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Ministry of Education and Culture
Helsinki
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Dear Sirs / Mesdames

Statement and Opinion of the International Association of Scientific, Technical and Medical
Publishers (STM) regarding

The draft of the Government Bill to Parliament proposing amendments to the Copyright Act and
Section 184 of the Electronic Communications Services Act and its § 38 specifically

PREFACE

STM relies on an automated English translation of the proposed Bill (“the Draft”). Should there be any translation error or misunderstanding due to mistranslation, we would welcome it, if this could be pointed out to STM, should this submission be too critical or substantively incorrect as a result of any translation issue.

In this brief submission, STM will focus its opinion on a provision within the Draft that is of particular importance to members of STM and its members, i.e. **§38**.

STM strongly opposes the introduction of **§ 38** as we find it contrary to EU and international law. With this document we wish to offer the STM perspective and analysis of this provision in **greater depth**.

STM VIEW ON §38 OF THE DRAFT LAW

GENERAL REMARKS

Firstly, Finland has a long tradition of leadership in copyright law and intellectual property and, for this reason alone, Finland should take great care to continue respecting its international and EU obligations by only implementing new laws or policies consistent with Finland's existing obligations. Even outside the area of intellectual property, Finland has made a name for itself to act responsibly and in line with international agreements. The current §38 and some of the DSM implementing provisions contained in the Draft fall short of this long and commendable tradition.

Second, Finland should avoid taking measures that have unintended consequences and also that may be enforceable in Finland only, but lack effect and to some extent harm Finnish authors and publishers seeking an international show-case and recognition. In this regard, STM posits that §38 of the Draft is actually full of unintended consequences and counter-productive to the interests of Finnish authors and publishers, and even of foreign authors and publishers with whom Finnish authors seek to collaborate. The net result would be a reduction in the available access possibilities of Finnish authors of publishing opportunities and collaboration opportunities. STM urges Finland's lawmakers to study comparable copyright texts of other countries, especially in France and Germany, rather than proceeding with the current harmful provision.

Below, STM elaborates on an analysis of §38 in the light of international law, EU law and also in the light of existing provisions in France and Germany that are to some extent comparable, but far more narrow in scope.

This analysis is then followed by an assessment of unintended consequences the new §38 of the Draft may have.

Finally, STM ventures to make some recommendations how to proceed regarding §38 of the Draft.

DEFINITIONS¹

Accepted Manuscript (AM): The version of a journal article that has been accepted for publication in a journal. A second party takes permanent responsibility for the article. Content and layout follow publisher's submission requirements.

Version of Record (VoR): A fixed version of a journal article that has been made available by any organization that acts as a publisher by formally and exclusively declaring the article "published". This includes any "early release" article that is formally identified as being published even before the compilation of a volume issue and assignment of associated metadata, as long as it is citable via some permanent identifier(s). This does not include any "early release" article that has not yet been "fixed" by processes that are still to be applied, such as copy-editing, proof corrections, layout, and typesetting.

Re § 38, read with 27(4) of the Draft

Parallel Publication Exception (presented as an author's "right")

1. The explanatory memorandum accompanying the Draft suggests that §38 of the Draft, read with §27(4) of the Draft, has the ambition of giving effect to Finland's Open Science and Open Access Policy, underpinned by EU and UNESCO calls for greater Open Science and Open Access.
2. This submission is not intended to engage with any of those underlying policies, but rather to point out that the implementation through §38 of the Draft from a copyright law perspective is fundamentally flawed in multiple ways, and that from a science publishing market perspective, the provision will have harmful unintended consequences for Finnish authors and publishers of science.
3. Nonetheless, we note that the Draft fails to acknowledge and reflect the current reality where the VoR is currently immediately available for all Finnish authors for almost all journals via a paid Open Access model and via transformative agreements.

¹ As per NISO-RP-8-2008, Journal Article Versions (JAV): Recommendations, April 2008 (Visited 28 October 2021).

A. International and EU legal perspective as well as comparison with comparable yet less far-reaching French and German legal provisions

4. §38 of the Draft purports to create a parallel publication “right” of an author of a scientific article and does so in rather broad and undefined terms, even allowing an author to rely on this so-called right against the wishes of his or her co-authors. In fact, the so-called “right” is actually a copyright exception or limitation of the (sole) author’s exclusive right, and in some way, of his or her non-consenting co-authors’ exclusive rights. Under EU applicable directive, there is a closed list of exceptions and limitations permissible under directive 29/2001. Later directives also do not create any comparable exception in EU law, nor a basis for a national exception. This is perhaps the reason the exception has been presented as a “right”. Apart from there being an obligation on Finland to not introduce exceptions and limitations not enumerated in the EU copyright acquis, the EU copyright acquis also contains the famous 3-step test originating from the Berne Convention of 1971 (Paris text) and binding Finland also under the TRIPS Agreement as well as WCT, for which adoption in 1996 the Finnish delegation may proudly claim a fair share of considerable credit for.

