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**STM POSITION ON THE ROLE OF PUBLISHERS IN THE COPYRIGHT VALUE CHAIN  
AND RECOGNIZING PUBLISHERS' RELATED RIGHTS**

**POSITION:**

STM favours the recognition of a distinct Publishers' Related Right *and* a clarification of the rights publishers may rely on regarding the works they publish to receive fair compensation under legitimate exceptions and limitations, where denial of fair compensation would render the exceptions and limitations harmful, imbalanced and unjust.

Therefore:

- STM posits that a Publishers Related Right (PRR) should be legally recognized for publishers of periodicals, short works and "look-up" type works such as dictionaries, reference works, as well as for multi-author works and for multi-media publications with embedded content. Thus, STM supports the position of news publishers in favour of a broad exclusive publisher's right (see: <http://www.publishersright.eu/>);
- and
- STM seeks clarification and confirmation that publishers of all publications - including single-author and monograph books - are rightholders and able to receive a share of statutory licensing fees jointly with their authors by virtue of the rights as transferred or licenced from authors.

**JUSTIFICATION OF POSITION:**

Publications are the result of the joint effort between authors and publishers and consist of several layers. The first layer is the author's original manuscript; the second layer consists of editing, styling, peer-review and ancillary efforts to build a high-quality article worthy of incorporation into the "minutes of science". The second layer, in multi author works, also entails aggregating contributions of co-authors and other creative contributors as well as adding the publishers own beneficications through selection and organising content. The third layer consists of enhancements, enriching the content, i.e. ensuring discoverability, indexing, referencing, static and dynamic links to related data, illustrations, navigation and auto-updating tools and alerts to newly published or re-edited information. Distinctly, the fourth and fifth layer arise from creative contributions and organisational factors enabled by the publisher's ongoing stewardship of a publication. These activities comprise selecting an article to be part of the publisher's wider imprimatur, organising the journal or reference work where the author's contribution appears, selecting of editors-in-chief and editorial teams with publishing and domain-specific knowledge, operating a platform, organising journals by

subject, enabling searching across platforms, enabling download, storage and indexing, updating and dynamic referencing. These layers are different from the first three in that they do not result necessarily directly in a visible or “fixed” addition to an author’s manuscript but are of organisational, contextual and dynamic value.

Thus, as demonstrated above, there are two separate contributions worthy of exclusive rights, the contribution of the author and the contribution of the publisher, albeit being combined in layers. The clarification is necessary to confirm publishers as the rightholder of the first layer by virtue of the contractual agreement between publishers and their authors. However, the introduction of the PRR would serve to establish publishers as rightsholders in recognition of their unique contribution as set out in layers 2 to 5. The aim is to protect and recognise the role of publishers in the cycle of creating content as well as their investment and responsibility in the production and publication of works destined for dissemination.

For avoidance of doubt, the PRR is to be recognised as a distinct exclusive right originating in the hands of the publisher; the right exists without prejudice and without interfering or limiting the rights of authors and does not interfere with contractual relations. The right is fully transferable by contract.

#### **DRAFT DEFINITION:**

*“published edition” includes:*

- (i) an edition of an article or contribution in final form and accepted for publication in a periodical publication of at least one issue per year,*
- (ii) an edition of a work or a contribution in final form and accepted for publication in multi-author books, such as reference works, thesauri, dictionaries, collected writings, lectures, speeches, educational multi-author textbooks created according to a publication plan of the publisher.*

#### **EXPLANATORY REMARKS TO THE DRAFT DEFINITION:**

It is crucial for the object of protection in a PRR to be correctly identified and defined and to address the specific elements exposed to copying. This necessitates the accurate identification of the unique contribution of publishers in the copyright value chain. The legal definition of “published edition” corresponds to the (mostly digital) object of protection. The said “object” is not to be confused with the “physical carrier” of the object in which property rights may subsist. This concept is broader than the first published version and is more similar to the director’s cut of a film or a master sound recording, the “version of versions” containing all other versions. Thus, for publishers and other producers, the object of protection embodies all the resulting broad aspects that are combined in one “product”, the result of the creative and investment input known from producers of film and sound recordings and now also to be recognized for publishers.

