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European Commission
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DG Markt

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**STM submission on European Commission Reflection Document:
"Creative Content in a European Digital Single Market: Challenges for
the Future"**

The International Association of Scientific, Technical and Medical Publishers ("STM") comprises approximately 100 publishers of journals and reference works, based in 26 countries, including in many Member States of the European Union. EU-based publishers publish 49% of all research articles worldwide (STM's members may originate approximately 2/3 thereof), employing 36,000 staff directly and another 10-20,000 indirectly, and make a Euro 3 billion contribution to the EU's balance of trade. STM publishers disseminate journal content, books and reference works, and databases, in a variety of forms including print and online, and in addition provide systems that enable access to individual articles and contributions (hereinafter: "Content") of a multitude of European 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 welcomes this opportunity to make its submission as part of the consultation following the Reflection Document of DG INFOSO and DG MARKT, entitled "Creative Content in a European Digital Single Market: Challenges for the Future" ("the Reflection Paper").

STM's interest representative ID number is: 704612025371728109.

STM has taken great interest in the Reflection Paper which raises some of the fundamental questions affecting the European copyright landscape. Because copyright has been a *sine qua non* for the investments that have driven unprecedented creativity and have also encouraged its widest possible dissemination (including through STM publishing activity), at stake is no less of a question than how that creativity and its dissemination are to be funded, and how access to creative works can thereby best be maximized by the European Union.

STM wishes to contribute constructively to the debate by giving its opinion on what STM believes to be the major policy questions (Sections A., B., C. D. and E. below) that should inform any possible EU action for a single market for creative content online (para 5 of the Reflection Paper). Section F. provides a brief Conclusion. STM supports the submission made by the Federation of European Publishers (FEP) as it applies to the wider publishing sector (trade & education, other than STM):

I, Executive Summary

We recommend that the Commission:

- **Maintain the current balance and equilibrium in copyright**, which for the text-based publishing sector already enables a single digital market place. In this sector, no additional layer of rights is required to serve any market demand beyond territoriality, **but greater enforceability of rights is required** (See Sections A).
- **Co-ordinate**, rather than harmonise: (i) the **concerted fight against internet piracy** by all actors and intermediaries participating in the digital market place; (ii) **national solutions for orphan works** and out-of-print licensing; and (iii) efforts by stakeholders to **increase access for the visually impaired** through **practical and responsible measures**. (See Section A)
- **Let the market develop** for territorial and multi-territorial licences, by fostering experimentation with rights clearance mechanisms and assisting in the setting up of **rights discovery tools, such as ARROW**. (See Section B)
- **Support** the tried and tested copyright/*droit d'auteur* system of **"property rights cum moral rights"**: giving authors the freedom to decide if, when and how they publish; and publishers the freedom to engage in licensing and rights clearance, deciding on formats and also on pricing of those. The Commission should not be tempted by

simplistic solutions: **a flat tax on culture would provide insufficient incentives for creativity and innovation.** (See Section C)

- **Focus on piracy, illegal uses and a lack of respect for copyright; these are the single biggest obstacles for the ongoing development of a single digital market** (See Section D). Therefore, STM recommends the fight against internet piracy as the primary activity target for the Commission's co-ordination role (See first bullet above and Section A).
- **Promote the zero-rating of VAT on electronic books and journals** in the whole of the EU, alternatively – and at the very least - , applying to electronic books and journals the same reduced VAT rates as currently are applied by EU Member States for printed publications. In this regard, STM fully supports the submission made by the Federation of European Publishers (See Section E).

II. Comments on the Reflection Paper in Detail

A. The Future of European Copyright - Harmonisation or Co-ordination?

1. The current *copyright acquis* already provides an appropriate balance between exclusive rights and exceptions and limitations. The *acquis* allows for national differences in Member States, yet sets outer limits to those by introducing a community-wide rule, the famed "three-step test".¹ The *acquis* embodies a *sound equilibrium* of community harmonization that allows a single digital market to develop over time. The *acquis* should, therefore, not be re-opened for negotiation.²

2. As a general long-term trend, STM observes that, the early part of the 20th century was the era of mostly unremunerated exceptions, ie free to the

¹ See Article 5.5 of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society: *The exceptions and limitations provided for in paragraphs 1, 2, 3 and 4 shall only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder.*