4.1 §38 purports to create a “parallel publication right” for an author or for each co-author of a scientific article. In reality, the provision is an exception or limitation of the author’s exclusive right of reproduction and communication to the public and/or the author’s exclusive right of making available to the public. These rights are guaranteed under the Finnish copyright act and also under the relevant WIPO Copyright Treaty Provisions, the TRIPS Agreement and also in EU copyright directive 29/2001. The only legal mechanism to limit this right has to be consistent with the famous Berne Convention 3-step test, which is not only binding on Finland directly, but also by virtue of the 3-step test having been included both in the EU Directive 29/2001 and also the DSM Directive, the very Directive the present Draft seeks to implement.

4.2 §38 of the Draft is not consistent with the aforementioned 3-step test as it is general (not limited to certain special cases), and conflicts with the normal exploitation of the author’s right – publishing a science article in a science journal has to be considered a “normal exploitation” of the copyright subsisting in the author’s article (See also Art. 2(4) Berne Convention specifically protecting scientific works).

4.3 §38 also is causing unreasonable prejudice to the legitimate interest at least of co-authors who may disagree with the reliance of one among their midst on the said exception or limitation from copyright, forcing their hand to a parallel publication of their contribution to scientific article.

5. In Germany §38(4) of the Copyright Act² is very specific as to how an “accepted manuscript version” (AM) may be re-used by the author, where the author has conveyed exclusive rights to a publisher. Under no circumstances may the accepted manuscript version be changed or adapted, even less to approximate the look and feel or usability of a Version of Record (VOR), which would go against the balanced solution that §38(4) of the German Copyright Act was meant to introduce. The aims of the said article were to balance the interest of wide availability of scientific information with the recognized commercial interest of the publisher. Recognising the publisher’s investment and production and organization of peer-review of the final article version. According to the latest Copyright Bill in Germany, meant to implement the DSM), §38(4) of the German Copyright Act will be given even wider scope of application as the provision will be mandatorily applicable to articles about German research if funded by more than 50% from public sources, even if publishing agreements are entered into under the laws of other countries. In other words, the German balance will apply regardless of the law of the contract of the governing publishing agreement. Consequently, the fact that a research article would have been written outside Germany or by non-German authors or author teams would no longer matter, as long as the research funding emanates from Germany in the required proportion. The German law is very clear that any re-use of the raw manuscript legitimately to be made has to be accompanied by a link and correct reference to the VOR. Many examples of these articles show that in many if not most instances the link to the VOR is absent. Instead, a link and reference to a “free version” of lesser authority is very prominent to the detriment of the advancement of science.

² §38(4) of the German Copyright Act: “§38(4) Der Urheber eines wissenschaftlichen Beitrags, der im Rahmen einer mindestens zur Hälfte mit öffentlichen Mitteln geförderten Forschungstätigkeit entstanden und in einer periodisch mindestens zweimal jährlich erscheinenden Sammlung erschienen ist, hat auch dann, wenn er dem Verleger oder Herausgeber ein ausschließliches Nutzungsrecht eingeräumt hat, das Recht, den Beitrag nach Ablauf von zwölf Monaten seit der Erstveröffentlichung in der akzeptierten Manuskriptversion öffentlich zugänglich zu machen, soweit dies keinem gewerblichen Zweck dient. Die Quelle der Erstveröffentlichung ist anzugeben. Eine zum Nachteil des Urhebers abweichende Vereinbarung ist unwirksam.”

English translation by German Federal Ministry of Justice and Consumer Protection: “§38(4) The author of a scientific contribution which results from research activities at least half of which were financed by public funds and which was reprinted in a collection which is published periodically at least twice per year also has the right, if he has granted the publisher or editor an exclusive right of use, to make the contribution available to the public upon expiry of 12 months after first publication in the accepted manuscript version, unless this

6. Similarly, in France, research articles that are funded by more than 50% of public funding, not counting the salary of any authors for purpose of this calculation would permit the deposit by the author of an accepted manuscript for non-commercial purposes, yet only in unchanged form. As such French law may well give the publisher as the rights holder of exclusive rights based on a publishing agreement (*contrat d'édition*) all the rights and remedies to take action against unauthorised modifications to articles whether rising to the level of derivative works or simply representing a form of republication in an alternative unauthorized format. Normally, the holder of publishing rights would be the one authorizing republication, say, in a collection or in a paper back format of a first hard-back edition. Even revised editions, 2nd editions are authorised in this way, where the originating publisher holds exclusive publication rights under publishing agreement.³

