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STM SUBMISSION REGARDING THE PUBLIC CONSULTATION ON THE IMPLEMENTATION OF THE DIRECTIVE 2019/790 ON COPYRIGHT AND RELATED RIGHTS IN THE DIGITAL SINGLE MARKET

The International Association of Scientific, Technical and Medical ('STM') Publishers welcomes the opportunity given by the Kulturdepartementet of Norway to respectfully submit observations and comments on the implementation of Directive 2019/790 on Copyright and Related Rights in the Digital Single Market ("the DSM Directive").

This brief will provide inputs with regards to the implementation of (1) Article 3 of the DSM Directive (Text and Data Mining for the purpose of scientific research); (2) Article 4 (exception or limitation for Text and Data Mining); (3) and Article 17 of the DSM Directive on the use of protected content by online content-sharing service providers.

I. ARTICLE 3 — TEXT AND DATA MINING FOR THE PURPOSE OF SCIENTIFIC RESEARCH

STM submits that Article 3 of the DSM Directive must be transposed verbatim so as to meet the objectives of harmonization of the Directive and bring legal certainty to all interested parties.

(1) Beneficiaries

Article 2(1) and accompanying Recital 12 of the DSM Directive provides that the beneficiaries of the TDM exception under Article 3 are research organizations defined as "*a university, including its libraries, a research institute or any other entity, the primary goal of which is to conduct scientific research or to carry out educational activities involving also the conduct of scientific research: (a) on a non-for-profit basis or by reinvesting all the profits in its scientific research; or (b) pursuant to a public interest mission recognized by a Member State in such a way that the access to the results generated by the such scientific research cannot be enjoyed on a preferential basis by an undertaking that exercises a decisive influence upon such organization*." Article 3 of the DSM Directive has been narrowly construed to offer legal certainty to a limited number of beneficiaries for the purpose of non-commercial research—non-for-profit organizations or performing in the public interest mission recognized by a Member State—when they perform TDM for non-commercial purposes only.

(2) Permitted Use

Norwegian Law should respect the narrow nature and scope of Article 3 of the DSM Directive. Article 3 provides that TDM is restricted to reproductions only and is for research purposes only; no other copyright-related re-uses are permitted. Consequently, Norwegian Law would need to reflect the narrow use permitted under Article 3 of the DSM Directive — that is reproduction only.

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(3) Lawful Access

STM believes that a 'lawful access' clause as foreseen by the EU in Article 3(1) of the DSM Directive is an essential part of the implementation of Article 3 in that it prevents unlawful performance of TDM on unlawfully accessed corpus of articles, and thus does not undermine the activities of the rightholders. '*Lawful access*" should be defined within the remits of the DSM Directive. Recital 14 provides, "*Lawful access should be understood as covering access to content based on an open access policy or through contractual arrangements between rightholders and research organisations or cultural heritage institutions, such as subscriptions, or through other lawful means*."

(4) Storage of Copies

The storage of copies of works and other subject matter has a high potential of compromising information providers and publishers' business models if not approached with the highest standards of professional diligence. As it is stated in Recital 15 of the DSM Directive, 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."

(5) Measures to ensure security and integrity under Article 3(3)

TPMs to ensure the integrity and security of copies of content made for the purpose of TDM, and of databases and networks, are already widely used in the STM publishing industry. TPMs are essential for the protection, exercise and enforcement of copyright in the digital, networked environment. TPMs are essential as digital technologies that enable access to authorized customers while at the same time preventing unauthorized access or use, and are thus also important to protect the industry content from piracy.

In addition to being tailored to both providing access to the user and preventing unauthorized access to the content, TPMs are already considered a proportionate mechanism. As provided in Article 6 of the Infosoc Directive, to which the DSM Directive refers, the aim of preventing or restricting acts not authorized by the rightsholder is inherent in any system of copyright and is specifically encouraged by the legal protection required under Article 6 of Directive 2001/29.

TPMs would also remain proportionate in accordance with the CJEU case law as they do not extend beyond what is necessary. In C-355/12 *Nintendo vs PC Box and 9Net*, the CJEU held that TPMs can be defined broadly to be effective and can include "access control or protection process, such as encryption, scrambling or other transformation of the work or other subject-matter or a copy control mechanism." This means that a TPM should be effective enough to enable a rightsholder to avoid circumvention of the security and integrity of their content. The effectiveness of TPMs is thus consistent with the principle of proportionality.

Last, in addition to TPMs, the STM Publishing industry has already developed solutions to enable and facilitate TDM while guaranteeing the security and integrity of both the copies made

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for TDM and the integrity and security of networks. A few examples are the CrossRef Text and Data Mining API which provides a standardized API that works across thousands of publishers; the Copyright Clearance Center XML for Mining Service that provides centralized access to normalized and licensed full text XML from multiple publishers or the Publishers' Licensing Services Clear for Text and Data Mining which helps researchers identify rightsholders and communicate project requirements efficiently.

