Öffentliche Konsultation zur Umsetzung der EU-Richtlinien im Urheberrecht (DSM-RL (EU) 2019/790 und Online-SatCab-RL (EU) 2019/789)

Public Consultation on the Implementation of the EU Directives DSM 2019/790 and the Online SatCab 2019/789

Submission by the International Association of Scientific, Technical and Medical Publishers ("STM")

6 September 2019

Dear Sirs/Mesdames

We refer to your invitation for an open consultation, dated 28 June 2019 and thank you for the opportunity to participate. STM makes this submission in English after consultation with its membership that publishes world-wide and also in the 28 Member States of the EU. Many of STM’s leading members large and small, for profit and organised as scientific societies are based in Germany.

As per your invitation of 28 June 2019, and for ease of reference, STM will follow in this submission the outline and numbering system as suggested. STM will focus its submission on selected provisions of the DSM Directive (heading “A” in your invitation to this consultation). STM reserves the right to make submissions at a later stage, depending on how the DSM implementation evolves in relation to specific or general submission requests and in relation to general or specific draft
legal provisions to be adopted. Naturally, STM stands ready to amplify or provide additional information, as appropriate and of assistance to the BMJV.

I. **Introduction and General Observations**


In STM’s view, the DSM Directive contains three kinds of provisions that may affect implementation in different ways at German/National EU member state level:

2. Provisions that modify existing framework but are not a wholly new concept, whether at national or at EU law level.
3. Provisions that confirm the existing framework that some EU member states already fulfil, or perhaps even exceed.

Moreover, the DSM – as its very name suggests – seeks to establish more strongly one single EU-wide market and enable cross-border uses in designated fields. Thus, a further question for any EU member state may be whether or not a national implementation would enhance the aim of a single digital market or rather cement national differences.

Finally, there is one particular DSM provision that for Germany is of such importance that implementation should be fast-tracked: Art. 16 DSM, restoring the ability for authors and publishers to be joint beneficiaries of collective management copy fees and levies is critical. STM thus urges the BMJV – to the extent that it is feasible – to fast-track some provisions requiring little consultation with other EU member states, to include the “Verlegerbeteiligung” among such provisions.
II. Comments Regarding Individual Provisions and Implementation Questions (following numbering system in invitation)

Ad A. II. 1. – Article 3 DSM - Text and data mining for the purposes of scientific research

Key Aspects of EU law

Text and data mining (TDM) is an automated process that allows computers to analyse large datasets, content and texts for the purpose of uncovering underlying patterns and trends. It can help to organise large sets of research results, offer additional evidence on which to draw conclusions, find gaps in research and lead to new discoveries.

The Directive noted that there was legal uncertainty surrounding the use of new tools such as TDM for research purposes due to the fact that the InfoSoc Directive exceptions, including the research exception (Article 5.3.a), were optional, and thus partially and differently implemented across Member States.

Therefore, a new mandatory provision – Article 3 – for TDM, covering an exception only for reproductions, and not an exception for communications to the public, of all protected subject matter (copyrights and sui generis database rights) for the purpose of scientific research, has been introduced in the new Copyright Directive, which specifies that:

- Non-for-profit research organisations or research organisations acting pursuant to a public interest mission recognised by Member States, as defined in the Directive, can perform TDM
- Under the Copyright Directive, beneficiaries include:
  - universities and their libraries
  - cultural heritage institutions
  - research institutes or
  - any other entity whose primary goal is to conduct scientific research or to carry out educational activities
- TDM can only take place if the above defined beneficiary has lawful access to the content (e.g. via subscriptions or another bespoke license)
- TDM is for research purposes only and is restricted to reproductions; no other copyright-related re-uses are permitted.
• All beneficiaries will have to make sure that content is handled with high security standards, and copies are only kept for the time needed to verify research results; not to conduct other or new TDM research or other research altogether. Storage for later re-use beyond the strictly necessary time is only permitted under licence and otherwise the content has to be permanently deleted. EU Member States can decide on further arrangement for secure storage and appoint trusted bodies for the storage of such but need to involve relevant stakeholders in the discussion. In the current environment with mass piracy (eg Sci-hub), fake news and intrusions the need for “secure”, “trusted”, and verifiable storage mechanisms and entities cannot be overemphasized and STM members will be rightly concerned that the highest standards are mandated in this respect.

• Rightsholders are allowed to apply measures to protect the security and integrity of their systems or databases. Those need to be proportionate.

