Diskussionsentwurf – Erstes Gesetz zur Anpassung des Urheberrechts an die Erfordernisse des digitalen Binnenmarkts

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

Artt. 3, 4, 15 &16

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

30 January 2020

To: BMJV, Referat III B 3

Dear Sirs/Mesdames

We refer to your invitation for submissions, dated 15 January 2020 and thank you for the opportunity to participate. STM makes this submission on the BMJV’s Discussion Draft Bill ("the Draft Bill") as a follow-up to our submission of 6 September 2019. STM’s membership includes publishers 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.

STM stands ready to amplify or provide additional information, as appropriate and of assistance to the BMJV.

I. Introduction and General Observations

STM strongly supports the decision of the BMJV to fast-track the implementation of the publisher’s share in copy fees due to Collective Management Organisations (CMOs). The prejudice by the present situation unnecessarily and unacceptably damages the German publishing landscape causing harm not only to publishers but also to the whole publishing ecosystem. In particular, a speedy introduction of the publisher’s share is needed to preserve the good cooperation between publishers and authors within VG Wort, one of the leading CMOs of the world.

As part of general remarks, STM would like to highlight the following cross-cutting observations and priorities for consideration by the BMJV:
1. Territoriality and “legal fiction” – new §60a (3a) UrhG (German Copyright Act): STM appreciates the obligation of the German Government to implement the legal fiction concerning acts of communication to the public and appreciates the explanatory memorandum in this regard. However, the BMJV’s “explanatory memoranda” are not binding on Courts, as was confirmed in the Vogel case by the BGH where that Court made short shrift of the legislative intention expressed in the 2003 explanatory memorandum to another provision, namely §63a UrhG of 2003. Regarding territoriality, it should be made clear in the actual text of §60a(3a) UrhG that where an educational institution is situated in more than one Member State then the communication to the public occurs in each. Also the legal fiction should not apply where a tertiary institution maintains a domicile or a campus outside the EU and the content is hosted there. Finally, it should be made clear that the uses in question have to be the only for the permitted purposes of §60a UrhG, “exclusively” (ausschliesslich). Thus, STM posits that further useful remarks and clarifications may still need to be included in the definitive and binding legal text of a Bill, to avoid a similar fate as the explanatory memorandum to the old §63a UrhG.

2. “Machine readable” Disclaimer for TDM according to Art. 4 DSM: Whilst the DSM may have envisaged that a publication is either available in a subscription model or freely available on the internet, the reality is that one and the same publication may be released in both ways, as a form of dual licensing. STM is of the view that the requirement of a “machine readable” disclaimer also for publications that are available on subscription is going too far and any human-readable disclaimer should be sufficient. In this regard, STM notes that Art. 7(1) DSM does not mention that contractual restrictions of exceptions shall be excluded (contract-override) in relation to Art. 4 DSM. Therefore it should be perfectly valid to agree in a contract or licensing agreement with a potential entity wishing to engage in TDM that all content from the represented rightsholders in question are “opted-out”, irrespective of where the content resides. In short: Art. 4 and “machine readable” disclaimer language should not get in the way of binding contractual agreements and licences.

STM posits also that the requirement of machine readability of any disclaimer, not necessarily in the work itself, but in connection with the online publication of such work, e.g. in the Terms and Conditions, must be narrowly construed and the notion of what is “machine readable” should be broadly construed in order to meet the requirements of Art. 5 (2) of the Berne Convention which prohibits formalities as a pre-condition of protection of copyright works. Moreover, the Draft Bill should encourage all stakeholders to develop sector specific standards for disclaimers, as otherwise disclaimers risk to become a new “battle of the forms” and an all or nothing game, rather than a means of communication and licensing.
3. The Draft Bill refers to Art. 7 DSM and to a later implementation thereof in a subsequent bill concerning the legal protection of Technical Protection Measures (TPMs). STM can support dealing with the question of TPMs in a second stage, but would like to highlight the crucial importance of Art. 6.4(4) of the Infosoc Directive, No 2001/29. Whilst Art. 7 DSM limits the application of this very important carve-out from the legal protection of TPMs, to the extent that the Draft Bill maintains exceptions and limitations that are based not on the DSM but find their root in one of the closed-list exceptions or limitations of the Infosoc Directive, then Art. 6.4(4) must be respected.

