



INTERNATIONAL ASSOCIATION OF SCIENTIFIC, TECHNICAL & MEDICAL PUBLISHERS

Oxford, 22 December 2010

To: LEGAL DEPOSIT OF NON-PRINT WORKS CONSULTATION:
DRAFT REGULATIONS

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STM submission on:

“Consultation on Legal Deposit of Non-print Works”

The International Association of Scientific, Technical and Medical Publishers (“STM”) comprises approximately 100 publishers of journals and reference works, based in 26 countries, including many in the United Kingdom and other Member States of the European Union. EU-based publishers publish 49% of all research articles worldwide (STM’s members may originate approximately 2/3 thereof), employing 36,000 staff directly and another 10-20,000 indirectly, and make an Euro 3 billion contribution to the EU’s balance of trade. Apart from publishing in print, STM publishers originate and disseminate online, books, journals databases and individual articles and contributions (hereinafter: “Content”) of a multitude of European and international scientific, medical and technical authors and scholars. This creative Content is available widely in electronic and in print form for access by individuals, whether through academic and corporate libraries or directly, for use in research, education, in industry the professions and business.

STM welcomes this opportunity to make its submission as part of the Consultation on Legal Deposit of Non-print Works (the "NPW Consultation") on Draft Regulations to the Legal Deposit Act 2003 (the "Draft Regulations").

STM's submission is composed of two parts:

- A. STM position and comment regarding Legal Deposit Policy and the present Draft Regulations; and
- B. STM answers to specific questions contained in Annex A of the NPW Consultation.

Moreover, STM supports the submission of the Publishers' Association (PA) and the Association of Learned and Professional Society Publishers (ALPSP).

Very truly yours,



Michael Mabe,
Chief Executive Officer

Cc: Richard Mollet, CEO, The Publishers' Association
Ian Russell, CEO, the Association of Learned and Professional Society Publishers

STM SUBMISSION ON

A. STM Principles for Legal Deposit and the current Draft Regulations (UK)

1. Legal Deposit Policy

STM's responses to the detailed questionnaire are informed by the following broad principles:

- Legal deposit in the digital age, more than ever before, is a shared responsibility, and close co-operation by all stakeholders is required to make it a success.
- The purpose of legal deposit is to collect, within a clearly defined collection priority, publications that form part of the national heritage of a country, eg "at-risk publications of national import". Given the enormous amount of content that might be arguably relevant to national heritage, a country should set clear priorities to ensure that its most critical and important heritage is collected, otherwise there is a risk of duplication and squandering of resources.
- Copies and Non-print works deposited must not be used like other materials forming part of a library's collection. In particular, legal deposit copies must not be used as the source of reproductions and other uses made under copyright exceptions and limitations applicable in national copyright law.
- Access must be limited in number (finite number of read-alone/display-only terminals; no simultaneous access in excess of copies deposited) and location (inspection on premises only, access on-the-spot via secure terminals only). The Berne Convention Three-Step Test must be respected¹

¹ . 9(2) Berne Convention, Art. 13 TRIPS, Art. 10 WIPO Copyright Treaty (WCT), Art 5(5) Directive 2001/29 EC:: "The exceptions and limitations provided for in paragraphs 1, 2, 3 and 4 shall only be applied in

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2. Draft Regulations

Whilst the current Draft Regulations are much improved and STM is able to agree and accept a fair number of rules contained in them, the following key issues should be further considered and, where possible, refined, before the Draft Regulations are put into operation:

1. Need to choose well what to preserve - Absence of clear guidance on collection priority:

In the present reality, the world suffers from an over-abundance of information resources. No legal deposit library will be able to collect and preserve all, but will have to choose. This is perhaps the critical factual difference, any modern legal deposit legislation has to take into consideration. Concomitantly, it becomes essential to choose what to preserve – and to choose well, avoiding duplication.

It would appear that the legal framework does not offer guidance on collection policy. This entails the risk that the legal deposit libraries will make ad-hoc decisions on collection. Also, they should be encouraged to work with publishers who clearly understand the need for long-term preservation and have already made more than adequate arrangements to preserve their publications in an integral fashion. The legal deposit libraries should, in the view of STM, collect and preserve UK national heritage that is essential and falls into a legally defined priority of collection policy..

