The global voice of scholarly publishing

7 July 2017

Ms J Fubbs
Chairperson: Portfolio Committee on Trade and Industry
Attention Art.4(1)(b)
Parliament of the Republic of South Africa
CAPE TOWN

By email only to: Art.4(1)(b)@parliament.gov.za

Dear Sirs

Comments by the International Association of Scientific Technical and Medical Publishers (STM) in response to the Copyright Amendment Bill, 13 of 2017

STM is the leading global trade association for academic and professional publishers. It has over 120 members in 21 countries, who each year collectively publish nearly 66% of all journal articles and tens of thousands of monographs and reference works. STM members include learned societies, university presses and private companies.[1]

STM wishes to restate its submission to the Department of Trade & Industry in response to the Draft Copyright Amendment Bill, 2015, made on 15 September 2015, a copy of which is attached. All of the issues raised in our earlier submission remain in relation to the Bill, with one exception.[2] Although references to some of the section numbers have changed, we note that none of the other points we made in our prior submission have been addressed in the new Bill. In addition, the Bill contains a blanket Open Access mandate and a new exception for public administration, to which we respond below.

[1] See STM's website at http://www.stm-assoc.org/.
[2] Para 2.2.3 of the STM submission of 15 September 2015, relating to the Draft's intended criminalisation of copyright owners, which has not been retained in the Bill

We do not intend repeating all the points from our previous submission, but will emphasise some below. This submission therefore does not deal comprehensively with the many faults in the Bill. We have seen numerous errors in the Bill – such as repeated references to "user, performer, owner, producer or author", which amongst others have the incongruous effect of giving a "user" (a term not defined in the Copyright Act, 1978) a right to royalties, but which we suspect may be an error arising from an incorrect "global cut & paste' edit.

Considering that the publishing industry's warnings of unintended consequences of the proposed changes not having been heeded in compiling the Bill, the lack of policy direction and the absence of impact studies, we submit that the Bill is not a sound document on which to base a review of South Africa's copyright laws.

We have seen the submission of the International Publishers Association, as well as its submission in response to the Draft Bill, which we support.

Open Access for publicly-funded research

New Section 13B(4), dealing with "open access" of "scientific and other contributions", did not appear in the 2015 Draft Bill. Its poorly-drafted provisions amount to overreach, not only undermining the rights of authors and publishers, but also denying authors academic freedom.

At the outset, we should say that STM publishers welcome sustainable Open Access as a legitimate alternative to the traditional subscription model. Many STM members publish on an Open Access basis only.[3]

However, new Section 13B(4) does not have its origin in any discussions with STM publishers or any policy developed in South Africa that we know of. Nether the Explanatory Memorandum to the Bill[4] nor the SEIAS report[5] makes reference to it. On the contrary, para (d) and an inconsistency in drafting para (a) indicate that it was written by or at the behest of stakeholder groups representing libraries. If true, that would mean that this clause and the remaining proposed exceptions for education and libraries are, in effect, a wish list and not a reflection of sound and properly consulted policy consideration.

[3] See the STM signature statement "Publishers Support Sustainable Open Access" at http://www.stm-assoc.org/public-affairs/resources/publishers-support-sustainable-open-access/.

[4] The Explanatory Memorandum only says that new Section 13B provides "for the permission to make transient or incidental copies of a work, including reformatting, an integral and essential part of a technical process" – which we find to be a very questionable explanation.

[5] Not only does the SEAIS Report not deal with the issue, it also states that there are "No areas for further research" (para 10).

STM would welcome the opportunity to illustrate the role of publishers in the academic publishing field. In short, publishers are an indispensable link in the chain of registering, certifying, formalising, improving, disseminating, preserving, and using scientific information – making long-term investments in publications around which emerging, and established scientific communities coalesce and evolve. Global access to scientific information for investigators at research institutions is easy and widespread due in no small part to the entrepreneurial efforts of STM publishers to successfully convert paper-based to online dissemination. These are described in more detail in STM's 2008 "Position Paper on Scientific, Technical and Medical Publishing."[6]

STM objects to legislation that places restrictions on academic freedom. STM believes that authors should have the right to choose the journal in which they publish and the method in which they publish. A choice to publish in an Open Access journal – of which there are many in South Africa and around the world – is as valid and legally supportable as a choice to publish in a journal published for subscription.