4. §60a(3) no 2 UrhG, the “carve-out for schoolbooks should be extended to a full carve-out also for textbooks used in tertiary institutions and educational institutions of further education. Especially, but not only, for the learned publishing sector offering textbooks in German the missing carve-out of tertiary learning materials and textbooks creates prejudice, wrong incentives and seems arbitrary. By including tertiary materials under the said carve-out, possibly coupled with a further licensing option by way of a voluntary collective licensing arrangement and remuneration scheme, the BMJV could end this untenable situation, possibly delaying implementation of this section until 2023. Given the need to implement the DSM educational exception and given the BMJV’s generally welcome approach to meeting the DSM requirements, namely, that a licensing offer prevails over an exception if the beneficiary library/university reasonably easily can avail itself of an adequate license, makes the continued arbitrary and unjustifiable exclusion of German higher education textbooks is no longer tenable. At this point there is no legal justification for treating publishers of university-level textbooks worse than schoolbook publishers. STM urges, in the interest of a German language tertiary learning and textbook market to reconsider this significant omission of allowing a reasonable remuneration solution. Although immediate action would be best, the obligation to remunerate for reproductions of tertiary learning material and textbooks could be delayed until 2023, as a compromise – if it is made part of this Draft Bill.

5. Regarding the new press publishers right: Whilst scientific and academic publications are specifically carved-out from Art. 15 DSM, STM wishes to highlight that many STM publishers also publish periodicals that are and should be eligible for the new kind of protection. STM thus strongly supports the need for a correct definition of the object of protection, while the definition of who is a “press publisher” should be purely a function of that definition of the object of protection, namely the producer of a press publication. In particular, many STM publishers publish professional or trade
publications and newsletters in periodical format that are not scientific and not academic, but might also not readily be considered “mainly” journalistic. In essence, STM posits that the current definition in the Draft Bill is too restrictive and should not exclude periodical publications that, from a functional point of view, suffer the same prejudice as online newspapers, but are not written in a “mainly journalistic kind” but conform to the professional kind of writing style that keeps the readership up-to-date. The business model of such publications tends to include advertising and these type of periodical publications suffer the same harm as newspapers or online news portals even if the writers would not consider themselves journalists. Consequently, the new press publishers right should not define what is “included” but strictly what is “excluded”: academic and scientific publications; full stop. All other periodical publications should a contrario be included.

II. Comments Regarding Individual draft Provisions (following numbering system of BMJV’s draft legal text)

Ad §44b Urheberrechtsgesetz (German Copyright Act, “UrhG”) – Text and Data Mining (TDM) general provision

STM supports the general approach of having a general TDM provision and then a lex specialis regarding TDM in the field of scientific research.

STM is of the view that the definition section should also include a reference to “extractions” (“Entnahmen”). It may even be helpful to also include a reference to TDM input and output. The previous German law referred to a “corpus” which now would appear to be covered simply by “necessary reproductions”. STM does not oppose the deletion of “corpus” but as will appear from below, there should be different exceptions applying to what can be retained or even shared legally. Sharing or retaining TDM outputs is different from retaining mass copies of TDM input. The risk of a compromised system is immeasurably larger and disproportionate for TDM input (“necessary reproductions”).

Apart from the above decisions on how to define terms, one of the central provisions is the opt-out possibility created in Art. 4 DSM. In implementing the exact nature of the disclaimer or “method of opt-out” required under national law, the BMJV should properly evaluate the context of this provision: part of creating the necessary legal-technological infrastructure for a modern, online and networked rights and licensing infrastructure, ideally across Europe. The “machine readable” disclaimer, STM posits will be one of the DSM provisions around which legal decisions around the “right” automated licensing infrastructure is bound to crystalize.

Viewed through this lens, §44b UrhG sub-section 3 unhelpfully declares a declaration of “opt-out” only to be effective if the declaration is “machine readable”. Implicit is (perhaps) that not everything that is “human readable” (or “lawyer readable”) is not “machine readable”.
There are several problems with this too unclear provision:

(1) In our view, and thanks to technological advance, any “human readable” disclaimer or opt out is also machine readable. Thus, the notion that it would be a defence to deploy a “machine” that cannot decipher a human readable disclaimer associated with content somehow makes the disclaimer ineffective is unwarranted.

(2) From a legal point of view, it would be wrong to create two classes of disclaimers, those “readable” by all machines and those readable by some machines only. Thus, the definition should be broad and emphasize that in general what is readable by humans is also readable by machines (but machines might also read code that humans cannot. Otherwise, the definition becomes restrictive and counter-productive. Moreover, a narrow definition or an absence of clarity what is machine readable this may lead to unnecessary litigation over whether or not a disclaimer is valid and the DSM does not foresee that a disclaimer may be valid in relation to some machines (most probably the more “literate” ones) but not others: the term will also have to be broad enough to cover technological advance and innovation (eg what is machine readable tomorrow, might not have been a year ago).

(3) The provision as such would appear to discourage rightholders from releasing fairly nuanced disclaimers, permitting some forms of TDM but not others. That would to STM be a lost opportunity as STM hopes that eventually the software companies or their trade associations and trade bodies of interested copyright holders would define common standards for disclaimers that are not only machine and human readable but also actionable.