• Research organisations and cultural heritage organisations cooperating in a public-private partnership can rely on their private partners for carrying out TDM for scientific research for the benefit only of the Research Organisation. If the private partner is to gain access to the TDM results, the private partner needs a separate licence.

**Need to adapt German law**

The current German exception, § 60d UrhG, requires some changes to be compliant with Article 3 DSM.

➢ Particularly, the beneficiary of the exception should be defined as a ‘scientific research organization’, as per Article 2(1) of the Directive, not the ‘user’ as currently drafted.

➢ The Directive’s exception relates to the reproduction and extraction from a database rights only, not the right of making available, (§ 60d (1) 2. UrhG).

➢ The German exception also lacks the safeguard against mining of illegal/pirated content and should include a reference to the fact that the content must have been lawfully accessible. As the techniques that are used to mine text and data are also used by pirates to illegally copy vast
amounts of protected works, there is the concern that such pirates might use the exception to undermine the activities of rightsholders. A legal access clause as foreseen by the EU in Art. 3.1 DSM is needed. Even though it is highlighted in the justification of the German law that this provision does not grant access but that the user who wants to do TDM needs to have lawful access already, we would strongly favour a clarification in this regard in the law itself.

➢ The exception would benefit from the clarification that rightsholders may apply measures to avoid jeopardising their systems’ security and integrity although this could be included in another provision dealing with technical protection measures (TPMs) as well, but it must be clear that this is a “lex specialis” allowing TPMs. Regarding TPMs it must also be said that Art. 6.4(4) of the Infosoc Directive continues to apply and control when it comes to rights not specifically dealt with in the DSM (eg making available right or communication to public right). Thus, any exceptions to the communication to the public right remain fully subject to Art. 6.4(4) Infosoc Directive.

➢ The TDM exception should be carefully and narrowly crafted and therefore not to prejudice existing and emerging wider TDM markets. This would also be consistent with an implementation that creates same conditions EU-wide: a narrow TDM exception and otherwise voluntary licensing solutions, of which STM can demonstrate there are many.

➢ The storage of copies of works and other subject matter has a high potential of compromising information providers and publisher’s business models if not approached with the highest standards of professional diligence. As it is stated in recital 15 of the DSM the storage of copies might be necessary in certain cases, such as the subsequent verification of scientific research results. Those cases should be clearly defined and be restricted to uses related to the original research project to ensure that this exception does not allow for the creation of unlicensed corpora of content or “shadow libraries”.
Ad A. II. 2. – Article 4 DSM - Exception or limitation for text and data mining

Key Aspects of EU law

Since TDM allows for ground-breaking research, other types of businesses (outside of research organisations), are also interested in mining content from the free and publicly available Internet for commercial purposes.

The Copyright Directive introduces the possibility to mine content made publicly available online over the Internet. Nonetheless, rightsholders are allowed to reserve their rights by machine readable means including metadata and terms and conditions of a website or a service. Rightsholders can request that TDM is not performed on the content they own without the user acquiring an appropriate license for it.

It should also be possible for rightsholders to decide on a case-by-case basis what content to make available to read but not to mine, and what to make available with certain conditions attached. Machine readable disclaimers need to be practicable and usable without impinging on contractual freedom in this regard.

Need to adapt German law

The current German exception, § 60d UrhG, requires changes to be compliant with Article 4 DSM.

➢ In STM’s view the German implementation should verbatim mirror the EU text in Art. 4 DSM. Whatever might not be covered by the current language of the DSM can be handled by market forces.

➢ In STM’s view there is no need to address statutory licensing in the implementation, as otherwise the article’s aim will be frustrated by creating 28 different licensing systems EU-wide.
Ad. A.II. 3 – Articles 5 and 7 DSM Exceptions for Educational Uses

Key aspects of EU law

➢ In STM’s view, Articles 5 and 7 permit a great degree of flexibility in view of national educational policies that are not unified across the EU. Therefore, EU law does not strive to full harmonisation, nor does it really wish to unify EU law relating to educational exception. However, the DSM seeks to permit crossborder uses in appropriate cases. The EU law also contains many safeguards against over-broad exceptions that permit in essence a taking of the heart of a copyright-protected work and then reproducing it. Especially for books and other materials whose main market is the educational market, over-broad and uncompensated exceptions would be devastating.