However, the across-the-board requirement for deposit of final published versions of articles from subscription journals into institutional repositories cannibalises publishers' investment in those journals and disregards the publisher's rights in respect of the published edition, which includes the publisher's contributions to the article such as editing and peer-review.

This undermining of the subscription model means that the provision does not provide a sustainable solution. A proper Open Access policy needs to take into account the difference between Gold Open Access, where the publication of an edited and peer-reviewed article under an appropriate Open Access licence (there are many) is funded upfront, and the situation where authors have the option to make earlier versions of their work available after a time delay under an appropriate Open Access licence in a model which sees subscriptions continue to support journal publication.

STM considers a 12-month time delay period for STM literature, even for versions of an article that precede the final published version, to be unsustainably short. Such a short period will not allow publishers to recoup their investment in the publication before it becomes available to the public free of charge.

With that background, we submit that Section13B(4) should be withdrawn from the Bill entirely.

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[6] Available at http://www.stm-assoc.org/2008_04_01_Overview_of_STM_Publishing_Value_to_Research.pdf. A comprehensive periodic study on the STM industry, which includes the latest developments on Open Access, is the STM Study, the 2015 edition of which is at http://www.stm-assoc.org/2015_02_20_STM_Report_2015.pdf. Also of interest might be "96 Things Publishers Do" by Kent Anderson at https://scholarlykitchen.sspnet.org/2016/02/01/guest-post-kent-anderson-updated-96-things-publishers-do-2016-edition/.

Whilst not taking away from our submission that Section 13B(4) should be withdrawn, we wish to point out various flaws and errors and other problems with the provision:

- The application of this section to "the final accepted manuscript version peer-reviewed post print" in "a contribution published in a collection that is issued periodically at least once per year" means that, despite the uncertainties in definitions referred to below, the subject of Section 13B(4) is indeed articles in subscription journals published by STM publishers.
  This drafting is an objectionable overreach into material over which the author has no control, notably editing and peer-review undertaken by the publisher and in respect of which the publisher has rights of copyright in the published edition. The deposit of final published versions of subscription articles into repositories is universally considered as infringement of copyright. Indeed, inasmuch as this section deprives the copyright owner of its exclusive rights, this section will not comply with the Three-Step Test for permissible exceptions under the Berne Convention and cause South Africa to be in breach of its Treaty obligations.
  The drafting is contradictory in that by "contribution" one would usually understand the author's submitted manuscript, before editing and peer review, yet there is the ungrammatical addition at the end of para (a) stating that the object of this section is "the final accepted manuscript version peer-reviewed post print".
- The object is described as a "scientific or other contribution". Unlike other Open Access policies, this therefore clause not only applies to literary works – which journal articles are – but *any* kind of copyright work, so long as it is the result of a research activity publicly funded by at least 50%.
  - Its wide ambit will cause this section to conflict with the Intellectual Property Rights from Publicly-Financed Research and Development Act, 2008, in respect of computer programmes and in respect of works that may benefit from, say, both copyright and patent protection. This section will mean that the intellectual property in such works will end up being controlled through different channels and deny the exclusivity in any intellectual property rights regulated by the 2008 Act.
  - Subject to what is meant by the term "collection" (see below), this section could apply to books.
  - The section could apply to works that are not capable of being housed in institutional repositories, like three-dimensional works that qualify as artistic works or computer programmes.
- There is a lack of proper definition across the board. Not only is "scientific or other contribution" not linked to copyright works as defined in the Act. "Open access", "public licence" and "librarians" are not defined in the Bill. There is also no definition of "open access institutional repository", which means that any platform, even known pirate sites outside South Africa, can claim to perform this function in defence to an action for copyright infringement.
- The use of the term "collection" does not seem to be consistent with the term used elsewhere in the Copyright Act, 1979. Does this mean a collection like an anthology or a collection of the author's works or a collection of a library or a museum? As indicated in the first comment above, we gather that this is not what was intended.
- The term "even after granting the publisher or editor an exclusive right of use", inasmuch as it might be meant to relate to publishing by STM publishers, is ill-informed in that it does not take into account commercial reality.

