A tale of two bills: the Research Works Act and Federal Research Public Access Act
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(1) The Research Works Act (RWA)

The RWA is now dead, withdrawn by its Congressional sponsors and chief lobbyist-supporter. But here's a biography and obituary.

(1.1) The RWA would have repealed the OA mandate at the NIH and blocked similar policies at other federal agencies. It was introduced in the House of Representatives by Darrell Issa (R-CA) and Carolyn Maloney (D-NY) on December 16, 2011, and referred to the Committee on Oversight and Government Reform, where Issa is chairman.

RWA targeted the method used by the NIH to avoid copyright infringement. When NIH grantees publish articles based on NIH-funded research, they must retain a non-exclusive right to authorize OA to the final version of their peer-reviewed manuscript. RWA would have blocked this method in two different ways. First, it would have made author consent insufficient, and required publisher consent, even when authors were the copyright holders. Second, it would have prohibited federal funding agencies from requiring author consent in the first place.

RWA in the House of Representatives (HR 3699)
http://hdl.loc.gov/loc.uscongress/legislation.112hr3699

See my reference page on RWA at the Harvard Open Access Project.
http://cyber.law.harvard.edu/hoap/Notes_on_the_Research_Works_Act

(1.2) Of these two RWA strategies, the first was new and ominous (more in 1.3, below). The second was borrowed from the Fair Copyright Research Works Act (FCRWA), a bill introduced in the House twice by Rep. John Conyers (D-MI), in September 2008 and February 2009. In most OA discussions, the FCRWA is better known as the Conyers Bill.

FCRWA in the 110th Congress (H.R. 6845) (September 2008)
http://hdl.loc.gov/loc.uscongress/legislation.110hr6845

FCRWA in 111th Congress (H.R. 801) (February 2009)
http://hdl.loc.gov/loc.uscongress/legislation.111hr801

One reason to note the RWA's antecedents is to note that much of the analysis already done on the Conyers bill also applies to the RWA.

For example, see my two articles on the Conyers bills (October 2008 and March 2009)...
http://dash.harvard.edu/handle/1/4322592
http://dash.harvard.edu/handle/1/4391154

...and see the many articles, blog posts, and public statements on the bill at the time.
http://goo.gl/SgTql
http://www.connotea.org/tag/oa.conyers

Another reason to note RWA's antecedents is simply to recall that the publishing lobby does no give up easily. Even though RWA is now dead, some version of it may come back in the future. In this respect, OA opponents and OA proponents are alike, and do not accept legislative setbacks as permanent obstacles.

(1.3) One difference between RWA itself and the Conyers bill is that the Conyers bill was explicit in its aim to amend US copyright law. If the RWA would have amended copyright law, at least it didn't declare its intention to do so.

By amending copyright law to block the NIH policy, the Conyers bill effectively conceded that the NIH policy was lawful under current copyright law. If the NIH policy infringed copyrights, then publishers

could have gone to court rather than to the legislature. Filing a lawsuit is much easier than amending copyright law.

The RWA didn't explicitly say that it would amend copyright law, but it could could have done so implicitly, or by superseding any parts of current law inconsistent with the new law. Under the NIH policy, authors give permission for OA when they are still the copyright holders. Even when they later transfer some rights to publishers, they retain the right to authorize OA. Hence, OA through NIH is authorized by the relevant rightsholder, in this case by the author. But RWA Section 2.1 would have required publisher consent for that OA. It would have required publisher consent even when the holder of the relevant rights under current law had already consented. A consent which suffices under current copyright law would not suffice under RWA. Either that would violate US copyright law or amend it pro tanto (that is, amend it to the extent necessary to avoid irreconcilable conflict between the old and new statutes).

This may seem like a technical point of law. But it's the most radical aspect of RWA. Under current law, in the US and around the world, authors are the copyright holders in their work until or unless they decide to transfer rights to someone else, such as a publisher. Copyright consists of a bundle of rights, and authors may lawfully transfer all, some, or none of those rights, as they see fit. If they retain the right to authorize OA, then no other permission is needed. Under RWA, however, publishers would have held a new right, beyond copyright, to overrule the rights exercised by authors under copyright law.