Need to adapt German law

➢ German law as a result of the 2017/2018 law reform has substantially broadened educational exceptions. In addition, the CJEU Darmstadt case, in combination with the scrapping of a collective licensing system that allows publishers to participate meaningfully, has led to a situation where German law is hardly in compliance with international obligations under WIPO and TRIPS.

➢ Key is to return to a narrow implementation of exceptions and to also permit the participation in any collective licensing schemes of publishers.

➢ German law with its inflexible percentages, that at times permit the taking of very large sections of a copyright-protected work, and the missing but needed carve-out of higher education for especially textbooks, mean that German law is no longer compliant with EU law. In the implementation of the EU law it should also be considered to apply the same rules that apply for books to scientific journals. Currently, articles in scientific journals can be used completely which is highly problematic given the extended scope but also the widened circle of beneficiaries since the last copyright reform in Germany. Also, as the individual article becomes more and more important this interferes directly with publishers’ primary market.
Furthermore, the exception from the legislation for schoolbooks has to be extended to university textbooks and textbooks used in vocational training to ensure that the primary market for these works is not destroyed.

Ad. A. III, 1., 2. – Articles 8 and 9 DSM – Out of Commerce Works and Licensing of Works

Key Aspects of EU law

STM is a founding signatory to the EU-Commission sponsored MOU on Out-of-Commerce. STM also has adopted unilateral “safe harbour” declarations for both orphan and out-of-commerce works to put users that do a diligent search at ease for using works they mistakenly (but in good faith after due diligence) classified as orphan or out-of-commerce. A feature of the “due diligence” required in all cases is a search in the country of first publication, and of consultation of digital resources of that country at least (eg “books in print in Germany, or similar”). The DSM does not explicitly require such a due diligence, but arguably there is room for sector-specific implementation. In STM’s view sector-specific implementation should be required and the rule. As the wish of the EU is, however, to arrive at a system for all EU citizens, the sector-specific rules should be similar across the EU. For STM-type content, STM believes that the MOU is an excellent starting point to arrive at well-accepted rules that would work for all EU countries, and that would arguably also work well in respecting third-country originated copyright works (which the DSM suggests should be done).

STM does not have a large orphan or out-of-commerce issue as the sector is highly digitised and most works continue to be “in-commerce” even if published many decades ago, sometimes extending to issues and volumes no longer in copyright. The new EU law has embraced many of the good ideas in the MOU. However, one area where the new EU law could benefit from the example of the MOU is “diligent search”. It would appear that on a particular reading of the DSM, a work could be “out-of-commerce” in, say Lithuania, whereas in Spain, the place of first publication, it is not. STM is of the view that national implementation should aim to bridge this gap and arrive at a system where the same work is or is not out-of-
commerce throughout the EU, if it is in fact out-of-commerce in the country of first publication. This rule should in any event apply to non-EU works (works authored or first published outside the Union, or both).

Need to adapt German law

➢ STM has no view whether or not it is necessary to adapt German law regarding the German territory. STM assumes it is necessary to adapt German law to give effect to crossborder uses of works first published in Germany that are “out-of-commerce” and that may be used in other EU countries under the provisions of Articles 8 or 9.

➢ STM believes Germany would be well-placed to contribute to an EU-wide harmonised implementation that allows sector-specific solutions; in the case of STM-type works along the lines of the MOU.

Ad A. VII. – Article 15 DSM - Protection of press publications concerning online uses

Need to adapt German law

➢ STM defers to comments that are likely made by trade associations of newspaper and media publishers. However, any implementation in Germany that adapts the existing law should bear in mind that the new EU law recognises an exclusive right and that the object of protection is tied to the publication, ie the medium, not the publisher of the medium.

➢ Thus, while scientific publications are generally excluded from the scope of the new object of protection, STM members do avail themselves of this right whenever they publish professional or magazine-style journals, of which there are many. In those cases, news aggregators and similar sites will have to seek licensing solutions to use copyrighted content. It is very important that any German implementation does not run counter to the decision at EU level to protect any such publication that is not solely academic but professional or magazine style, even if the content could be considered of a scientific interest or nature.
Ad. VIII. – Article 16 DSM – Participation of Publishers

Key aspects of EU law

➢ EU law makes the implementation of this provision voluntary. This is mainly so as not all EU member states have actually suffered from problems relating to the HP vs Reprobel case. Some EU member states have under national law created a situation that allows publishers to participate, other member states simply have assumed that HP vs Reprobel does not apply to their legal systems or licensing traditions. In essence, what EU law should aim for is that it does not matter whether or not a publisher is publishing in or for a particular territory in Europe: a publisher should be entitled to compensation in the form of a share of collective licensing fees as was the case in all EU member states prior to the HP vs Reprobel case.

