INTERNATIONAL ASSOCIATION OF SCIENTIFIC, TECHNICAL & MEDICAL PUBLISHERS
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Department of Broadband, Communications and the Digital Economy, Australia

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Joint Submission on the Digital Economy Future Directions Consultation Paper by the Department of Broadband, Communications and the Digital Economy

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The International Association of Scientific, Technical and Medical Publishers ("STM") comprises approximately 100 publishers collectively responsible for more than 60% of the global annual output of research articles, 55% of the active research journals and the publication of tens of thousands of print and electronic books, reference works and databases. Five of our largest members have staffed offices in Australia and most of our members are active directly or through representatives. Apart from publishing in print, STM publishers originate and disseminate online, books, journals databases and individual articles and contributions (hereinafter: "Content") of a multitude of Australian and international scientific, medical and technical authors and scholars. This creative Content is available widely in electronic and in print form for access by individuals, whether through academic and corporate libraries or directly, for use in research, education, in industry the professions and business.

STM welcome this opportunity to make a joint submission as part of the Consultation on the Digital Economy Future Directions ("the Consultation").

This submission will outline the Position of STM by way of general remarks (under I.) and then by way of specific comments on two aspects of the Consultation (under II), namely:

A. Open Access to Public Sector Information, Paragraph 1; and

B. Ensuring Australia's Regulatory Framework Enables the Digital Economy, Paragraph 4, of the Consultation Paper.

This will be followed by a conclusion (under III.):

I. General Remarks: The Role of Book and Journal Publishers

1. Society benefits from the pursuit, distribution, preservation and usage of scientific discovery, education, knowledge and creativity. Publishers are trusted partners in this endeavour and an indispensable link in the chain of creating, registering, certifying, formalising, improving, disseminating, preserving and using any kind of information.

2. Publishers continue to make long term investments in publications around which all kinds of creative and scientific communities form, coalesce and evolve.

3. Overall Publishers embrace the electronic and networked world, similar to the Australian society as a whole. In the STM field, over 90% of journals are available online today. Online STM publications represent not just an additional line of business for STM publishers: they largely define what STM publishers do and are absolutely core to their existence.

4. The e-book market for academic and educational titles has been growing rapidly as well, particularly in the last couple of years. Publishing and providing access to e-books online and offline constitutes another core market area for academic, educational and scientific publishers. Many are retro-digitising their backlists in a fashion similar to that which has already been done in the journal market, where journals from volume one, issue one (often covering 100 years or more) are accessible and widely used online today and are cross-referenced with the constant stream of new knowledge that research communities generate.

5. Publishers have and continue to invest heavily in developing new tools and knowledge management techniques that will make research output ever more rapidly accessible for research and education (whether in traditional educational establishments or distance learning institutions).

6. STM publishers' innovations are not confined to tools and technology. They continue to refine traditional business models which centre around a mix of sales, pay-per-view and subscriptions coupled, where appropriate, with suitable Digital Rights Management (DRM). STM publishers also invent and experiment and compete with new business models to disseminate Content; open access and hybrid forms between subscriptions and author-pays/grantor pays models are some examples.

7. The dynamic market described above illustrates the power of a market-place orientation with intense competition and innovation, which has resulted in more access in a more immediate way to more users than at any time in history.

8. However, one essential pre-condition for Publishers' continued investment and innovation is a sound intellectual property framework, including up-to-date copyright legislation, as well as adequate and effective enforcement. This framework also includes a sound definition of so-called Public Sector Information (PSI). In this regard please refer to section II. A, paragraph 13-15 below.

9. Copyright legislation and policies around PSI, howsoever defined, must allow Publishers to obtain the necessary rights from contributors to publications (such as authors, illustrators and designers) and the rights must be robust enough to allow Publishers the exclusive use of the copyright-protected content in all relevant media (online, electronic, print, micro-fiche etc). Moreover, the copyright system must permit publishers to enforce these rights against third-parties who intend to free-ride or otherwise illegally avail themselves of the publishers' content, or indeed to develop additional or competing services on the back of the publishers' added value.

10. Unlike in the analogue world, in the Information Society and Knowledge Economy, publishers are able to contract directly with users (license) and also to provide access to

their customers (be they for profit or non-profit organizations, or private individuals) online. To the extent that such licensing agreements are enforceable, they represent another indispensable tool to do business in the Knowledge Economy.

11. Copyright and licensing through contractual arrangements are thus key ingredients to enable the digital economy.

12. Because of their experience with the electronic world, STM publishers have valuable input and wish to contribute to this debate, *inter alia*, by making this submission.

II. Specific Comments on Aspects dealt with in the Consultation Paper

A. Open Access to and Re-use of Public Sector Information

- ***Defintion of PSI and other terms needs to be clarified further***

13. In STM's view, it is essential to clarify, unpack and disambiguate the meaning of PSI. In STM's view more study, consultation and reflection on a proper definition of PSI is necessary before any sensible policy decisions or draft legislation on PSI may be elaborated or put forward.