2. Data security:

The Draft Regulations and Guidance do not offer much insight into the all crucial issue of data security. Especially publishers of digital material are concerned with system security, as their livelihood depends on it.

3. Access Limited to On-site, Limited in Number:

There are some statements and tendencies in the Impact Assessment and Guidance Document that would appear to see an

certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder”.

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additional objective of the Draft Regulation to be a wider access provision. This undermines the enthusiasm and confidence of the publishing community into the true motive of long-term preservation that is being pursued. In this regard STM is concerned about Regulations 23 and 24 which purport to widen access (see also our response to questions 14 and 15 below in part B of this submission).

4. **Governance and Periodic Review are Key:**

As information age hurtles forward, the Draft Regulations run the risk of becoming out-dated quickly. Moreover, a responsive mode is required to deal with changes under the regulations. A proper stakeholder governance structure and a dispute settlement mechanism may benefit the Draft Regulations in achieving their end.

On a positive note, the sunset / obligation to review provision that will let the legislation lapse in 2018, is a welcome sign that the Government is committed to on-going consultation and periodic adaptation of the legal framework to address new technology and emerging concerns.

Respectfully submitted
For and on behalf of the International STM Association
22 December 2010

B. STM Answers to the Questionnaire in Annex A of the Consultation on Legal Deposit of Non-print Works

Question Number	Question
1	<p>Will these Regulations provide for a meaningful national archive of non-print publications to be deposited with the Legal Deposit Libraries? Please provide an answer for each category:</p> <ol style="list-style-type: none"> 1. Off line publications, 2. On line publications which are free of charge and without access restrictions, 3. On line publications which are subject to a charge or access restrictions <p>If not why not? Please provide reasons and evidence.</p> <p><i>Offline publications: the scheme of the Act and Regulations will provide a framework for meaningful coverage. It must be noted, however, that the coverage will be limited to UK publications and therefore not measure all of the UK's research or innovation or creative output, but at the same time include research output generated outside the UK, but published in the UK.</i></p> <p><i>Online publications: the collection criteria are insufficiently clear and in STM's view there is a risk that the collectors of information may be defaulting to collect based on a diversity of ad-hoc criteria, including easy availability/harvestability, rather than on the basis of more concrete and agreed criteria.</i></p>
	Draft Regulations - Introduction
2	<p>Regulation 2(3) – The Regulations are intended to cover all types of non-print publications. Do you agree with this approach? If not, why not? Please provide reasons and evidence.</p> <p><i>In general, there is no objection to a broad definition, as long as the definition is reviewed over time, including at the time</i></p>

	<i>of the "sunset" in 2018.</i>
3	<p>Regulation 2(3) – The Regulations provide some illustrative examples of the types of non-print publication which are covered. Are there any other examples of non-print publication which should be that should be expressly included? Please list them.</p> <p>Do you foresee any difficulties with the definitions which we have used? If so, please give reasons and evidence. Please suggest an alternative.</p> <p><i>No comment.</i></p>
4	<p>Regulation 2(3)</p> <p>Should we include the following in the Regulations:</p> <p>Off line publications?</p> <p>On line publications which are not subject to any access restrictions and which are freely available?</p> <p>On line publications which are there is a charge or which is subject to public access restrictions?</p> <p>Electronic publications which comprise material packaged and filtered in response to an enquiry from a user?</p> <p>If not, why not? Please provide reasons and evidence.</p> <p><i>STM does not believe that the last category, ie "electronic publications which comprise material packaged and filtered in response to an enquiry from a user" is desirable or feasible. There would be an obligation to deposit an infinite number of publications depending on the number of user-queries on databases offered.</i></p>
	Draft Regulation - Deposit
5	<p>Regulation 5(2) – When substantially the same work is published in both print and non-print, the Regulations must provide that the medium for delivery is print unless an alternative medium has been agreed between the publisher and the Legal Deposit Library.</p> <p>Are there any consequences that make this impracticable? If so what are they? Please provide reasons and evidence.</p> <p><i>It does make sense to avoid duplication. Over time, it is hoped that the default will be an electronic deposit. This would, however, necessitate a greater flexibility on the part of the deposit libraries to accept a variety of standard electronic publication formats.</i></p>