- In any event, the term "even after granting the publisher or editor an exclusive right of use" contradicts the new Section 5(2), because if the work is made by public funding, the copyright in the work would vest in the State or the funding organisation, the author would have no exclusive rights to grant and all the actions contemplated in Section 13B would infringe the copyright vested in the State or the organisation in terms of the new Section 5(2).
  (This passage also led us to believe that Section 13B was likely drafted by an external resource, most likely someone representing library stakeholder interests.)
  This observation does not mean that STM departs from its position in its earlier submission that the proposed amendments to Section 5(2) by the Bill must be withdrawn.
- Para (b), which permits agreements (by which we understand to mean publishing agreements) to provide for an embargo, will be difficult to enforce and is not typical of embargo rulings in some other countries. An embargo ruling is always a default, contained in a policy or in legislation. STM's position is that individual agreements should allow variations from the default, whether stricter or more permissive.
- Accreditation (attempted to be regulated by para (c)) is normally a term of an Open Access licence, which the Bill does not deal with sufficiently, as noted above. Accreditation only of the "place of first publication", as required by para (c), does not meet international practice for Open Access licences used for academic and scientific publications.
- We question what is meant by allowing, as contemplated in para (d), a librarian or any third party to undertake these activities on behalf of the author. The specific direction of the author does not seem to be required, thereby not only depriving the author of freedom of choice, but opening up all scientific works to unrestricted piracy.

<u>The introduction of 'fair use' and other overbroad exceptions for education, libraries and public administration</u>

STM stands by its position, also stated in its earlier submission, that it advises against the introduction of US-style 'fair use' in South Africa. We find that the need for the defences and exceptions to copyright set out in the new Sections 12(1), 12A, 13B and 19C to be entirely unsupported by evidence.

The cases for application of 'fair use' set out in new Section 12(1) are extensive and many are not considered cases for 'fair dealing' exceptions in industrialised countries. Indeed, many of the cases listed there (for instance "education", "access for underserved populations" and "public administration") and are not even considered as cases for the application of 'fair use' in the United States.

We note that a general exception (in this case an application of 'fair use') to the needs of public administration is a new provision in the Bill that did not exist in the 2015 Draft. To the extent that this exception will extend to published materials that are available for purchase on the open market, STM contends that STM publications would be especially hard hit in their core market, as governments and government organisations are an important and legitimate market for their publications. These publications are among the most read and consulted by scientists, companies, researchers and others involved in the cycle of innovation, development,

productivity gain and economic growth. STM submits that the extension of 'fair use' to public administration it is uncalled for and that such a broad exception would be in conflict with the normal exploitation of the exclusive rights of rightsholders under the Berne Convention's Three-Step Test.

Prescribed contract terms and provision to make unenforceable any part of an agreement restricting or preventing an Act to be allowed by the Copyright Act

We are surprised that the Bill, in new paras in Section 39 and in new Section 39B, continues to provide for State-initiated contract and remuneration terms and to maintain a blanket ban on contractual terms that have an impact on copyright exceptions without soliciting the views of the publishing industry and not taking into account our earlier submission (in para 2.2) addressing precisely this point.

The overriding of contractual terms between copyright owners and the consumers of their products may well have a place in specific exceptions, but these need to be analysed on a case-by case basis. The override of contracts it is surely a last resort as it sets a dangerous precedent for commercial agreements of all sorts. Similarly, there may be circumstances in which, measures against unfair contract terms under consumer protection legislation may be appropriate in relation to transactions for copyright works, as they are in all consumer transactions.

Our comments above apply equally to the proposal in the same recommendation to allow the circumvention of technological protection measures.

Conclusion

STM is ready to amplify or otherwise assist in any way that would inform the debate on an effective and efficient copyright system.

Yours faithfully

Art.4(1)(b)

@stm-assoc.org

15 September 2015

Art.4(1)(b), Department of Trade and Industry
For Attention: Art.4(1)(b)
77 Meintjies Street
Bock B, First Floor
Sunnyside
Pretoria
SOUTH AFRICA

Email: Art.4(1)(b) @thedti.gov.za

Dear Sirs

South Africa - Draft Copyright Amendment Bill

We are writing to you in connection with the Department of Trade and Industry's Draft Bill, Government Gazette – Government Notice No 646, Government Gazette No 39028, 27 July 2015, the period for comment on which was subsequently extended to 16 September 2015.