(4) Sub-section 3 may create the impression that agreements between users wishing to engage in TDM and rightholders, including publishers, are going to be invalid. The Sub-section should make clear, at the very least that contractual provisions remain entirely binding and any “disclaimer”, irrespective of being machine readable or not, could be agreed upon as part of a contract or licensing agreement, even if such agreement concerns content that is not access-restricted in some way.

Ad §60d (3) Urheberrechtsgesetz (German Copyright Act, “UrhG”) – Licensing prevails over exception where licenses are easily available and findable

STM supports this provision strongly as it favours market-driven solutions and licensing solutions. STM is of the view that with this change in the Draft Bill the time has come to end the distinction between school books and tertiary learning materials in the sense that now there is even less of a reason to stand in the way of a tertiary educational market licensing solution that in particular takes into account the difficulties of German language textbooks to remain viable. As mentioned above, STM urges the BMJV to include in this Draft Bill a sunset clause for the carve-out of tertiary learning materials from a system of fair contracting and fair remuneration.
Ad §60a Urheberrechtsgesetz (German Copyright Act, “UrhG”) – Territorial fiction

As mentioned under general remarks, the qualifications contained in the explanatory memorandum should be adequately and explicitly included in the actual text of the Draft Bill to avoid the same fate as §63a of the old German Copyright Act met in the Vogel case.

Ad §60d Urheberrechtsgesetz (German Copyright Act, “UrhG”) – Text and Data Mining (TDM) for purposes of scientific research

The Draft Bill proceeds to define TDM for scientific purposes as a lex specialis to the general TDM exception. STM supports this systematic approach. The Draft Bill then proceeds, however, to retain elements of the existing exception in §60d (3), creating a limited exception from the communication to the public right in §60(d) (4), without the safeguards in §60d(5) UrhG.

Already §60d(3) is overbroad in that it adds to the beneficiaries which are certain research organisations individual “researchers” without expressly stating that these researchers need to be affiliated with the beneficiaries. §60d (3) no 2 should be amended to only refer to “researchers affiliated with a research institution”. In this regard, STM is pleased to refer also to the global initiative “Seamlessaccess.org”, which makes lawful access to a research institution’s content that much easier and more convenient.

§60d (4) UrhG is an exception to the communication to the public right and as such is clearly not covered by the DSM exceptions on TDM. Consequently, this proposed exception must stay within both the bounds of the DSM Directive (see Art. 25 DSM) and the additional boundaries of Art. 3 of the Infosoc Directive. In this latter regard, it is absolutely key to retain and respect Art. 6.4(4) Infosoc Directive and to have it apply all aspects of §60d (4).

Moreover, STM is of the view that §60d(4) creates a great risk in an age of pirate sites like Sci-hub and fake news for the misappropriation of copyright content. Specifically, unlike §60(d) (2) and (3) UrhG, §60d(4) UrhG purports to allow the communication to the public or the making available for collaborative research reproductions created for TDM.

Whilst STM supports collaborative research and sharing, what should be shared is the snippets illustrating the “TDM output”, any the entire output of any TDM exercise. To share the entire “TDM output” is a disproportionate risk. The “content on which the TDM was performed” should not be shared as it is not needed for assessing the research performed. It should stay within the four corners of the DSM Directive Art. 3. In general, mass sharing of the content on which the TDM was performed without appropriate authorisation, and
controls that respect the rights of rightsholders, undermines the incentives created to produce and disseminate this valuable content. No use and should stay within the four corners of the DSM Directive Art. 3. Allowing mass sharing of reproductions without appropriate controls that respect the rights of creators and rightsholders undermines the incentives created to produce this valuable content.

Furthermore, §60d (4), unlike §60d (5), fails to oblige the relevant users that are making potentially massive quantities of copyright works available to other researchers to use adequate safety measures. It makes little sense to oblige the beneficiaries under §60d (2) and (3) no. 1 to take “adequate” security measures, if individual researchers are permitted to share scientific papers on a potentially very large scale. STM is of the view that “adequate” security measures in and of themselves are not enough and the Draft Bill should require “adequate and effective security measures that are of a high professional standard according to the state of the art”.

STM urges BMJV to extend the obligation to use the above-mentioned security measures to all TDM beneficiaries under §60d, as otherwise a disproportionate risk for the systems and databases and the copyright works embodied in such databases is created. Whilst STM naturally only speaks for scientific content, it is reasonable to assume that other content, eg music and film, will equally be greatly put in jeopardy, if mass sharing of copyright content without adequate and effective security measures is allowed.

