

**Safe Harbour Provisions for the Digitisation and Making Available of Out Of Commerce Works
forming part of the Scientific, Technical and Medical Literature**

An STM, ALPSP, AAP/PSP Position Paper
(and authorized by publisher signatories below)

In September 2011, the EU witnessed the signature of a Memorandum of Understanding entitled “Key Principles on the Digitisation and Making-available of Out-of-Commerce Works” (the MoU)¹, to which STM and many other organisations acceded.²

As copyright holders, users, publishers and citizens, the publishing community (and publisher associations) have an important stake in the question of allowing uses of so-called out-of-commerce works and to ensure that works from a pre-online, pre-Internet era are not left behind. Publishers also recognize the importance of establishing clear and reasonable rules of practice. We also appreciate the support in such initiatives of organizations such as EWC, IFRRO, EBLIDA, LIBER, and others.³

Each publisher who is a signatory to these Safe Harbour Provisions is hereby notifying prospective users that, to the extent such publisher owns rights in or to “out-of-commerce works,” users who comply with the provisions of the MoU, whether situated within the EU or anywhere else, will be entitled to the “safe harbour” protections noted herein.

Core requirements (see MoU easy-read summary for more detail⁴)

- Users must subscribe to the MoU key principles and successfully collaborate with local rightsholder organisations in developing a digitisation project as envisaged under the MoU.
- Users of an “out-of-commerce work” covered by an implementation agreement and consequent copyright licensing schemes (books, journals and embedded illustrations and visual materials) must be able to demonstrate that they have and maintain adequate policies and procedures, including a reasonably diligent, good faith search to exclude materials that are not out-of-commerce under the MoU and/or that they have obtained additional rights clearance for the use of such materials;
- The use must respect authors’ moral rights and therefore include clear and adequate attribution to the original work, author, original publisher and copyright holder, if possible and as appropriate under the circumstances;
- In the event that a copyright owner or its representative subsequently identifies a work previously deemed to be an “out-of-commerce work” but turning out not to be out-of-commerce, the user must be prepared to pay a reasonable royalty (see below for further guidance); and
- After a work has been so identified, the user must ensure that there is no further re-use or re-utilization of the copyright work (beyond the initial derivative use and subsequent distribution thereof) except as may be agreed with the copyright holder or its representative.

In the event that any of the publishers who are signatories to these Provisions identify works used as “out-of-commerce” and inform the user as to the ownership status of the work, the publishers hereby agree to waive, if the above requirements have been met by the user, any claim or entitlement to all fees or damages including statutory, punitive, exemplary or other special or general damages (other

¹ http://ec.europa.eu/internal_market/copyright/docs/copyright-info/20110920-mou_en.pdf

² CENL EBLIDA, EFJ, EPC, EVA, EWC, FEP, IFRRO, LIBER, STM

³ http://www.researchinformation.info/news/news_story.php?news_id=839

⁴ http://www.stm-assoc.org/2012_10_18_MoU_OOCW_OMIT_in_EU.pdf

than a reasonable royalty as described below). Moreover, to the extent required under the criminal provisions of any copyright law, the publisher signatories approve of an implied licence removing criminal liability of a bona fide user, akin to a situation known in some jurisdictions as a form of innocent infringement.

Reasonably diligent good faith search for copyright owners in scholarly material

The publishers who are signatories to these Safe Harbour Provisions accept that it is not possible to provide an exhaustive list of resources for each scientific, technical or medical discipline that would be useful for a reasonably diligent good faith search. Clearly care must be demonstrated on the part of the user in identifying literary and bibliographic resources that would be most relevant for the work in question and for its customary channels in trade.

The publishers do believe that in virtually all cases searches and reviews must be conducted of these kinds of resources identified generically as:

- Published indexes of published material relevant for the publication type and subject matter;
- Indexes and catalogues from library holdings and collections;
- Sources that identify changes in ownership of publishing houses and publications (see below comment on imprints) including from local reprographic rights organizations;
- Biographical resources for authors;
- Searches of recent relevant literature to determine if the citation to the underlying work has been updated by other users or authors;
- Relevant business or personal directories or search engine searches of businesses or persons;
- Sources on the history of relevant publishing houses or scientific, technical or medical disciplines; and
- Rights databases and federated query systems, such as ARROW and ARROW+.

Additionally, where the user can identify a prior publisher that appears to be out of business, the list of imprints available from this link⁵ should be consulted immediately prior to each use.

Reasonable royalty or similar fee

The publishers who are signatories to these provisions have agreed that the royalty rate or similar fee to be charged will be identical to the publishers' normal permissions request rates. If the use goes beyond the relevant publisher's normal policy for granting permissions, such publisher-signatory commits to making a good faith effort to determine a reasonable royalty rate, taking all circumstances into consideration.

Relationship to STM Statement "Safe Harbour Provisions for the Use of Orphan Works for Scientific, Technical and Medical Literature"⁶

Whilst the Orphan Works Safe Harbour is concerned primarily with a reasonably diligent search in a "vertical" sense, ie along the chain of title, the identification of a work as being out-of-commerce requires a "horizontal" search, ie across varying customary trade channels. **Publisher signatories to the two Safe Harbour statements recognise that a user would only have to meet one type of search to benefit.** Accordingly, the signatories to this statement agree that where a work is found to be both out-of-commerce and later also found in fact to have been an orphan work as well, the

⁵ For STM list, see: <http://www.stm-assoc.org/documents-statements-public-co/2007.10%20Science-Medical%20Publisher%20Imprints%20List.pdf>

⁶ http://www.stm-assoc.org/2007_11_01_Safe_Harbor_Provisions_for_the_Use_of_Orphan_Works.doc

publisher signatory hereto agrees that whichever more favourable safe harbour from the bona fide user's perspective applies to the uses regarding the work in question.

Publisher signatories/ imprints:

The publishers who have signed below have agreed with these provisions to extend a "safe harbour" for uses of "out-of-commerce works" whose "parentage" or ownership is later identified.

American Chemical Society
American Institute of Physics
BMJ Publishing
CABI
Elsevier (including Woodhead Publishing)
Emerald Group Publishing
Hogrefe Verlag GmbH & Co KG
IWA Publishing
John Wiley & Sons
Massachusetts Medical Society
Springer Science+Business Media
Taylor & Francis
Thieme Publishers
Wolters-Kluwer Health

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