II. ARTICLE 4 — EXCEPTION OR LIMITATION FOR TEXT AND DATA MINING

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.

In STM's view, the Norwegian implementation law should verbatim mirror the EU text in Article 4 of the DSM Directive. Specialty cases not covered by the current language of the DSM can be handled by market forces.

At the outset, the implementation into Norwegian law should reflect the explicit, necessary distinction between Articles 3 and 4 of the DSM Directive, that is: on the one hand, a narrow exception limited solely to the right of reproduction that allows research organisations (as defined) to carry out, for the purposes of scientific research, text and data mining of works or other subject matter to which they have lawful access; and on the other hand, a second exception allowing businesses outside of research organisations, to perform text and data mining on content made freely and publicly available on the Internet for any purposes with the possibility for rightsholders to reserve their rights by machine-readable means including metadata and terms and conditions of a website or a service.

(1) Reservation of Rights

Article 4(3) of the DSM Directive provides explicitly for rightsholders to be able to reserve their rights in an appropriate manner, such as machine-readable means. Recital 18 also provides that an appropriate manner to reserve rights is by contractual means in terms and conditions of

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a website or a service. The clear intent of the DSM is that rightsholders consent should always be a prerequisite for any TDM performed on content made freely and publicly available on the internet.

(2) Use of TPMs

Rightsholders should be able to protect their content by the use of TPMs as provided under Article 7 of the DSM Directive, especially as Article 4 may touch on STM's publisher's core business and already available TDM commercial solutions.

(3) Retention of Copies

Article 4(2) of the DSM Directive also allows beneficiaries of the exception to store reproductions and extractions "*for as long as necessary for the purposes of text and data mining".* Since the exception is open to any purpose and touches on an already existing and functioning market, it is necessary that the retention time is reduced to the minimum reasonable time to carry out text and data mining. Unlike Article 3, Article 4(2) does not provide for the retention of copies for the purpose of scientific research including the verification of research results. The time of retention under Article 4 should thus necessarily be short so as to not jeopardize the normal commercial exploitation of the work and the interests of rightsholders. Rightsholders should therefore be allowed to use any appropriate Technical Protection Measures to that extent. Since the issue of retention is common to the same rightsholders as to under Article 3 or to rightsholders with common interests, STM believes that the forum to determine best practices under Article 3(4) could be extended to also discuss best practices with regards to retention under Article 4. This because best practices could enable the determination of a commonly agreed standard and a collaborative framework among the different actors impacted by Article 4.

III. ARTICLE 17 — USE OF PROTECTED CONTENT BY ONLINE CONTENT-SHARING SERVICE PROVIDERS

(1) General Comments on Article 17

With greater clarity than ever before, Article 17 of the DSM Directive establishes the responsibility of online content sharing service providers (OCSSPs) to collaborate in good faith with rightsholders and address the posting of unauthorized, copyright-protected content on OCSSP websites. This is of key importance to STM's members who are the rightsholders in the majority of peer reviewed scientific and scholarly content. STM members have long been directly engaged with OCSSPs regarding STM member copyright-protected content being made available to the public in violation of our members' rights. This is of special concern where OCSSPs give access to a large amount of copyrighted content uploaded by their users and organize, index, promote and sometimes incentivize further uploads for commercial gain. Before the adoption of Article 17, the copyright responsibility of OCSSPs was not clear and

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often resulted in a complete lack of accountability. Article 17 is thus particularly relevant in the STM publishing sector as it clarifies the liability of OCSSPs particularly.

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 and the measures taken to answer to such uncertainty with regards to copyright liability.

STM respectfully suggests that the Ministry of Culture stay true to the text and spirit of the DSM Directive and adopt ad verbatim implementation of Article 17 whose main aim is to focus on ensuring equity for rightsholders with regards to the handling of their copyright protected works and other subject matter when they are uploaded and shared on OCSSPs' services.

STM wishes to draw the attention of the Ministry of Culture on certain elements that are of utmost relevance when implementing Article 17 of the DSM Directive.

(2) <u>Definition in Article 2(6)</u>

Article 2(6) of the DSM Directive brings forward the definition of an Online Content-Sharing Service Provider ('OCSSP') and is of paramount importance for the implementation of the copyright in the DSM Directive. Such concepts and definitions need to be carefully and narrowly understood and all the elements of Article 2(6) need to be transposed. The text of the Directive provides helpful additions in related Recitals clarifying the definition under Article 2(6) and concepts under Article 17.

