting/borrowing libraries and lending/fulfilling libraries is fundamental to the distinction between ILL and document delivery activities (the latter conducted through voluntary licenses) and must be continued; and
- Libraries that are state institutions should not be able to rely on the "affirmative defences" of section 108 if they are at the same time claiming sovereign immunity.

STM notes that the extension of ILL provisions to permit the scanning of print materials for ILL purposes as described generally in Section 108, with the protective measures noted above, would be generally acceptable. This would be limited to the scanning by a fulfilling/lending library to facilitate ultimately a "non-digital" delivery to the end-user through the requesting/borrowing library.

STM's responses to the specific questions noted in the Study Group Statement are set out below, and we would be pleased to provide further comment if it would be thought useful.

Very truly yours,



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¹⁹ STM notes however that many of its members offer licenses for just such activity, either directly or through agents such as the CCC.

Specific questions:

Topic A

1. How can the copyright law better facilitate the ability of libraries and archives to make copies for users in the digital environment without unduly interfering with the interests of rightsholders?

STM response: The general recommendations made by the STM association as described above are in our view the only changes that could be made without unduly interfering with the development of the market for subscriptions, purchases and individual journal article transactions.

2. Should the single-copy restriction for copies made under subsections (d) and (e) be replaced with a flexible standard more appropriate to the nature of digital materials, such as "a limited number of copies as reasonably necessary for the library or archives to provide the requesting patron with a single copy of the requested work"? If so, should this amendment apply both to copies made for a library's or archive's own users and to interlibrary loan copies?

STM response: As noted in our general recommendations, assuming that agreement can be reached on digital delivery and measurement and reporting requirements, we believe that the "single copy" restriction can be relaxed to accommodate the making of a digital copy from an analog original. This should be limited to the ability of a fulfilling library to scan and send a scanned file to the requesting library, provided the copy provided to the end-user is in analogue or print form only. STM notes that this principle was agreed with the Subito university consortium in Germany, where the end-user collects a print copy, even though the Subito system itself operates at a greater degree of digital efficiency as between the member libraries. Many STM members have also accepted in direct licensed arrangements the use of Ariel technology which incorporates certain digital delivery aspects.

3. How prevalent is library and archive use of subsection (d) for direct copies for their own users? For interlibrary loan copies? How would usage be affected if digital reproduction and/or delivery were explicitly permitted?

STM response: Given the lack of transparency in current measurement and reporting requirements, it is difficult for publishers or publishing trade associations to comment on how prevalent the uses described above are. As noted in our general comments, our view is that permitting digital delivery would have serious and dilatory effects on current STM market innovations in licensing and transactional usage.

4. How prevalent is library and archives use of subsection (e) for direct copies for their own users? For interlibrary loan copies? How would usage be affected if digital reproduction and/or delivery were explicitly permitted?

STM response: See above.

5. If the single-copy restriction is replaced with a flexible standard that allows digital copies for users, should restrictions be placed on the making and distribution of these copies? If so, what types of restrictions? For instance, should there be any conditions on digital distribution that would prevent users from further copying or distributing the materials for downstream use? Should user agreements or any technological measures, such as copy controls, be required? Should such requirements apply both to direct copies for users and to interlibrary loan copies?

STM response: As noted in our general recommendations above, permitting digital delivery, or more precisely permitting the delivery of digital copies to end-users, would create significant problems for STM publishers in our direct sales and licensing activities and should not be incorporated into US copyright law. We do note however that DRM protection (preventing alteration and further distribution) for digital copies is often a useful component of voluntary licensing activities for document delivery activity.

6. Should digital copying for users be permitted only upon the request of a member of the library's or archives' traditional or defined user community, in order to deter online shopping for user copies? If so, how should a user community be defined for these purposes?

STM response: As noted above, digital copying should be restricted to the fulfilling library for ILL purposes, and we have described what we believe the appropriate user community.

7. Should subsections (d) and (e) be amended to clarify that interlibrary loan transactions of digital copies require the mediation of a library or archives on both ends, and to not permit direct electronic requests from, and/or delivery to, the user from another library or archive?

STM response: STM believes that the mediation of a library or archive for an ILL request is critical, and an important distinction of ILL activity vs. true "document delivery" activity. Therefore we would support clarification of this point.

8. In cases where no physical object is provided to the user, does it make sense to retain the requirement that "the copy or phonorecord becomes the property of the user"? 17 U.S.C. 108 (d)(1) and (e)(1). In the digital context, would it be more appropriate to instead prohibit libraries and archives from using digital copies of work copied under subsections (d) and (e) to enlarge their collections or as source copies for fulfilling future requests?

STM response: As noted, we do not support the delivery of a digital file under ILL. However we do support the clarification noted above prohibiting the use of digital copies to enlarge library collections or to fulfil future requests.

9. Because there is a growing market for articles and other portions of copyrighted works, should a provision be added to subsection (d), similar to that in subsection (e), requiring libraries and archives to first determine on the basis of reasonable investigation that a copy of a requested item cannot be readily obtained at a fair price before creating a copy of a portion of a work in response to a patrons request? Does the requirement, whether as applied to subsection (e) now or if applied to subsection (d), need to be revised to clarify whether a copy of the work available for license by the library or archives, but not for purchase, qualifies as one that can be "obtained"?

STM response: As noted, an active transactional market under voluntary licensing schemes has developed for STM materials in the past several years, and we believe that recognition of this in determining whether a requested item can be readily obtained should be incorporated into law. The phrase "fair price" however requires further clarification and definition, or perhaps deletion. A more appropriate measurement would be whether a "price" is a competitive price in comparison to the commercial market for individual transactions.

10. Should the Study Group be looking into recommendations for revising the CONTU guidelines on interlibrary loan? Should there be guidelines applicable to works older than five years? Should the record keeping guidelines apply to the borrowing as well as the lending library in order to help administer a broader exception? Should additional guidelines be developed to set limits on the number of copies of a work or copies of the same portion of a work that can be made directly for users, as the CONTU guidelines suggest for interlibrary loan copies? Are these records currently accessible by people outside the library community? Should they be?

STM response: As noted in our general response, STM believes that the current legal limitation of ILL activity to the photocopying and print environment under the "rule of 5" limits, has served US researchers and users of STM information well by ensuring a strongly competitive market. In particular, STM publishers have competed with each other to offer favourable terms for ILL activity under their licenses for electronic content as part of normal commercial negotiations. STM does not believe that a general revision is required, although it does note, as described in our general comments, that greater clarity with respect to the definition of the user community and on measurement and reporting would be useful (including record-keeping by "lending" libraries). With respect to the five year limitation, STM member publishers have, as noted above, gone to considerable efforts to make "back-files", articles from journals published before journals were broadly available in electronic form, available in online and digital formats. STM does believe that guidelines should be negotiated to deal with

works older than five years, provided that such guidelines recognized the developing market in "back-files".

11. Should separate rules apply to international electronic interlibrary loan transactions? If so, how should they differ?

STM response: Given that copyright law is a matter of national practice, it is clear that any copyright exceptions must be limited to national territory. The concept of an "international" ILL cannot be contemplated as a matter of US copyright law. International deliveries should be considered commercial document delivery activity and operate under voluntary direct rights-holder licensing arrangements.