<p>6</p>	<p>Regulation 5(2) – The Regulations do not make provision as to the circumstances in which works are or are not to be regarded as substantially the same for these purposes as we think that this will depend on the nature of the work and will evolve over time. We also consider that this is an issue which the Legal Deposit Libraries and the publishers can and should agree between themselves.</p> <p>Do you agree? If not, please provide reasons and suggest how: (a) the Regulations or (b) the Guidance should address this. Please provide evidence.</p> <p><i>It is impossible to cover all possible cases in the Regulations. Publications differ due to updates and formatting. The need to reach an understanding between each individual publisher, the depositors, and the legal deposit library seems inevitable.</i></p>
<p>7</p>	<p>Regulation 5(3) – When substantially the same work is published in more than one medium i.e. a word document or a pdf, the Regulations provide that the medium of delivery shall be agreed between the publisher and the legal deposit library. However, the Legal Deposit Libraries Act 2003 stipulates that we must make it clear in the Regulations which medium prevails. Therefore, the Regulations provide that if the publisher and the legal deposit library cannot reach agreement, it is up to the publisher to decide in which medium they should deposit the work.</p> <p>Are there any consequences that make this impracticable? If so what are they? Please provide reasons and evidence.</p> <p><i>STM is supportive of this solution and applauds it as simple, clear and practical.</i></p>
<p>8</p>	<p>Regulation 5(3) – The Regulations do not make provision as to the circumstances in which works are or are not to be regarded as substantially the same for these purposes as we think that this will depend on the nature of the work and will evolve over time. We also consider that this is an issue which the Legal Deposit Libraries and the publishers can and should agree between themselves.</p> <p>Do you agree? If not, please provide reasons and suggest how: (a) the Regulations or (b) the Guidance should address this. Please provide evidence.</p>

	<i>Our response to question 6 applies with equal force.</i>
9	<p>Regulation 13 – The quality of non-print work should be agreed between the Legal Deposit Libraries and the publisher and should be the most suitable for preservation purposes. If agreement cannot be reached the publisher will decide upon the quality of works to be deposited.</p> <p>Do you consider this the most appropriate approach? If not what do you suggest and why? Please provide evidence.</p> <p><i>Our response to question 7 applies equally.</i></p>
10	<ul style="list-style-type: none"> • Regulation 14 - This covers on line publications which are available free of charge and which are not subject to any public access restrictions. These publications must be delivered as soon as reasonably practicable after a request from a legal deposit library. • Publishers will only have to deposit once with the requesting legal deposit library and will not have to send copies to the other legal deposit libraries. • Do you agree with this approach? If not, please provide reasons and any suggestions you may have for an alternative approach. Please provide evidence. <p><i>STM agrees with the above approach, but would like to note that freely accessible publications should not fall under a different access scheme and should be deposited under the same terms and conditions as other publications. Almost all publications, whether freely accessible or not are funded through a variety of income streams, including sponsored access or advertising revenue models. It is pivotal that legal deposit does not undermine the running of these publications depending on new business models.</i></p>
11	<ul style="list-style-type: none"> • Regulation 17 – This covers on line publications for which there is a charge or which are subject to public access restrictions. These publications must be delivered within three months of a request from a deposit library unless