B. Legal Assessment and Analysis of §38 of the Draft

7. In comparison to the approaches taken by other countries, e.g., France and Germany, a number of elements in the Finnish text are either absent or insufficiently developed such as the following:

serves a commercial purpose. The source of the first publication must be cited. Any deviating agreement to the detriment of the author shall be ineffective." https://www.gesetze-im-internet.de/englisch_urhg/englisch_urhg.html

³ Article 533 (4) of the Research Act, reads as follows (the writer's translation followed by the French original: "Art. L. 533-4.-I.-When a scientific paper from a research activity funded at least half by state, local or public funding, grants from national funding agencies or European Union funds is published in a periodical published at least once a year, its author has, even after granting exclusive rights to a publisher. , the right to make available free of charge in an open format, digitally, subject to the agreement of potential co-authors, the final version of its manuscript accepted for publication, as long as the publisher itself makes it available free of charge digitally or, failing that, at the end of a current period from the date of the first publication. This period is no more than six months for publication in the fields of science, technology and medicine and twelve months in the humanities and social sciences. "The version made available under the first paragraph cannot be exploited as part of publishing activity of a commercial character."

French Original Text: « Art. L. 533-4.-I.-Lorsqu'un écrit scientifique issu d'une activité de recherche financée au moins pour moitié par des dotations de l'Etat, des collectivités territoriales ou des établissements publics, par des subventions d'agences de financement nationales ou par des fonds de l'Union européenne est publié dans un périodique paraissant au moins une fois par an, son auteur dispose, même après avoir accordé des droits exclusifs à un éditeur, du droit de mettre à disposition gratuitement dans un format ouvert, par voie numérique, sous réserve de l'accord des éventuels coauteurs, la version finale de son manuscrit acceptée pour publication, dès lors que l'éditeur met lui-même celle-ci gratuitement à disposition par voie numérique ou, à défaut, à l'expiration d'un délai courant à compter de la date de la première publication. Ce délai est au maximum de six mois pour une publication dans le domaine des sciences, de la technique et de la médecine et de douze mois dans celui des sciences humaines et sociales.

« La version mise à disposition en application du premier alinéa ne peut faire l'objet d'une exploitation dans le cadre d'une activité d'édition à caractère commercial », see https://www.legifrance.gouv.fr/jorf/article_jo/JORFARTI000033202841

- 7.1 The Finnish text does not limit the version to be published to an Accepted Manuscript which both the German and French provisions do.
- 7.2 The Finnish text does not include an embargo period, typically 12 months, provided the article version is the Accepted Manuscript, not the so-called “Version of Record” or “Final Published Article”.
- 7.3 The Finnish text does not define what funding applies in determining whether an article is subject to §38. This could be a private Finnish citizen or citizens (and in practice most science articles have co-authors from 2 or more countries, the average number of co-authors of STM’s members’ journal publications is 4.8 authors per article of at least two countries).
- 7.4 The Finnish text does not limit the re-use of an article to non-commercial re-uses nor gives indications as to licensing options to allow for the re-use of works.
- 7.5 The Finnish text does not preserve, or even acknowledge, the counter-vailing interest of co-authors. In doing so, the text actually strips away the rights of co-authors NOT to have the right exercised.
- 7.6 The Finnish text states that the author may “abandon” their so-called “right” if that is in his or her favour, but it is unclear how that could be legally done (see also the critique below on the inadequacy of §38 meeting the requirements of any Finnish Open Science aspiration in this regard). The Finnish text does not suggest what should happen if the “favour” of one co-author may be sufficient to limit the right of another co-author. For example, if one co-author from a middle or low income country would prefer not to publish in Gold Open Access, avoiding thereby their share to have the article published, and instead would like to opt for a conventional publication, would that be a waiver “in the author’s favour” of a fee? The draft legal text is unclear and bodes for confusion in the context of international collaboration amongst multiple authors.
- 7.7 The Finnish text makes no provision and lacks clarity as to its applicability where the law of the contract between a publisher and an author, or the co-creation agreement between authors, is not Finnish law. If the parties choose the law of the domicile or seat of the publisher or the law of another co-author to regulate how they may exercise their joint rights, would Finnish law and courts respect this choice of law? §38 of the Draft provides no answer.
- 7.8 Overall, the legal basis for the Finnish text is unclear, and no solid interplay is established between contract law, publishing agreements and copyright law. As drafted, §38 might lead to conflicts between the publisher’s copyright and the rights allegedly attributed to authors to publish the same paper in multiple venues.