² On 14 December 2009, the European Union deposited its deed of Accession to the WIPO Copyright Treaty (WCT) and the WIPO Performance Protection Treaty (WPPT) alongside a great number of Member States. This was a cause for celebration and shows that the European *acquis* is built with a framework of international consensus, 88 countries being a party to the WCT and 86 to the WPPT.

user; the latter part of the 20th century saw the rise of national remunerated exceptions coupled, sometimes, with market-based licensing solutions to correct for what would otherwise be over-broad exceptions. The 21st century will see flexible, adaptable contractual relationships rise further; some may be collective, many will be found through individual customized licensing or combinations.³ Copyright law should allow this trend to develop as it is market-driven and a community-wide phenomenon. The Commission should limit its actions to supporting this broader trend by removing “blockages” (instances of market failure, or where a market place cannot meaningfully take root without intervention). The Commission should thus foster co-operation among stakeholders and, where necessary, co-ordinate reform of national copyright norms in order to arrive at community-wide solutions. Currently, the Commission could do this in three specific areas:

- (i) foster co-operation among all actors in the digital market place to fight online piracy of works;⁴
- (ii) rights clearance issues relating to orphan works and out-of-print works; and
- (iii) finding practical and responsible ways to increase access for the visually impaired.

3. The creation of a “2nd layer” Community Copyright seems to create the very complexity the Commission is trying to avoid and could potentially replicate the current problems found in the music sector that have been caused or exacerbated by multiple layers of rights. Thankfully, authors and publishers of text-based works do not currently have such complex layers of rights and are fully able to serve whatever market demand exists for their Content. Territorial rights are a tool, not an obstacle; they are used with discretion by publishers, but not invariably. It all comes down to real market demand which cannot be forced by legal rules, but arises out of economic, social and cultural realities.

4. To abandon national copyright laws in favour of a single, unitary European copyright code, would be a very ambitious goal, politically.⁵ Whether it would constitute a step forward towards a single digital market, would have to be examined very carefully. Even an EU copyright code would be applied by local

³ The trend away from exceptions towards licensing may be attributed, inter alia, to the online world permitting direct contracts between rightsholders and users, falling transaction costs, ability to monitor usage and a customer demand for increasingly personalised or customized Content.

⁴ See more fully under D. below.

⁵ Leaving aside whether this would be feasible at all, or legal under Article 118 of the Lisbon Treaty

judges and could be interpreted differently, depending on the various legal traditions prevailing in EU Member States. In addition, a single code could in STM's view only operate prospectively, ie not retro-actively (for future works, not works already protected under national law prior to a cut-off date to be defined). Contrary to the Reflection Paper, a European copyright code should not re-open the *acquis* (see para 1 above).

5. In STM's view, exceptions and limitations from copyright infringement should remain exceptions, ie not become the rule. This is true for exceptions in a "consumer" market and also for exceptions referred to by the Reflection Paper as "in the public interest", ie in the field of education, academia and research (the main and primary markets for STM publications). In this regard, STM refers to its submission made on the Green Paper "Copyright in the Knowledge Economy", dated November 17th, 2008, where STM's position on exceptions and limitations in the digital world has been outlined in great detail, including on "public interest exceptions". STM publishers are a part of and, as such, deeply involved in education, academia and research. For this reason STM have devoted considerable thought as to what should be the guiding principles in considering or developing exceptions and limitation to copyright (including public interest exceptions) and what pitfalls should be avoided. Our contribution to the discussion of these issues may be found in the submission we made on the Green Paper "Copyright in the Knowledge Economy", dated November 17th, 2008 and is available on the web.⁶

6. That exceptions and limitations should not become the rule is also true for both commercial and non-commercial uses. We note that the Reflection Paper does not define the terms "commercial" and "non-commercial" and assumes that these are clearly delineated or self-explanatory terms. Moreover, it would appear that the Commission assumes that a use falls into either category, and could not be a "mixed" use. Regrettably these assumptions are not supported by the realities of the marketplace for the following reasons:

- (i) Firstly, what is and what is not "commercial" is often highly contentious and may depend on context.
- (ii) Secondly, the Reflection Paper seems to equate "non-commercial" with personal and private uses. However, STM and educational publishers have to deal also with "institutional uses", ie uses by a customer that is not a natural person "consumer", but is also not a for-profit entity, albeit being a market actor or professional or research public or private body. Uses taking place in non-commercial organizations are neither personal

⁶ http://www.stm-assoc.org/docs.php?name=2008_11_01_STM_Submission_EU_Green_Paper_Copyright_in_Knowledge_Economy.pdf

and private, nor are these uses necessarily commercial, ie conducted for profit. The uses taking place do, however, constitute instances of normal exploitation of works and should be subject to authorization from the rightsholder. Classifying these uses as "commercial" or "non-commercial" seems artificial and attaching differing legal consequences depending on such classification would be erroneous.