	<p>the request specifies delivery within a period exceeding three months but within the period specified.</p> <ul style="list-style-type: none"> • As indicated in the Guidance, we included the possibility of a period longer than three months in order to accommodate those publishers who may need more than three months in order to meet this obligation • Regulation 18- Publishers will only have to deposit once with the requesting legal deposit library and will not have to send copies to the other legal deposit libraries. • Do you agree with this approach and are these timings practical? If not, please provide reasons and any suggestions you may have for an alternative approach? Please provide evidence. <p><i>STM believes that 3 months is an adequate time frame, provided the legal deposit library requesting a publisher to deposit is willing to move the time frame, reasonably.</i></p>
<p>12</p>	<p>Regulation 19 – A request for deposit must be made in writing (whether sent by web harvester or other means). Are there any consequences that make this impracticable? If so what are they? Please provide evidence.</p> <p><i>The above is acceptable.</i></p>
<p>13</p>	<p>Regulation 21 – This covers both on line publications for which there is a charge or which are subject to a public access restriction and also on line publications which are available free and which are not subject to any public access restriction. The regulation provides that the quality of the deposited work should be agreed between the legal deposit library and the publisher and should be the quality most suitable for preservation purposes. The regulation also provides that if agreement cannot be reached the publisher will decide upon the quality of the work to be deposited. Do you consider this the most appropriate approach? If not what do you suggest and why? Please provide evidence.</p>

	<i>The above is agreeable.</i>
	Draft Regulations - Permitted Activities
	<u>Providing access to the relevant material</u>
14	<ul style="list-style-type: none"> Regulation 23 - This provides that access to the same non-print work is restricted to one display terminal at any one time in each of the Legal Deposit Libraries. Therefore the same non-print work can only be viewed on a maximum of six display terminals at the same time as there are only six Legal Deposit Libraries (including Trinity College Dublin). This mirrors the system for printed publications whereby a maximum of six copies of the same work are available for readers across the six Legal Deposit Libraries. <p>Do you agree with this approach? If not please give reasons and suggest an alternative. Please provide evidence.</p> <p><i>The purpose of legal deposit is to ensure the long-term preservation and availability of publications of a UK origin. Legal deposit depends fundamentally on co-operation between the stakeholders. Widening access undermines this co-operation.</i></p> <p><i>Therefore, STM does not agree with the absence of a clear definition of "premises". Any access must be limited to a single simultaneous access in any one of the legal deposit libraries. In other words, either access is provided via a stand-alone terminal from which no on-copying is technically possible, or access is limited to a print copy with no reproduction facilities available in the reading room in question.</i></p> <p><i>Moreover, the Draft Regulations seem to use the terms "work", "materials" and "publication" in inconsistent ways. This needs to be clarified. At the end of the day, legal deposit should not lead to a widening of access, but rather be focused on archiving and preservation for the long term.</i></p>

	<p><i>Legal deposit library should be obliged to provide access and usage statistics on a periodic basis and/or on request. This would ensure that abuses are quickly detected and corrective measures adopted.</i></p>
15	<p>Regulation 24 - This provides that a legal deposit library may not allow access to a deposited work if a publisher has requested an embargo for a period not exceeding three years from the date of the request. The deposit library may not refuse the request if the publisher has shown that on a balance of probabilities, viewing by a reader would conflict with the normal exploitation of the work and unreasonably prejudice the legitimate interests of the publisher.</p> <p>Regulation 27-This provides that an embargo may be extended. Do you agree with this approach? If not please give reasons and suggest an alternative. Please provide evidence.</p> <p><i>Embargo periods are essential, in STM's view. The purpose of legal deposit is not to facilitate document delivery or other purposes outside long-term preservation. Embargo periods are designed to re-enforce this and will assist especially publishers of vulnerable journals with only small circulation numbers to survive.</i></p> <p><i>As mentioned in response to question 14, the purpose of legal deposit is to ensure the long-term preservation and availability of publications of a UK origin. Legal deposit depends fundamentally on co-operation between the stakeholders. Widening access undermines this co-operation. Therefore, STM does not agree with the absence of a clear definition of "premises". Any access must be limited to a single simultaneous access in any one of the legal deposit libraries. In other words, either access is provided via a stand-alone terminal from which no on-copying is technically possible, or access is limited to a print copy with no reproduction facilities available in the reading room in question.</i></p>
	<u>Research and private study</u>
16	<p>Regulations 29 and 30 - A legal deposit library may only provide a print copy of an article or part of a work unless permission has been given by the publisher for the legal</p>