➢ As emphasised in the introduction of this submission, the implementation of this provision should be considered for fast-track. STM understands that the stresses on its German members and the wider German publishing environment may not be able to tolerate further delays. Collective licensing with publisher participation has formed the very basis of German publishing from the mid-1960s onward and has permitted this sector to be a key export sector for Germany of world-wide significance. The industry is now in serious distress and the correction of the misguided HP case and the ensuing German BGH cases is sorely needed.

➢ Regarding the wording of Article 16, it is important to keep the English text in mind that was the basis for negotiation. STM notes that the German translation may be inaccurate, in particular regarding the legal ability of publishers to “claim” compensation. The English text quite rightly emphasises the ability of publishers to claim compensation. In other words, the entitlement that publishers enjoy is a full right, rather than a potential participation in someone else’s right.

Need to adapt German law

➢ Germany should consider simply returning to the status quo ante of the CJEU’s HP vs Reprobel case. This would allow the 40+ year collaboration between authors and publishers of all sectors to collaborate and for the
German collective management organisations to resume functioning along the well-understood lines before these judgments. To take account of the findings of the German BGH a legal clarification is needed.

➢ STM supports in all other respects the submission of the Börsenverein des Deutschen Buchandels e.V. in particular regarding Article 16 DSM and its implementation in Germany

Ad. IX. 1., 2. And 3. – Article 17 DSM – OCSSP Responsibility – Use of protected content by online content-sharing service providers (OCSSPs)

Key Aspects of EU law

The rationale behind the adoption of Article 17 concerns the situation of legal uncertainty arising when certain online platforms and internet service providers give access to a large amount of copyrighted content uploaded by their users. In those cases, copyright liability was not clear under the previous regime and platforms could escape their responsibilities and claim to be mere hosts of content (Article 14, e-Commerce Directive).

Article 17 is aimed at Online Content-Sharing Service Providers ("OCSSPs"), whose main purpose is to store and give public access to a large amount of copyright-protected works or other protected subject matter. Content is uploaded by the users of OCSSPs and then, in turn, OCSSPs utilise this content for profit-making purposes. The article clarifies that OCSSPs make an act of communication to the public, thus, they’re liable for the content users are able to access via their services.

OCSSPs make copyrighted content uploaded by their users available for commercial purposes, by organizing, indexing, promoting and sometimes incentivizing further uploads for a commercial gain. Article 17 recognizes that, in such cases, OCSSPs are responsible for the legality of such content. In cases where there is no authorization, OCSSPs must demonstrate “best efforts” to take down content notified by rightsholders with relevant and necessary information and prevent their future availability. During the latter part of 2019, Stakeholder meetings will take place with the facilitation of the European Commission in order to determine best practices between OCSSPs and rightsholders.
Need to adapt German law

➢ Arguably, German law already contains the basis of law that can be interpreted in ways entirely consistent with Art. 17 DSM as far as the liability of OCSSPs is concerned. Much of this will actually depend on the outcome of two cases pending before the Court of Justice of the EU: the YouTube (C-682-18) and the Uploaded (683-18) cases.

➢ In STM’s view, the main issue is the pragmatism and the level at which OCSSPs are prepared either to take up licensing solutions or to cooperate with publishers. According to STM’s experience during the last years, most OCSSP are very interested to ensure that their services are copyright compliant and to this there are already many successful and well-working collaborations between OCSSPs and publishers in place.

➢ Providers are obliged to make, “in accordance with high standards of professional diligence, best efforts ensure the unavailability” of unauthorised copies on their platform. Various tools can help providers make these decisions and they generally work by providers checking relevant metadata against a database.

➢ Such systems already exist, work well and efficient and are used by many platforms.

➢ German law should make clear that, for sites with high numbers of illegally commercialized content, no safe harbour is available. This would prevent cases such as the Uploaded case or the cases surrounding defunct Rapidshare from trying to hide behind a safe harbour that was never intended to apply to such infringing services.

➢ The “notice and stay down” measures foreseen in paragraph 4 have been a key tool for rightsholders in dealing with copyright infringements. However, they are not enough as rightsholders can only act once a protected work is detected as being available, by which time a great deal of economic harm can be caused. We therefore welcome the strong provision of paragraph 4 (b) to prevent availability of infringing works.