- 7.9 The Finnish text might have implications on research integrity, as it allows for the promulgation of multiple, potentially incorrect versions.
- 7.10 Although the provisions introduced in Germany and France could be brought more closely in line with the 3-step test and the closed list of allowable exceptions under EU law, they at least contain checks and balances to safeguard the legitimate interests of publishers and the co-authors of any author seeking to rely on them.
- 7.11 The German provision also does not undermine the rights of co-authors. There, German law has a specific provision of how authors may exercise their joint rights, either jointly or at least not unreasonably. The comparable provision in France also preserves the rights of co-authors expressly. In contrast the Finnish Draft §38 2nd paragraph purports to insulate the so-called “right” from the rights of co-authors. This is an interference with the exclusive rights of co-authors and as such an exception and limitation – and one not foreseen in EU law and inadmissible under international agreements Finland is a party to.

C. Negative Unintended Consequences of §38 of the Draft

8. The unbounded nature of the provision is particularly harmful, particularly the absence of:
- 8.1 Embargo periods that are discipline specific, for example embargoes around 1 year for natural sciences and perhaps 2 years for social science articles, severely risk undermining the market for such works;
- 8.2 A restriction to cases of articles written by researchers, who have received a majority of government-funding underlying the research of the article’s subject, is an over-reach and no basis for a copyright exception - even if intended to benefit the author (to the detriment of co-authors and his or her publisher).
- 8.3 A restriction to a re-publication right as an “Accepted Manuscript” version only, not as a Version of Record, appropriating the publishers investment, signage and input and added-value functionality of electronic content, is disproportionately harming the interest of the publisher.
- 8.4 Restricting the application to published articles. Without this condition, it becomes more difficult to distinguish pre-prints, prior to peer-review and actually published and peer-reviewed research. There is a danger of low or no quality publications being promulgated and undermining the public trust in legitimate scientific articles.

- 8.5 A commercially relevant embargo period prior to allowing the republication of an Accepted Manuscript version. The absence of this necessary safeguard could easily force Finnish research authors to publishing models such as Gold Open Access which may or may not be in line with the wishes or the budgets of their co-authors. This in turn could preclude certain important research collaborations and diminish the influence of Finnish scholars in the global research community. The end result could be that the other authors will only agree to a Finnish co-author joining the project, if the institution of the Finnish author undertakes to fund the publishing cost upfront in a Gold Open Access journal.
9. The memorandum accompanying §38 maintains that a principal driver for §38 is to avoid Finnish authors violating research grant provisions that mandate immediate open access publication or the terms of their publishing agreement. Unfortunately, §38 only exacerbates the potential risk of the Finnish researcher. STM would welcome the opportunity to collaborate in the development of a provision that advances our shared goal of Open Science and avoids the harmful consequences of §38 as it now stands for authors, co-authors and publishers in and outside Finland.

D. Recommendations

10. STM opposes enacting §38 in its present form.
11. Instead, more research and investigation should be undertaken to assess:
- 11.1 The legal scope and ambit of a Finnish copyright provision seeking to limit the author's right;
 - 11.2 The compatibility with EU and international law, especially the 3-step test.
 - 11.3 How the Finnish provision compares to similar provisions in other research-intensive EU countries, such as France or Germany;
 - 11.4 The impact on co-authors who appear under §38(2) to be deprived of their exclusive rights without necessarily expecting to be in this position merely by having a Finnish co-author.

We very much thank you for the opportunity to participate in this consultation and STM would be more than happy further to participate and contribute to the lawmaking process in Finland.

Sincerely / Yours faithfully

STM

PER: PHILIP CARPENTER, CEO

Cc: Ms. Barbara Kalumenos, Director, Public Affairs

Mr Carlo Scollo Lavizzari, Lenz Caemmerer Basel, outside legal counsel

About STM

At STM we support our members in their mission to advance research worldwide. Our over 140 members based in over 20 countries around the world collectively publish 66% of all journal articles and tens of thousands of monographs and reference works. As academic and professional publishers, learned societies, university presses, start-ups and established players we work together to serve society by developing standards and technology to ensure research is of high quality, trustworthy and easy to access. We promote the contribution that publishers make to innovation, openness and the sharing of knowledge and embrace change to support the growth and sustainability of the research ecosystem. As a common good, we provide data and analysis for all involved in the global activity of research.