	<p>deposit library to make a copy in another medium. Do you agree with this approach? If not please give reasons and suggest an alternative. Please provide evidence.</p> <p><i>STM strongly believes that consultation of legal deposit copies should only take place on the premises, ie the physical location of the legal deposit library and that this should be limited to the United Kingdom (five libraries). The library should be limited to making a copy of an article, if in fact there is risk to the integrity of the legal deposit copy. No copying other than that due to the technical preservation ought to be allowed. Disturbingly, page 69 of the Impact Assessment seems to suggest that legal deposit copies are used to widen access. If this were so, the publishing industry would suffer. Publishers themselves operate document delivery services, or licence third-parties to do so. Legal deposit copies must not be abused to allow legal deposit libraries to enter into unfair competition with the publishers themselves.</i></p>
	<u>Visual Impairment</u>
17	<p>Regulation 31 - This regulation sets out the circumstances in which a legal deposit library may make an accessible copy of a deposited work and the conditions which apply. Do you agree with this approach? If not please give reasons and suggest an alternative. Please provide evidence.</p> <p><i>STM agrees with this approach, as long as access is provided on the premises only, or as long as the reformatting is licensed by the publishers or their agents, such as the Copyright Licensing Agency Ltd.</i></p>
	<u>Copying and adapting for preservation purposes</u>
18	<p>Regulations 32 and 33 - These regulations set out the circumstances in which a legal deposit library may copy or adapt copies of deposited works for preservation purposes and the conditions which apply. Do you agree with this approach? If not please give reasons and suggest an alternative. Please provide evidence.</p> <p><i>The wording is too wide. Any adaptation should be limited to the technically necessary and should remain faithful and as near as possible to the original as submitted.</i></p>

	<u>Disposing of copies of deposited works</u>
19	<p>Regulation 34 - This provides that a deposit library may dispose of duplicate works by destroying them but may not destroy all copies of the deposited works. This regulation also provides that the deposit library must retain the copy or copies of the deposited works which it considers most suitable for preservation purposes.</p> <p>Do you agree with this approach? If not, please give reasons and suggest an alternative. Please provide evidence.</p> <p><i>This is acceptable.</i></p>
	Draft Regulations - Exemption from liability
20	<p>Regulation 35 - This regulation sets out the circumstances in which exemptions from liability apply and thereby define the geographic scope of the works and publishers covered by the regulations.</p> <p>Do you agree that the regulations should only cover publications which are from publishers based in the United Kingdom and also published in the United Kingdom? If not, please give reasons and suggest an alternative. Please provide evidence.</p> <p><i>A limitation to UK publications seems sensible, also from a jurisdiction and practicality point of view. However, the definition of who is considered a UK publisher is too wide and/or vague. STM considers the definition offered by the eJournals Working Group more practical:</i></p> <p><i>"1. An electronic publication is a UK publication if publishing control is exercised in the UK and the publication content is lawfully made available to the public.</i></p> <p><i>2. 'Publishing control' will be deemed to be exercised in the UK if the natural or legal person who exercises the function of making final legal determination to disseminate content carries out this function in the UK.</i></p> <p><i>3. A 'natural or legal person' will be deemed to exercise publishing control in the UK if they do so:</i></p>

	<p>3.1 from their registered office in the UK, or</p> <p>3.2 from a principal or a significant place of business in the UK, or</p> <p>3.3 from a place of establishment identified to be at a UK domain</p> <p>4. For the purposes of these provisions "to the public" means general public and excludes private intranets available only to members of an organisation.</p> <p>5. Publications with no connection to the UK are not included."</p>
21	<p>Regulation 36 - Do you agree that the regulations should NOT cover works which are accessible to readers based in the United Kingdom unless they are published in the United Kingdom by publishers based in the United Kingdom? If not, please give reasons and suggest an alternative. Please explain your position.</p> <p><i>STM agrees.</i></p>
22	<p>Guidance: section 8</p> <p>We have suggested that for on line works which are free of charge and without access restrictions (which will normally be requested via a web harvester), the Legal Deposit Libraries should assume (unless told otherwise) that a Publisher :</p> <ul style="list-style-type: none"> - is based in the United Kingdom; and - is publishing from the United Kingdom; <p>If:</p> <ul style="list-style-type: none"> - the publisher has made it clear on its website that it is based in the United Kingdom, has provided its trading location in the United Kingdom and is based in the United Kingdom for the purposes of the e-Commerce Directive; or - the publication is available from a website with a top level UK domain name. <p>In the event that these assumptions prove incorrect, the Publisher could refuse the deposit request by blocking the web harvester.</p> <p>Other websites may be within scope but will need to be asked directly.</p> <p>Do you agree with this approach? We have suggested that for an on line publication for which</p>

