



American Library Association



Association of Research Libraries



SPARC
(Scholarly Publishing & Academic
Resources Coalition)

MANDATORY PUBLIC ACCESS TO FEDERALLY FUNDED RESEARCH DOES NOT VIOLATE COPYRIGHT OBLIGATIONS

In recent communications to members of Congress, several publishers of scientific, technical, and medical (STM) journals have argued that the proposed legislative changes to the NIH Public Access Policy would violate U.S. treaty obligations under Article 13 of TRIPS and Article 9 of the Berne Convention, and potentially constitute a “compulsory license.” These arguments have no merit.

The proposed provision included in the Labor, Health and Human Services, Education and Related Agencies FY 2008 Appropriations Bill would require all investigators funded by NIH to submit an electronic version of their final peer-reviewed manuscripts to the National Library of Medicine’s PubMed Central (PMC), which would then make the manuscript publicly available within twelve months of the official date of publication.

Contrary to the STM publishers’ assertions, this policy does not create a statutory exception or limitation to an investigator’s copyright. Rather, it merely requires the NIH to condition its grant of funding to the investigator on his agreement to provide PMC with a copy of his article for the purpose of making the article publicly available via PMC.

In other words, if the investigator chooses not to receive NIH funding, he need not provide his article to PMC. But if he elects to receive NIH funding, he must accept certain reasonable conditions, including deposit of the article with PMC so that the article can be made publicly accessible. This condition serves the interests of the public, which funded the research, and of NIH, which depends on awareness of and application of its research findings to drive medical advances.

The proposed legislation concerns **contract terms, not copyright exceptions**. As such, the proposed legislation in no way implicates Article 13 of TRIPS or Article 9 of the Berne Convention, which address permissible copyright exceptions. These treaty provisions are completely silent on the issue of the terms a funder or other licensee can require of a copyright owner in exchange for valuable consideration.

Similarly, the proposed provision does not constitute a “compulsory license” or a “taking,” as some publishers have suggested. A compulsory license arises when the statute requires the copyright owner to permit others to use his work without his authorization. By contrast, under the proposed legislation, the copyright owner retains complete control of his work, unless he chooses to accept NIH funding. The proposed provision simply provides that, in exchange for public funding, the investigator must deposit a copy of the articles stemming from that funding with PMC so that it can make it publicly available.

The proposed provision also does not implicate the publisher's copyright. Many STM publishers require the investigator to transfer the copyright in the article as a condition to agreeing to publish the article. If, as a condition for receiving NIH funding, the investigator has granted PMC a non-exclusive license to use the article, then the copyright the investigator subsequently transfers to the publisher is already subject to this license. This means that the proposed provision does not change the scope of the publisher's copyright *after* the publisher has acquired it. Rather, the investigator will have agreed to grant PMC a license long before the publisher even enters into the picture.

Significantly, there is nothing unusual about a federal agency placing conditions on its funding of research projects. These conditions relate to a wide range of issues, including intellectual property rights. The proposed provision is consistent with this tradition.

The proposed provision to the NIH Public Access Policy in the FY2008 Labor, Health and Human Services and Education and Related Agencies Appropriations Bill should be adopted in its current form. In addition, the proviso that "the NIH shall implement the public access policy in a manner consistent with the copyright law" has been included since the legislation as it stands is entirely consistent with copyright law. This proviso was specifically added to address concerns regarding the proposed change in the NIH public access policy.

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