Ad §63a (2) Urheberrechtsgesetz (German Copyright Act, “UrhG”) – Publisher’s share in collective licensing revenues

STM welcomes the provision generally. However, it is not clear to STM, why as a matter of principle the publishers’ share can only be claimed by a CMO that jointly administers rights of authors and publishers. The condition of allowing licensing or transfer to a CMO that operates jointly for authors and publishers should either be included in the new paragraph 1, i.e. “Sie können im Voraus nur an eine Verwertungsgesellschaft …”, or excluded from paragraphs 1 and 2. Whilst STM has excellent relationships with the German CMO VG Wort there is no commensurate obligation on authors to entrust their collective management claims to a joint CMO in the Discussion Draft. This seems imbalanced: either a transfer should be disallowed for both authors and publishers, or the condition should be dropped. The current wording may allow a blocking vote by some author representatives to frustrate the very purpose behind the proposed amendment. This may not have been the intention of the Draft Bill but the present wording suggests such a possible unintended outcome.

We also believe the second sentence of §63a UrhG is redundant for the same reason and should be deleted. The whole point is for publishers and authors to come together and both share fairly in the collective licensing fees.
Finally, on a pure drafting note, the publisher’s share should not depend on the author in question actually receiving copy fees, but only being entitled to receive copy fees from collective or statutory licensing schemes.

Ad §87c (4) read with §60a Urheberrechtsgesetz (German Copyright Act, “UrhG”) – communication to the public for illustration in teaching

STM posits that the wording should be changed to: “Veranschaulichung und des Unterricht und der Lehre gemäss §60A.” or „Veranschaulichung im Unterricht und in der Lehre gemäss 60a”

Ad §87f (German Copyright Act, “UrhG”) – Definitions (Press Publications)

STM is pleased that the first sub-paragraph is devoted to a correct and short definition of the “object of protection”. The new right should not be defined by the rightsholder (the press publisher), but the press publication, correctly defined.

Consequently, and as mentioned above, in STM’s view the object of protection should not be limited to literary works of a “journalistic kind” or to publications containing “mainly” such works. At the very least, the object of protection should include any kind of publication that consists “mainly” of literary works. There is in STM’s view not even a good reason to exclude periodical publications that contain “mainly” opinion pieces or analysis or that even contain short works of fiction, eg a periodical of a theatrical society, or of a creative writing club, or book reviews, or reviews of other types of content, the reviews being neither academic nor scientific in character. There is also no reason to exclude periodicals covering fields such as industrial psychology, or newsletters of a trade or profession.

The term “mainly” is also vague. Would this apply to each issue of a periodical publication or only to the annual volume? Would “mainly” denote 51% or would it simply mean “more than any other genre”, eg 30%, but other genres and works would each cover only 29% at maximum (eg photography, short stories, creative writings, historical or philosophical essays, editorial comment and opinion?

Ad §87k (German Copyright Act, “UrhG”) – participation of authors and rightsholders of other types of protected subject matter.

STM is in agreement with a participation of other “rightholders”, but urges the BMJV to clarify if there is a publishers’ share attached to the share of the authors or if publishers for the purposes of §87k are to be considered rightholders.
Ad Changes to § 27(2) the Collective Management of Rights Act (Verwertungsgesellschaftengesetz, “VwGG”) – minimum share of 2/3 for authors and 1/3 for publishers by law.

STM is of the view that there is no reason to legislate the distribution key in the law. As before the Vogel case, the members of the joint CMO should agree among themselves what the correct distribution key is. In fact, within VG Wort different chambers of different subsectors agree different distribution keys. There is no reason to believe that these outcomes are unfair or that the legislator is best-placed to determine the “justum pretium”. The legislation of this key is an unwarranted incursion into the private autonomy of authors and publishers who are used to collective bargaining within VG Wort.

The distribution key of 2/3 may also have the unintended consequence of weakening and not strengthening VG Wort systemically. At least for CMOs situated in other EU member states, the CRM directive guarantees a free choice of adhesion. German and perhaps also non-German publishers will be more inclined to seek adhesion with a CMO in the EU that has a more balanced distribution key or one that in fact is more consistent with market forces in a particular subsector. Thus, an inflexible forced key that would be in place for decades may prove counter-productive.

STM urges the BMJV to reconsider this important decision in favour of party autonomy and subsidiarity of law compared to collective bargaining.


In STM’s view it is incorrect that the law should not be effective before the deadline of implementation of the DSM. In STM’s view, the present state of affairs is unfair and possibly unconstitutional and should be remedied at the earliest possible time. Other EU member states, such as Belgium have in fact already remedied their law following the HP decision of the CJEU. STM urges BMJV to select an earlier effective date for a correction of the law to the more balanced status quo ante.

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