	<p>there is a charge or which is subject to a public access restriction, the test for what amounts to a UK publisher should be based upon the location of who decides to publish the work. How do you think this approach can work in practice?</p> <p>Do you agree that for on line publications from UK based individuals who do not have a trading address, the Legal Deposit Libraries should find a way of directly asking the Publisher whether they are based in the United Kingdom? If not, please give reasons and suggest an alternative Please provide evidence.</p> <p><i>Please refer to STM's response to question 20 above.</i></p>
	Impact Assessment
23	<p>Do you agree with the impact, as set out in the impact assessments, for the Deposit Libraries? If not why not? Please provide evidence and a breakdown of your calculations.</p> <p><i>We note our concern over a passage of the Impact Assessment, page 69, expressed in our response to question 16 above.</i></p>
24-30	<p>If you are a publisher who currently deposits publications in print would you change to depositing non-print works instead? Would this prove to be more economical for you in the (a) short; (b) medium; or (c) to long term? Please state if you are a small, medium and or large business.</p> <p><i>STM comprises small, medium and large members, but is not able to provide this information for its members.</i></p>
	Ireland
31	<p>The 2003 Act allows for non-print works to be deposited with Trinity College Dublin (TCD). The 2003 Act is clear that we should not extend legal deposit to TCD unless the Secretary of State is satisfied that restrictions on use of the material under Irish law are not substantially less than in the UK. We are still awaiting information from Ireland on this issue and we do not propose to extend the Regulations to cover Ireland until we have this comfort. However, for the purposes of the consultation, we consider that the most prudent course is to include TCD as a legal deposit library in the draft regulations. Are there any points which you would like make on this</p>

	<p>issue? Please include, if possible, any evidence with your answer.</p> <p><i>STM believes that there is no need to include TCD, a library of a sovereign state fully independent of the UK, and that the legislation should be changed in this regard. The Draft Regulations should not be made applicable to any part of the Republic of Ireland.</i></p>
	<p>Other</p>
<p>32</p>	<p>Do you have any other comments, issues, concerns or questions? If so please can you clearly label what it is and then set it out, providing any relevant evidence.</p> <p><i>The present consultation process shows that the success of legal deposit depends on a clear and limited purpose: preservation and archiving of UK-published works. In particular, the legal deposit scheme should not be extended to pursue additional objectives, eg arriving at free copies to engage in document delivery or other methods of access provision in competition or to the detriment of publishers.</i></p> <p><i>At a time of rapid technological change, the above applies even more so: only where all stakeholders are clear as to collection policy (collection of what is not already adequately preserved), legal deposit purpose (strictly preservation), legal deposit methods.</i></p> <p><i>The sunset clause with its concomitant duty to review the legal deposit regulation confirms the view that all stakeholders must be consulted at reasonable intervals and that the way in which the intent of legal deposit is matched by its implementation and practice.</i></p>

Information provided in response to this consultation, including personal information, may be published or disclosed in accordance with the access to information regimes (primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004). **If you want the information that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence. In view of this it would be helpful**

if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Department.

The Department will process your personal data in accordance with the DPA, and in the majority of circumstances, this will mean that your personal data will not be disclosed to third parties.

The consultation is guided by the Government's Code of Practice on Consultation which is available at:
<http://www.bis.gov.uk/files/file53268.pdf>.

Respectfully submitted
For and on behalf of the International STM Association
22 December 2010