STM submits that Norwegian law should provide for a definition that covers an essential element in Recital 62 — the covering of both direct and indirect profits. Recital 62 clarifies the extent of one of the definitional criteria in order to qualify as an OCSSP under Article 2(6) of the DSM Directive − the for-profit purpose − by including both direct and indirect profits as one of the main definitional elements.

In order to provide clarity and legal certainty STM believes that the proposed new definition should nonetheless incorporate the following essential elements of Recital 62. First, Recital 62 clarifies which services should be excluded from the scope of Article 17. The proposed Section 52(e) should make clear that the liability exemption mechanism provided in Article 17 of the DSM Directive should not apply to service providers the main purpose of which is to engage in or to facilitate copyright piracy. This would prevent cases where operators of illegal platforms try to hide behind a safe harbour that was never intended to apply to such infringing services. Finally, in order to complement and add legal certainty to Article 2(6), the proposed Section 52(e) should indicate that services excluded such as cloud services and cyberlockers are only excluded under certain circumstances. For business-to-business clouds services and cloud services to be excluded, content uploaded by their users should only be for the uploading user's private use and not the general public. Similarly, Recital 62 clarifies that cyberlockers are only excluded under the same conditions applicable for cloud services. The Recital states that marketplaces are only excluded if their main activity is online retail and not giving access

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to copyright-protected content. Failing that, the proposed Section 52(e) should clarify that those services can qualify as OCSSPs.

(3) Licensing Is Not Mandatory Under Article 17

At the outset, it is important to note that the DSM Directive does not oblige directly or indirectly rightholders to offer licensing solutions to OCSSPs (see Recital 61 DSM Directive). Rightholder's participation in any collective licensing scheme should therefore be voluntary and withholding participation should not affect the obligations of an OCSSP towards a rightsholder.

(4) Best Efforts

Under Article 17(4) of the DSM Directive, providers are obliged to make, "*in accordance with high standards of professional diligence, best efforts to ensure the unavailability*" of unauthorised copies on their platform. "Best efforts" is not defined in the DSM Directive, it necessarily leaves room for interpretation on a case-to case basis assessing the circumstances and facts of the case. STM submits that "best efforts" should not be defined in national law and that interpretation of the terms should be left to both national courts and the Court of Justice of the European Union. However, in any case, "best efforts" shall be understood as a high standard of due diligence.

(5) Ensuring the Unavailability of Content Under Article 17(4)

Apart from determining what constitutes "best efforts" that platforms must use to ensure the future unavailability of works for which rightsholders have provided notification, STM publishers have a particular interest in Article 17(4)(a-c) and most notably the requirement for rightsholders to provide, "relevant and necessary information." In the STM Publishing industry, relevant and necessary information are already widely available for platforms, such as the Digital Object Identifier ('DOI'). The DOI is information used to permanently identify an academic article or document and link it to the web.

First, under Article 17(4), 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 efficiently and are used by many platforms. Because content and requirements differ per sector, it is important that Norwegian Law emphasises that the application of Article 17(4) must be sector specific.

Second, 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, by which time a great deal of

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economic harm can be caused. We therefore welcome the strong provision of paragraph 4 (b) to prevent availability of infringing works.

(6) Exceptions under Article 17(7)

Balancing the rights of rights of rightsholders and EU citizens is a key part of legislation and should be carefully considered. The DSM directive is the result of a careful compromise designed to establish this balance and a delicate equilibrium has been achieved. For this reason, STM submits that the Norwegian Law should implement Article 17(7) of the DSM Directive verbatim.

Article 17(7) provides that "Member States shall ensure that users in each Member State are able to rely on any of the following existing exceptions or limitations (…) (a) quotation, criticism, review; (b) use of for the purpose of caricature, parody or pastiche." Article 17(7) explicitly refers to these exceptions within the scope of Directive 2001/29/EC ("Infosoc").

STM therefore submits that Article 17(7) does not introduce "new" exceptions but instead refers to exceptions that already exist in law. Consequently, the use of such exceptions must necessarily be limited to the specific permitted use and be premised on compliance with all the conditions contained in the Infosoc Directive for each of the exceptions concerned. This means that their limited scope and applicability to some online services must be reflected in Norwegian Law.

Moreover, all exceptions should thus respect the three-step test of Article 9(2) of the Berne Convention and Article 5(5) of the Infosoc Directive. Each use under an exception should therefore only be granted in certain special cases and as to not conflict with a normal exploitation of the work or other subject matter and do not unreasonably prejudice the legitimate interests of the rightsholder.

Finally, the implementing law should also make clear the explicit reservations contained in Article 5(3)(d) of the Infosoc Directive with regards to quotations, criticism and review, i.e. the exception should "*relate to a work or other subject matter which has already been lawfully made available to the public, that, unless this turns out to be impossible, the source, including the author's name, is indicated, and that their use is in accordance with fair practice, and to the extent required by the specific purpose*."

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