#### **PRECEDENTS:**

1. In analogue times some EU member states with a common law tradition protect so-called typographical arrangement. This form of protection was relevant up to the era of photocopying but with digital distribution now being the norm, the typographical

arrangement would not be a suitable object of protection of a PRR. Nevertheless the existence shows that granting producer rights to the publisher is not novel.

2. EU law already recognises the possibility to protect works first published after expiry of a copyright term and also so-called scientific editions. To our knowledge the CJEU did not refer to this option when deciding that publishers are not considered original rightsholders in the EU *acquis* (HP - Reprobel case).
3. Film producers in Europe also enjoy a producer right in addition to relying on transfer of copyright and performing rights from authors and performers. The modern publisher in the digital world, especially when assembling a multitude of content, is in the same position as a film producer. The investment, creative input by assembling, directing editors, script writers and various performing artists, is comparable to the role of the publisher who, as it is stated in countless publishing agreements is granted the right by the author to “**produce and publish**” a book, ebook etc. It is the publisher who selects editors, compiles, formulates aims and scopes of publications with the editors, including on principles of selection.
4. Sound recording producers enjoy a right and the “master recording”, it is argued also captures the essence of the concept that is protectable due to the creative contribution and investment and responsibility of the producer of sound recordings.

## **THE PURPOSE OF SEEKING PROTECTION**

For STM the purpose of protection is twofold, on the one hand protecting the **creative input as producer** of the resulting ‘masterfile’, the published edition, and on the other hand the **publisher’s entrepreneurial investment and responsibility** for the overall publication.

### **I. The published edition** would have the following scope:

The object of protection, in STM’s view should be the authoritative source of data, which includes all pre- and post-production efforts and mastering required in the process of preparing the completed, enriched work, such as an article, multi-author work or reference work. This applies especially in the online and digital context, where works really exist as digital objects curated and published by the publisher. The object of protection would thus consist of the finally accepted manuscript (AM) resulting in what in STM terminology is known as the Version of Record (VoR). A VoR contains a so-called kitemark that identifies its nature to humans, and defined metadata to define its nature to machines. This is the source from which all copies will be produced and disseminated, i.e. the final demonstration containing the author’s expression and publisher’s mastering.

Producing a publication is a crucial gateway between the author’s original manuscript and the final product and involves technical knowledge, creative expertise, as well as specific aesthetics:

Plagiarism Detection

Editing, proofreading, styling, art and illustration handling, layout and composition designing

Peer Review

XML Generation, Document Type Definitions Migration (DTD) and format migrations

Tagging to generate metadata

Integrate and Track metrics

Depositing Content

Integrate new standards

Audience research and content adaptations to resonate with audience

Multi-author works – Managing, editing and combining contributions

## **II. The creative and investment input of publishers**

Technological development introduced a new level of infrastructure building and publishers now also build, integrate, migrate, manage, monitor and constantly upgrade technical systems, platforms and online databases. It is this application of technology and content curation that enables the business that publishing has become; an online business focussed on communicating research and educational results, including through abstracts, summaries, recommendations, augmentations, search engine optimisation and various “post publication” services. Aside from this, article and journal production necessitates extramural activities, some of which are listed below:

Selection of journal articles

Organising peer-review to evaluate articles earmarked for possible publication

DOI registration

Search Engine Optimization

Implementing and managing interlinking services

Hosting and Archiving

Platform management, upgrades and migrations

Establish, integrate, upgrade and monitor infrastructure and technical systems for access and authentication

Social Media distribution and management, including incorporating alerting functions to help users identify other relevant content

Investment and responsibility

Ensuring that the scientific record is accurate and faithfully kept and available for future generations

Selection of authors in multi-author works and contributors

Co-ordination among co-authors and co-contributors

Selecting, embedding, and producing graphs software video and other content enriching the electronic publications.

## **THE PROPOSED EXCLUSIVE RIGHT**

The exclusive rights proposed here are consistent with the bundle of rights accorded to other producers, such as music, film or broadcasters.