➢ For the remaining liability side of bona fide OCSSPs, German case law, particularly if confirmed by the YouTube and Elsevier/Uploaded cases, need not be changed and therefore the rest of the provision need not necessarily be implemented.
Ad A. IX. 4., 5., 6., 7., 8. – Article 17 DSM OCSSP Responsibility

Key aspects of EU law

Regarding these provisions, STM recommends that Germany closely coordinate its implementation with the EU Commission and consider its guidance. This is so as Article 17 DSM creates not only an entirely new scheme but also one that necessarily should be relatively uniform across the entire European Union (see Introduction to this submission).

Need to adapt German law

As the provisions create a new system of platform responsibility, an implementation is needed, except perhaps for the aspect of respecting existing exceptions under the 2001/29 Information Society directive – that is evident.

For the remaining provisions, STM is of the view that these provisions could simply be implemented into German law verbatim.

Ad. A. X. – Articles 18-23 DSM

Key Aspects of EU law

In STM’s view, EU law tries here to establish common sense ground rules. German law is already protecting very well authors that are perceived to be the weaker party in negotiations with publishers and producers. In STM’s view, EU law did not aim to harmonise contract law across the EU for which there is no basis, but purely set some ground rules equal throughout the Digital Single Market. Germany meets these ground rules already.

Need to adapt German law

➢ If anything, German law may in some respects already go further than DSM envisages.
➢ German law should make clear that the rules do apply only in common sense situations, mainly for single authors of single works, and that works where there is a great multitude of contributors cannot be stifled by demands of a few. Where an accounting or transparency reporting of usage or earned royalties is questioned, it should be permissible for a publisher to provide the information online or to a single author, perhaps one of the lead authors, rather than to each contributor of a multi-author and multi contributor work.

➢ Removal of content – injunctions from publication – should be a true last resort. It is important at least for the record of science to retain an accurate record of what scientific claims have been made, even if made in error or if those making the claims later would prefer to retract any scientific writing. Thus, German law should perhaps consider a carve-out for scientific works from the ability of scientific authors to withdraw content for “non-use” (likely if a scientific claim is disproved, it will be less in demand in the market) or for “changed conviction” (it is important for other scientists to know where others have gone wrong and pursued dead alleys).

Conclusion:

STM posits that the German law-maker should triage the provisions of the DSM into ones that introduce a new scheme, provisions that modify existing schemes and provisions that confirm existing solutions in Member States or introduce solutions that individual Member States already have or might already exceed.

STM deems it urgent at this stage to implement Article 16 DSM without delay. We support the Börsenverein e.V. in this regard fully. Remuneration schemes associated with exceptions and limitations in the DSM only make sense if there is a publishers’ share and right now that is not the case. It is imperative for the social contract between authors and publishers in Germany to return to the status quo ante HP vs Reprobel as rapidly as possible.

STM makes detailed comments especially regarding Text and Data Mining (TDM) and offers to contribute further to implementation in Germany. STM’s members have a wealth of experience on how to make TDM successful, high quality and also fit for Artificial Intelligence (AI), beyond the common rhetoric of seeking to
enlarge exceptions, but in practical and sustainable ways that guarantee a
dynamic and continuing flow of high quality data. TDM and AI after all start with
high quality data, and high quality data requires investment and a collaborative
environment. Whilst ensuring a technically and economically fit environment,
the law must also ensure a human-centred approach for the use of data.
Standards and collaborative models that are flexible and adaptable are better
suited to ensuring this than inflexible frozen-in-time exceptions. Finally, to
ensure maximum consistency throughout the EU, STM recommends adopting
the text of Article 17 as it is currently written. This is especially needed to
address services which are available across all EU Member States.

We thank you for the opportunity to contribute to this seminal law reform that,
if concluded successfully, should help to confirm Germany as one of the leading
hubs for information and creativity.

About STM

STM supports members in their mission to advance research worldwide. Together as partners
in science and policy, we serve society by developing standards and technology to ensure
research is of high quality, trustworthy and easy to access. STM promotes the contribution
that publishers make to innovation, openness and the sharing of knowledge. For us,
supporting the growth and sustainability of the research ecosystem means embracing
change. For the benefit of the community we provide data and analysis for all involved in the
global activity of research.