Our association, the International Association of Scientific, Technical and Medical Publishers ("STM"), is the leading global trade association for academic and professional publishers. It has over 120 members in 21 countries, who each year collectively publish nearly two thirds of the global annual output of research articles and tens of thousands of print and electronic books and references works.

STM publishers originate and disseminate books, journals databases and individual articles and contributions of a multitude of South African and international scientific, medical and technical authors and scholars, both online and in print.

STM publishers distribute their scholarly and scientific journals, books and databases for and to the research and education communities, communities that therefore constitute their most significant audiences and markets.

1. Basic Position:

Whilst there are many facets of the draft Bill STM could provide comments on, the present submission will deal with three thematic areas of close interest to its membership:

- Unwarranted expansion of State copyright
- Freedom of contract: counter-productive State interference
- US-style fair use exception: a benign legislative concept in need of a successful transplant, or a burdensome transfer of power to the judiciary?

We would like to preface a detailed discussion of the above points with the following broad principles that, in STM's view, should guide any copyright reform in the 21st Century:

- The author's freedom to choose when, where and how to publish his or her works is pivotal. This applies to works that are authored, privately, as part of public-private efforts or resulting from wholly or partly State-funded creative or research endeavours. This is consistent with copyright as a human right, as recognised in Article 27(3) of the UN Universal Declaration of Human Rights, as well as other important rights and freedoms, eg academic freedom, freedom of expression, free exercise of (intellectual) property rights.

- Maximising the exposure and use of works requires well-placed stewards that make sure a work shines not only at one moment in time, but is available well into the future. Ownership allocation of copyright works, as well as transferability of ownership, should be decided upon with this maximisation and need for stewardship in mind. State ownership of copyright is only appropriate to the extent that the State is in fact able to play the role of "good steward", of actively managing and maximising use of works. More often than not, it is prudent for the State to minimise its role as "steward of last resort", ie only undertake this endeavour where the market place leads to under-supply of works (market failure), where no private-public partnership is possible and where self-regulation is leading to inadequate results.

- The Berne Convention Three-Step Test for exceptions and limitations must be respected, as the protection of copyright in a digital networked work is only as strong as the weakest link in the chain. South Africa, as one of the leading countries on the African continent, should also be cognisant of its role and responsibility for sound copyright protection and participation in the international community. Moreover, exceptions and limitations must take account of the increased risk of digital dissemination.

- Special markets and how they are served by specialised right holders must not be eroded by a too broad or general exception or limitation, and specifically, recognition must be accorded to the development by publishers of innovative online scholarly and scientific resources that are hugely beneficial to researchers and society.

- Licensing is the "smart" route to provide access to knowledge and preferred over exceptions and limitations, especially in the 21st century and where markets develop at a fast pace, eg digital content, social web, cloud and analytical research tools and services.

- Exceptions and limitations must take into account cultural diversity and legal traditions. A transplant of one legal tradition into another needs many safeguarding and supporting measures, including avoiding legal uncertainty that discourages investment.

2. Detailed Position:

2.1 State Copyright / State-Controlled Copyright

2.1.1 We note that the draft Bill proposes to add the words “or funded” to the definition of State copyright in section 5 of the Copyright Act (98 of 1978). STM urges you to delete this amendment. Declaring all works that receive unspecified State funding to be State-owned works, will greatly increase locally the volume of works deemed to fall under the control of the State. STM also urges the DTI to assess the broad economic and financial impact such an allocation of private rights in the hands of the State would have: the State would actually be responsible to manage these rights across all government departments and may be the recipient of multiple licensing requests touching on almost all aspects of life in South Africa or connected to South Africa.

The provision will also lead to contradictions with other provisions of the Copyright Act that allow for works to subsist in the person who commissions a work or in an employer where a work was generated in the course of an employment relationship. The Act also remains silent on how the State would manage co-owned works – the number of co-owned works would also dramatically increase, each time a partly State-funded South African author collaborates with foreign authors, or non-funded or privately funded authors.