- (iii) Thirdly, one of the most difficult areas of copyright law is to determine to whom the act of making a copy or transmitting a work is legally attributed or imputed: eg the (commercial) agent, or the (non-commercial or commercial) end-user on whose behalf the agent claims to act.

6.1 As an example, STM points out that all the development in Web 2.0 applications are targeted at "consumers" (researchers, students, layman), not institutions, and generate a new economy. However those services have to be financed and therefore publishing needs a reliable (legislative) framework (copyright). Web 2.0 application are nowadays the add-ons to STM publishing offerings and attract consumers (researchers) to use those "feel-free-services". Some of the examples are:

- Specific discipline social networks -
<http://www.aipuniphy.org/Portal/Portal.aspx> - and also
<http://www.biomedexperts.com/> --- important note: network/graphical software to display maps is from a commercial company (Collexis); service is offered for free by the publisher to their community.
- Research, Rent and Read – <http://www.deepdyve.com/> -- rental business model for scientific articles
- "Article of the future". The idea is a clear structuring of the articles (introduction, results, discussion, references, methods etc) which can be directly clicked to via a separate tab. Advantage is that article can be displayed within one page. <http://beta.cell.com/index.php/2009/07/article-of-the-future/>-- there are 2 prototypes shown.
- <http://handheld.nejm.org/> - handheld application for New England Journal of medicine
- <http://www.nature.com/scitable> --- Collaborative learning space for Science focusing to genetics - A free science library and personal learning tool.

6.2 Looking to the STM market the existing framework has not prevented the transition to digital (e.g. journal – well over 95%% of STM journals are available electronically; well above 85% in Arts, Humanities and Social Science).

In summary, applying binary categorizations, like “commercial” and “non-commercial use” to the rich variations of the STM marketplace is a nontrivial and potentially misguided goal. We believe that this effort is not sufficiently thought-out to base a fundamental distinction on, as the Reflection Paper implies.

B. Multi-territory Licensing – Legislative Intervention or Market Experimentation?

7. The Reflection Paper rightly notes on page 17 that the ownership of rights substantially differs for music, audio-visual works and literary works. STM is pleased to note that multi-territory licensing presents no structural, legal-technical difficulties for publishers of text-based works. It can be done and will be done depending on market demand. No intervention whatsoever is needed and the market for literary rights is thriving and all actors should be left to experiment with rights acquisition, rights clearance and licensing. In this regard, STM also notes that – unlike in the area of musical works – all collective licensing is traditionally confined to the licensing of secondary uses and on the basis of non-exclusive rights. There is no culture of mandating Reproduction Rights Organisations (the Collective Management Organisations in the field of reprography) on an exclusive basis. Finally, STM would like to point out that, apart from licensing territory by territory, a practice has well developed to licence by language groups, eg Germany, Austria, Liechtenstein and Switzerland (sometimes called “GALS” territories), UK & Ireland etc. Moreover, translations rights are often considered a separate market, whereby a sub-publisher may hold EU-wide rights in one language, while the original publisher reserves EU-wide rights in the original language of the work. Any measures the Commission proposes should not undermine or prejudice the translation rights trade and market place.

8. A measure that could enhance multi-territory licensing would be to promote the greater availability of rights management information. ARROW⁷ is such a project and there may indeed be additional projects the European Union should support, including perhaps a study on a voluntary registration system, that could also be used to fight piracy more effectively.

C. Levy on Digital Services – Is A Flat Tax on Culture the Answer?

9. Copyright supplies the incentive for individual humans (and organisations like publishers who support them) to make a difference in the world through

⁷ Accessible Registries of Rights Information and Orphan Works towards Europeana (ARROW), see <http://www.arrow-net.eu/>.

innovation and creativity. Copyright is the furnace in which the fire of creativity is forged. Part of copyright is the strong reliance on exclusive personal rights – what the Reflection Paper calls the “property approach”. In Europe, the approach is actually much broader than that: it is an approach of economic right *cum* moral rights. For the author, this means that his or her moral rights of if, when and how to publish a work has to be respected. Respect for moral rights necessitates meaningful safeguards for orphan works, unpublished works and out-of-print works. For the publisher the “property *cum* moral rights” approach means that he has to be an expert on rights clearance, format selection and pricing: the publisher must not only be allowed but incentivised to play this pivotal role and must also be protected from unfair competition from others (eg libraries, search engines, internet service providers and also straight-forward pirates).