14. The present consultation does insufficiently define PSI and, thus, "Public Sector Information, PSI" remain unclear and to a large extent amorphous terms. The Consultation refers to and is based on Principles, Guidelines and Recommendations by the Organisation for Economic Co-operation and Development (OECD). However, the OECD has put forward a very wide definition of "Public Sector Information" and of "Research Data" respectively:

> *"Public sector information" is broadly defined for purposes of this Recommendation as "information, including information products and services, generated, created, collected, processed, preserved, maintained, disseminated, or funded by or for the Government or public institution", taking into account the legal requirements and restrictions referred to in the last paragraph of the preamble of this Recommendation."*[1]

The last paragraph of the Recital referred to in the definition further qualifies the scope and application of PSI principles. It reads as follows:

> "*Recognising that efforts to improve the access and use of public sector information need to take into account legal requirements and restrictions, including intellectual property rights and trade secrets, effective and secure management of personal information, confidentiality and national security concerns, and fundamental principles including democracy, human rights and freedom of information and that, consequently, certain principles contained in this Recommendation regarding in particular openness and re-use, can be applied to a different extent to different categories of public sector information;"*[2]
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> *"Research Data" are defined as factual records (numerical scores, textual records, images and sounds) used as primary sources for scientific research, and that are*

[1] OECD Recommendation of the Council for Enhanced Access and More Effective Use of Public Sector Information, [C(2008)36], 2008, p. 4.
[2] OECD Recommendation of the Council for Enhanced Access and More Effective Use of Public Sector Information, [C(2008)36], 2008, p. 4.

commonly accepted in the scientific community as necessary to validate research findings. A research data set constitutes a systematic, partial representation of the subject being investigated. This term does not cover the following: laboratory notebooks, preliminary analyses, and drafts of scientific papers, plans for future research, peer reviews, or personal communications with colleagues or physical objects (e.g. laboratory samples, strains of bacteria and test animals such as mice). Access to all of these products or outcomes of research is governed by different considerations than those dealt with here."[3]

15. An adverse consequence of the OECD's broad definition is that it results in a rather vague, yet far-reaching and complex policy recommendation. For example, the OECD is forced to qualify and amplify not only the meaning of PSI depending on context, but also the meaning of "publicly funded PSI"[4]. Moreover, the OECD conflates "use" (ie access by end-users) and "re-use" (ie creative uses by authors and intermediaries contextualizing, embodying and combining PSI with other information). In the end, the OECD reports leave a great deal open to interpretation, where greater guidance would be needed to assess the potential impact and consequences of adopting the suggested policies. Only then would it be possible to form a clear opinion on the merits and demerits of the OECD's suggested policies. In STM's view, the Australian Government should not go down the same route and adopt a more nuanced policy, foremost by adopting a clear and unambiguous nomenclature of what is and what is not PSI, or distinguishing between different kinds of (clearly defined) PSI.

- ***PSI may include raw data, research data and certain other items (eg grey literature), but not original publications***

16. STM does not object to the inclusion in the definition of PSI of *raw data*, of *research data as defined by OECD*, and certain other items (eg so-called *grey literature)*, where such raw data, research data or grey literature has been created by the public sector and the copyright subsisting therein is owned by the public sector. The scope of PSI policies and the scope of legislation underpinning PSI policy may justly include these items and seek best ways to make such raw data, research data and grey literature available. Researchers are best placed to determine the extent and timing of making available such raw data, research data and grey literature, especially also in the light of privacy protection for medical or social research, in the light of possible misuses of the data, or the risk of taking it out of context. Researchers know how the data was gathered and what this means for its interpretation and further use. They know what harm can be done by not carefully watching certain shortcomings or limitations to it (such as ensuring anonymity, etc). In practice, a promising strategy may well rest in the formation of public-private partnerships with the private publishing sector and other stakeholders, such as public and private universities and institutions.

- ***PSI Policies must respect intellectual property rights and especially copyright***

[3] OECD Principles and Guidelines for Access to Research Data from Public Funding, 2007, pp 13-14.

[4] The OECD has this to say about research data from public funding: "Research data from public funding is defined as the research data obtained from research conducted by government agencies or departments, or conducted using public funds provided by any level of government. Given that the nature of "public funding" of research varies significantly from one country to the next, these Principles and Guidelines recognise that such differences call for a flexible approach to improved access to research data." OECD Principles and Guidelines for Access to Research Data from Public Funding, 2007, p 14.

17. STM fully supports the clear expression and international consensus that copyright and the value-add of the private sector must be respected in the way PSI policies and/or legislation underpinning its collection and dissemination is applied.[5]

18. STM urges the Australian Government to see to it that the present consultation is not seeking to reverse this fundamental decision and consensus which is in the interest of the cultural sector and the information and knowledge society as a whole.