2.1.2 New sections 22(1) and 22(3) of the Copyright Act would disallow the assignment of any right of copyright by the State. Moreover, all assignments are made to be effective for a period not exceeding 25 years. Both provisions further exacerbate the State’s interference in contractual relations. This will be detrimental and may prevent contracts not only beneficial to authors, but to society at large being concluded. Where a public-private partnership, for instance, results in a co-owned work, it should be possible for the State to assign its share, provided the contractual conditions make such a decision advantageous. Many more examples are imaginable. It is also not clear why the draft Bill presumes that the State itself cannot look after its own licensing needs well enough to avoid entering into imbalanced agreements.

The provision in s 22(3) is presumably intended to protect authors as first rightsholders against unfavourable contracts with producers or publishers. However, the provision appears to apply irrespective of how favourable or unfavourable a contract is and seems to ignore practicalities: in the STM environment, a research article typically has between 4-5 authors from two or more countries. The conventional method of transferring rights is by way of assignment or exclusive licence to the publisher as custodian and steward of the rights of the contributing authors. If a share in the copyright now reverts for any participating South African author, but remains in place for other authors, according to many countries’ copyright laws, it becomes impossible to continue licensing a work without seeking the consent from the South African author. This may lead to a lesser visibility of South African authors due to a false sense of paternalism for their rights.

Moreover, the well-intentioned protective effect may also not be effective to address agreements that are deemed overly long, as authors may be able to assign works consecutively, or may be able to assign the future interest in a reversion of copyrights in any case. Many permutations are imaginable.

STM also questions whether it is necessary to provide for this maximum duration in the case of copyrights owned and/or controlled by legal entities or assignments that occur downstream (ie after an initial assignment, there may be a subsequent transfer). The encroachment on the freedom of contact seems disproportionate and should in STM's view be deleted.

In STM's view, section 22(1) should be deleted, while section 22(3) should also be deleted, but in any event not apply to authors who have contributed to a collection, database, periodical or newspaper or magazine, or a collective work, including authors who are contributing their works to any other multi-author work, whether as co-authors or individual authors.

2.1.3 Orphan Works and Out-of-Commerce Works

STM is concerned that the rules on orphan works may produce a system that will not remedy the peril with orphan works: an undersupply of such works as a result of the inability of users to licence these works. In STM's opinion a limitation of liability approach would be far preferable.

STM also notes provisions that appear to introduce a compulsory licence for translations and reproductions. The provisions may be inspired by the Berne Appendix but could also be interpreted as provisions dealing with the phenomenon of licensing "out of commerce" works, ie works not available through the ordinary channels of trade within a reasonable time. STM is itself party to a Memorandum of Understanding on Out-of-Commerce Works in the European Union and stands ready to elaborate on an implementation of the MoU which has for instance been undertaken in France, Germany and Nordic EU countries.

STM believes that this issue may well be relevant to the South African context, especially to preserve and utilise the rich cultural heritage during the country's liberation struggle in the 20th century. However, STM believes that South African citizens would be better assisted with a light-touch orphan works and out-of-commerce regulation than with an administrative burdensome process both for securing permission of orphan works through a Commission, especially created, or through mechanisms of compulsory licensing in the fashion of the Berne Convention Appendices, which have not proven very effective in other parts of the world.

STM also believes that there is no evidence that local or international rightsholders would outright refuse translation or reproduction licences where needed. In fact, through the local collective management agency, DALRO, licences are available from a broad range of territories.

2.2 Encroachment upon and Interference with Freedom of Contract

2.2.1 STM is very concerned about proposed section 39A which would make the validity of licensing agreements dependent, as a general rule, on copyright exceptions and even vested positions of copyright law. The provision would make it that much harder to offer preferential access in legally certain ways to deserving groups for fear of not being able contractually to exclude on-copying. To give an example: under s 39A, it may not be possible to provide the community of the blind with advance copies of copyright-protected

works, on restrictive legal terms, as legally it would not be permissible to prohibit the licensee from on-copying parts of the works made accessible for purposes falling under un-related copyright exceptions (eg for personal and private study of third parties who are not in fact visually impaired, or indeed for distance education – one of the main markets generally for the works in question).