10. A levy is, at best, a form of indemnity for harm suffered by rightsholders by uncontrollable uses, such as private copying. A levy cannot in any way supplant the primary sale of copyrighted works or the issuing of licenses in the field of electronic publishing. Levies, whilst perhaps easy to collect, are notoriously hard to distribute. As a result, levies do not create an incentive, but have rightly been called a “rough justice” solution. Levies prejudice high-quality content producers vs “mass” and “low quality” content producers as, ultimately, a high-quality content producer has the same entitlement to a portion of the levy as a low-quality content producer. Levies, thus, destroy market information about the demand for (high-quality) content. Moreover, the total amounts collected as levies would never be enough to fund cultural and scientific activity today funded through primary exploitation based on copyright’s exclusive rights.).

11. STM strongly opposes any move towards a “Culture Flat Tax” that purports to legitimize piracy and in effect is an abrogation of rights of copyright.

D. How to Create a Favourable Environment for Authors and Publishers - Reducing Online Piracy!

12. Illegal downloads on a large scale can jeopardize the development of an economically viable single market for digital content.⁸ In fact, in STM’s view *piracy, illegal uses and a lack of respect for copyright represent the biggest obstacles for the development of a single digital market.*

13. In the field of academic and STM publishing, the e-book market has moved beyond “nascent”; it already exists and will increasingly become the norm, along with new business models and offerings, eg via aggregators (Ciando, Ebrary, NetLibrary, etc.) and by rightsholders themselves (publishing

⁸ Reflection Paper, page 2.

companies) under a large variety of business models (subscriptions, one-time sales, combination of thereof). However, accompanied by this desirable development, increasing reports of illegal uses on the internet and intranets cloud the picture, as well as instances of wide-spread piracy. STM braces for developments very similar to the experiences suffered by the music and audio-visual sectors. Legal offerings of publishers will only thrive and multiply, if illegal and unfair competition is curbed adequately and effectively through legal means.

14. Therefore, the Commission should foster and promote greater co-operation from all actors, such as search engines, internet service providers, enforcement agencies and rightsholders. All these actors, fundamentally, have an interest in the smooth circulation of legal Content on networks benefiting users and consumers at large. To date, only some, but too little, co-operation has been achieved between all actors.

E. Zero-rate or Reduced-rate VAT on Electronic Books and Journals

15. In STM's view, one of the most significant barriers that a more well developed and integrated digital book market faces is connected to the high VAT rates applied to e-books and e-journals. As publishers are increasingly experimenting with new offers, it is paramount to keep on providing incentives for investment by fostering a stable legal framework that is technology neutral (viz. treats electronic as favourable as print). Disparate VAT rates in Europe between electronic and printed publications are one of the hindrances for the development of content online. If discrimination between electronic and paper publications continues, it will inevitably have an influence on the newly-born online publishing market and will seriously threaten the EU's stated objective of encouraging Europe to become a centre for e-commerce. VAT rates for online publications should be lowered while ensuring that printed publications are not in danger of losing reduced rates.

F. Conclusion

16. STM supports the Commission's role in fostering co-operation among all actors and respect for copyright. Only in this way can a project of the magnitude of realising a single digital market, rich in cultural diversity, be realised. We further support the Commission's goal of digitising Europe's diverse cultural heritage, but advise refraining from simplistic solutions that would undermine investment in creativity and innovation – Europe's engine of success. The Commission should also seek to encourage Member States to zero-rate VAT on electronic books or apply a reduced rate, as is the case for print publications.

STM would be pleased to make further submissions and amplify on the present, should this be necessary or useful.

Respectfully submitted
For and on behalf of the International STM Association
5 January 2010

Very truly yours,

A handwritten signature in black ink, appearing to read "Michael Mabe", with a long horizontal flourish extending to the right.

Michael Mabe,
Chief Executive Officer

Cc: Federation of European Publishers (FEP)

International Federation of Reproduction Rights Organisations (IFRRO)