19. One consequence of this basic consensus and decision is that the Australian Government should limit the application of PSI policies, and the scope of legislation affecting PSI, to raw data, public research output and grey literature, such as contained in internal government reports. PSI policies should not be established to engulf private sector information and private-sector value-added information, including copyright-protected works and materials originated and first published by the private sector.

20. When it comes to orphan works issues, publishers around the world have demonstrated their willingness to find pragmatic solutions and lend a hand to policies, guidelines and safe-harbor solutions that enable the access and re-use of such information.

- ***PSI Policies must not lose sight of encouraging re-use by commercial and non-commercial disseminators when devising access policies for end-users.***

21. Any PSI policy must distinguish between:

(i) measures aimed at making information accessible to the general public, whether open access or otherwise, whichever works best; and

(ii) measures encouraging the re-use and value-add, in other words, the refinement and enhancement of PSI.

22. Whilst it is true that the Public Sector generates a wealth of data and this data and knowledge in its unpublished, unstructured and uncertified form constitutes a resource from which knowledge may emerge, publishers and the private sector to a large extent assist in the germination registration and verification of such knowledge. Publishers, thus assist not only in the provision of access to the public in useful, structured ways (sub ii), but to a large extent are re-users of PSI which enhances the latter. Policies intended to maximize goal (i) should not at the same time undermine goal (ii).

23. The public sector institutions constitute primary markets for private sector publishers. Moreover, private sector publishers themselves have embarked on large digitisation programmes and now also publish "born-digital" documents precisely to serve governmental, publicly-funded cultural establishments, educational and research institutions and the public at large. Publishers also are trusted partners for the long-term preservation of the copyright-protected materials which they produce and publish. To force publishers to move to an Open Access model for any information that somehow embodies PSI would send the wrong signal and present a disincentive to publishers to continue in their efforts. Moreover, as was presented in the General Remarks, these materials are already adequately made available by the private sector publishing sector (goal 5(i) above is adequately taken care of).

[5] See in this regard or instance the admonition to take intellectual property rights into account in the Recital of the OECD Recommendation of the Council for Enhanced Access and More Effective Use of Public Sector Information, [C(2008)36], 2008, p 4 and Respect for Copyright on p 6.

24. Including original privately published books and original journal content embodying PSI within the scope of PSI policies and encouraging efforts to use or re-use them to the detriment of the originating publishers who have invested in them, whether commercially or non-commercially, would amount to duplication of the private sector efforts and potentially lead to the creation of a competing public sector publishing sector, which clearly would be totally beyond the PSI policies intention and scope.

B. Ensuring Australia's Regulatory Framework Enables the Digital Economy

25. The overall goal for the Australian economy in enhancing a vibrant digital economy should be to see to create a trusted environment for the smooth circulation of legal content. Legal content means licensed or otherwise legitimately made available content, as well as content that is not unhealthy for public consumption or display.

26. Around the world, including for instance in the UK, in France and in New Zealand, the government and the creative sector, including the publishing sector explores ways to find new accommodations with Internet Service Providers, Social Networking Sites, Peer to Peer network operators, search engines and e-auction houses and market places to combat counterfeiting and copyright piracy.

27. In the field of copyright, systems of notice and take down prove insufficient and a greater degree of co-operation from network operators and service providers is required. The way forward appears to be a co-operative solution, including a system of so-called "graduated response" coupled with education.

28. We strongly urge the Australian Government carefully to study these efforts around the world, rather than in enthusiastically pursuing the solution of "safe harbor"-type legislation. Granting a "safe harbor" to social networking sites in a blanket fashion would send the totally wrong message that these sites are a free-for-all where the rules of the road do not have to be respected. If anything social networking sites ought to have an interest in co-operating with rightsholders in constructive ways to make these networks safe and high quality.

III. Conclusion

1. STM is of the view that further study and consultation is necessary to attain a greater clarity of definition of the diverse elements comprised in the current use of the term PSI. Achieving a better understanding of what constitutes PSI is bound to lead to clearer and more focused policy decisions with fewer chances for harmful unintended consequences.

2. In general, STM is in favour of PSI policies that make raw data, research data and grey literature available through open access models or private-public partnerships, in consultation with the researchers involved.

3. STM opposes the extension of PSI and PSI policies to include original copyright-protected works published by the private sector for the mere reason that these works embody or build on PSI, properly defined. Any policy relating to PSI must distinguish between the goal of "wide access" to PSI and the goal of "best re-use" of PSI. Measures taken in an effort to enable wide access must not harm the value-add and enhanced re-use of PSI.

4. STM cautions that a blanket "safe harbor" extension is a blunt instrument to make the internet and social networking sites a better place. Such a measure would send the wrong signal and run counter world-wide trend of devising systems of graduated response to deal with the global ills of online counterfeiting and piracy.

Very truly yours,

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