2.2.2 The draft Bill seems to envisage overbroad and overlapping exceptions, especially in the field of education and private study and uses by libraries (for the pros and cons of introducing US-style fair use see below para 3). In a country where 80% of publishing is related to education, and where high quality availability of educational resources and textbooks is vital, exceptions for education have the potential to erode the normal market of especially the local publisher. STM sees a number of problems with the current draft and the wording:

(i) The three layers of exceptions are not clearly subject to the availability of licensing agreements. Moreover, they seem to cover areas of licensing that are currently the subject of individual and collective licensing: distance education and electronic access is as a matter of course an activity licensed by STM's member publishers. DALRO, the collective licensing agency in South Africa has for many years administered a collective licensing scheme permitting both "blanket" licensing or the purchase of transactional licences for course-pack, e-readers, e-reserve needs and many ancillary uses that may be made at educational institutions (eg preparing digital carriers to deliver reading materials to a distant campus that has poor connectivity or is struggling with power-outages).

(ii) The exceptions for libraries go well-beyond long-term preservation, back-up copying and long-term archiving and cover areas that are often collaboratively tackled by publishers and libraries. Licences for document supply, for instance are widely available in South Africa either directly form publishers, or via the local collective rights agency, DALRO. The exception in favour of business entities rendering "business advice" is glaring as for consultancies the clearing of copyright permissions is simply part of the cost of doing business.

STM urges the DTI to bring clarity and to carefully craft and simplify the exceptions and limitations. One needed simplification would be to state that the exceptions are without prejudice to existing and future licensing agreements that permit the uses in question.

2.2.3 Yet, the above provisions are not the only obstacle to a sound licensing environment for wide access to copyright works. The proposed s 23(4)(d) of the Copyright Act would make it a criminal offence, punishable with imprisonment of ten years (or less), unreasonably not to accede to a licensing request. STM recommends deletion of this criminal offence as entirely disproportionate: the free exercise of a right of copyright by the rightsholder is not only part of South African legal tradition, but an international treaty obligation. Criminalising, in very general and subjective terms, the exercise of exclusive rights in certain cases, is counterproductive to the wide availability of works, as it may be more "reasonable" not to licence a work on request in cases where the rightsholder has decided not to issue any licences of his or her work, full stop. Thus, the provision would even put a chilling effect on licensing. STM urges the DTI to reconsider this provision in the light of the prevailing rights and freedoms of authors and publishers in South Africa.

3. US-style fair use exception: a benign legislative concept in need of a successful transplant, or a burdensome transfer of power to the judiciary?

STM publishers operate globally and, in our experience, it is possible for a fair use or a fair dealing system to be implemented in practice that is consistent with the international copyright framework.

However, STM questions whether South African legislation that not only creates overlapping exceptions, but also exceptions that appear to be declaring certain uses as “fair use”, is providing for over-broad exceptions that are no longer consistent with South Africa’s binding international obligations.

Even without addressing the question of international compatibility, in STM’s view the draft Bill fails to consider safeguarding measures that would need to be in place to accompany a successful transplant of US-style fair use into South African law. The fair use system relies on a long tradition of case law and pre-2004 has been relatively stable and predictable. Since then, a number of cases have been pending, particularly relating to so-called “transformative” use that have rendered fair use even more volatile. In addition, the US legal system relies on a federal court system that is used to handle a large volume of copyright-related cases and on a copyright law that provides punitive and statutory damages that significantly alter the equation for any would-be infringers, likely to engage the courts.

The present draft Bill does, firstly, not provide for punitive and statutory civil damages that would deter a would-be infringer: any potential claimant of fair use could easily decide to claim fair use in order to defer a payment into the future of, at worst, what the payment would have been, had the user taken out a licence. Secondly, the court system in South Africa, including the new provisions of an Intellectual Property Tribunal, will effectively have to make policy decisions weighing the rights of copyright owners and the interest of the wider public. The South African court system may or may not have the resources to do this successfully and may or may not have the tradition of making policy decisions that in most other jurisdictions are made with greater democratic justification by Parliament.

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We urge the South African government to consider the above factors when deciding if and how to implement a general exceptions clause for certain special uses that must not be allowed to erode the market for works needed for education, science, art and culture in South Africa.

We applaud the DTI for its intention to update South Africa’s copyright laws and for the opportunity to participate from the very beginning in a wide and open consultation.

We sincerely hope that any new copyright regime that may be adopted eventually is not detrimental to authors and publishers and in line with international obligations.

STM stands ready to amplify or otherwise assist in any way that would be appropriate and conducive to sound South African copyright legislation.

Yours faithfully,

Art.4(1)(b)
, STM
@stm-assoc.org