The PRR should cover the exclusive right to authorise or to prohibit, the following acts: The exclusive right of reproduction, communication to the public, making available (Articles 2 and 3 of the InfoSoc Directive) and the exclusive right to distribute (Art 9 of the Rental and lending Directive, “distribution right granted to producers of film and phonograms”). The term of protection for the published edition shall be 50 years calculated from the end of the year during which first publication took place or the remaining term of protection of any work or protected subject matter embodied therein, whichever expires later.

As is the case for film producers, publishers will rely on both assignment, licenced exclusive rights or other transfers of rights and contracts of pre-existing works and works created during the production process resulting in eventual first publication.

We reiterate that the PRR originates in the hands of the publisher; the right exists without prejudice and without interfering or limiting the rights of authors and does not interfere with contractual relations. The right is fully transferable by contract.

Where publications pursue an open access business model, it is clear that the rights of the publishers acquired from the author and the PRR originating in the hands of the publisher will be licensed along the same principles to enable users freely to access and use the open access publications. Suggestions that a PRR would get in the way of Open Access are ill-founded and misleading. Where a publisher agrees with the author to issue an open access publication, the PRR would be licensed accordingly along the same principles, mutatis mutandis. In this regard we refer to the following guide on OA licensing - <http://publishingresearchconsortium.com/index.php/prc-guides-main-menu/166-open-access-licensing-0215>.

## **WHY IS THE PUBLISHER’S RELATED RIGHT NEEDED AND WHAT IS IT FOR?**

- Re-use capabilities: 21<sup>st</sup> century books and other publications offer many and multiple re-uses as is the case for other productions (film, sound recordings). Previously printed publications and books were capable of being re-used in only a few forms (for example photocopies) but in today’s digital world, publications and books are capable of re-use in manifold ways, so much so that the reason for lesser protection compared to film or sound recording productions has fallen away. Possible re-uses include rentals and e-lending, inclusion of extracts in presentations, amalgamation of extracts with other works, re-mix, re-combination, use of single chapters, audio-versions, read-aloud, minable content, extraction of graphs and snippets, links to data and other artefacts.
- Enforcement: Publishers require recognition of a Publishers Related Right (PRR) in order to enforce rights alongside those of authors. In a digital environment, where the publishers’ contribution results in clear improvements of the published edition of a work, this is increasingly necessary to combat piracy and free-riding and needs to be clarified.
- Share of statutory licensing fees: publishers require confirmation of the entitlement to receive a share of statutory licensing fees jointly with their authors, partly due to recent CJEU case law.

Thus, the PRR would serve to recognize the unique contribution of publishers in the cycle of creating and versioning content, their investment and responsibility in the production and publication of works destined for publication.

The practical impact of the PRR would be to protect the publisher's investment by making enforcement against infringing activity easier and to ensure that the value chain with aggregators and intermediaries can be effectively negotiated to establish a level playing field. Finally, the PRR would serve to clarify that publishers should receive a share of statutory licensing fees collected by Collective Management Organisations (CMOs), a lacuna in the current EU copyright framework as lately clarified by the CJEU and the German *Bundesgerichtshof*.

### **ABOUT STM AND ITS MEMBERS**

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 European 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 through some online market places and engage readers through internet search engines, social networks and app stores. The advent of the digital age has brought about significant changes for the publishing industry and, to illustrate, a recent Scholarly Kitchen Blogpost<sup>1</sup>, Kent Anderson expanded upon a 2012 article then listing 60 things publishers to 96 things publishers do in 2016. In merely 4years, the role of publishers had expanded by approximately 33% and it is predicted that, at the current rate, publishers will be tasked with more than 200 things by 2025 implicating further exponential growth in responsibility. The role of publishers is increasingly crucial and the sector's importance to society immense.

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<sup>1</sup> Anderson, K. (2016). 96 Things Publishers Do (2016 Edition). [Blog] *The Scholarly Kitchen*. Available at: <https://scholarlykitchen.sspnet.org/2016/02/01/guest-post-kent-anderson-updated-96-things-publishers-do-2016-edition/> [Accessed 31 Mar. 2016].