

NIH Public Access Policy Does Not Affect U.S. Copyright Law *Summary*

The National Institutes of Health (NIH) recently implemented a congressionally approved Public Access Policy designed to increase the scientific and social impact of NIH funding. The NIH Policy ensures that the results of its publicly funded research are made available to researchers, medical personnel and to individual taxpayers. NIH implemented this change in its funding agreements in response to a directive in the Consolidated Appropriations Act of 2008. As of April 7, 2008, researchers who accept federal funding from the NIH agree to submit to NIH an electronic copy of their final, accepted peer-reviewed journal manuscript. As a further condition of federal funding, these researchers also agree to give NIH a license to make these manuscripts freely available over the Internet from the NIH digital archive PubMed Central, within 12 months after the date of publication.

Although it is clear that the NIH Public Access Policy is simply a routine change in the contract between the NIH and funding recipients, the American Association of Publishers (AAP) submitted an opinion letter to NIH suggesting that this change raised copyright issues including U.S. obligations under international copyright agreements.¹ This AAP Opinion Letter is fundamentally flawed and mischaracterizes the relevant facts and law.

Contrary to the AAP assertions, the NIH Public Access Policy **does not affect U.S. copyright law in any way.** NIH has added a condition to pre-existing licensing terms in its grant agreements that affirms it can legally provide public access to publicly funded research. This change in the terms of NIH grant agreements is fully consistent with copyright law. Copyright is an author's right. Researchers are the authors of the articles they write with NIH support. In exchange for substantial federal funding, these researchers voluntarily agree to grant the federal government a license to provide public access to the results of publicly funded research. NIH receives a non-exclusive license from federally funded researchers, who retain their copyrights and are free to enter into traditional publication agreements with biomedical journals or assign these anywhere they so choose, subject to the license to NIH.

This change in the terms of the Public Access Policy has no relation to United States compliance with international intellectual property treaties. The Berne Convention on Copyright and the TRIPS Agreement concern the substance of copyright law, not the terms of licenses granted to the United States in exchange for federal funding. It is longstanding federal policy that in all federal contracts that pay for the creation of copyrighted works, the funding agency **must** receive a copyright license in exchange for federal funding. It is well recognized that these licenses given by authors have no effect on the robust set of protections given to

¹ Online at http://publicaccess.nih.gov/comments2/files/AAP_NIH_Submission_05_30_08.pdf.

authors in the United States Copyright Act and similarly raise no issues with respect to international copyright law.

See <http://www.arl.org/sparc/advocacy/nih> for the detailed analysis.