It was an unprecedented power grab by publishers. Unlike past, lopsided legal reforms to benefit publishers, this one was not limited to enhancing the rights of copyright holders against users and consumers. This one would have harmed all copyright holders except publishers, and benefited publishers even when they were not copyright holders.

This provision of RWA might have violated or amended US copyright law, and we wouldn't know which until a court ruled on it. In my view, that is why RWA took a dual strategy. If a court struck down the provision requiring publisher consent even when authors held the relevant rights, it could leave standing the second provision blocking federal agencies from requiring author consent.

(1.4) RWA didn't say that it applied to NIH-funded research or publicly-funded research. Instead, it applied to "any private-sector research work" (Section 2.1) defined as any "article intended to be published in a scholarly or scientific publication, or any version of such an article, that is not a work of the United States Government..., describing or interpreting research funded in whole or in part by a Federal agency and to which a commercial or nonprofit publisher has made or has entered into an arrangement to make a value-added contribution, including peer review or editing..." (Section 3.3).

There were two obnoxious presumptions here. The first was that peer review or editing organized by a private-sector publisher made an article into a private-sector article. The blogosphere lit up with anger over this point, reasserting in dozens of different ways that the funding, the research, and the writing of these articles are all done by parties other than publishers, and that the editing and refereeing are typically done by volunteers donating their time to publishers. The Association of American Publishers (AAP) poured fuel on the fire when it said in its press release endorsing RWA that the articles covered by the bill were "produced" by publishers.
http://www.publishers.org/press/56/

The second presumption generally went unnoticed. It was that articles published by private-sector publishers were private-sector articles. The presumption here was that publishers acquired copyrights or ownership, without qualification, and that the articles they published became their private property. This is often true, but in the case of articles arising from NIH-funded research it is entirely false. The NIH policy requires grantees to retain key rights. That means that publishers of NIH-funded research never acquire those rights. That means that those articles are not owned by publishers without qualification. They are *jointly owned* by authors and publishers. This is not a fine point that publishers can be forgiven for glossing over. It's is the very basis their grievance. It is the whole point of the publisher lobbying campaign against the NIH policy and in support of RWA.

(1.5) Elsevier has been very kind to Darrell Issa and Carolyn Maloney, the two RWA co-sponsors.

According to MapLight (Money and Politics Light), Elsevier has given two campaign contributions to Issa and 12 to Maloney for the 2012 campaign cycle. Out of 31 contributions Elsevier has made to House members for this cycle, 14 or 45% of the contributions have gone to Issa and Maloney.

http://goo.gl/GjZlN

According to OpenSecrets, only one donor has given more than Elsevier to Maloney's 2012 campaign.
http://www.opensecrets.org/politicians/contrib.php?cycle=2012&cid=N00000078

(Thanks to Mike Eisen for being the first to shine a light on these contributions.)
http://www.michaeleisen.org/blog/?p=807

(1.6) In addition to co-sponsoring RWA, Darrell Issa co-sponsored the Online Protection and Enforcement of Digital Trade (OPEN) Act, a palatable alternative to the execrable Stop Online Piracy Act (SOPA). Issa's anti-SOPA work came before RWA, and gave him some stature as a champion of openness. But then came RWA. People who opposed SOPA and supported OA --most people in each camp-- wondered why.

The answer is far from clear even now. But we do know that Issa's opposition to the NIH policy was not new. When Republicans took control of the House in November 2010, and Issa became the Chairman of the Committee on Government Oversight and Reform, I wrote this:
http://www.earlham.edu/~peters/fos/newsletter/12-02-10.htm#elections

> Issa was a co-sponsor of the original version of the Conyers bill (September 2008...), and a co-sponsor of its re-introduction in February 2009....In fact, Issa and liberal Robert Wexler (D-FL) were the only two members of the House other than Conyers himself to co-sponsor both versions of the bill. But Wexler has since retired, leaving Issa alone with that distinction....In 2007-08, only three members of Congress received more money from Elsevier than Issa....

(In the same article I go into more detail on Issa's support for open government and open data, and his mixed signals on OA research.)

Why did Mr. Anti-SOPA become Mr. Anti-OA? Rebecca Rosen of The Atlantic asked his office and got this reply: "[RWA] has been introduced to ensure that the intellectual property rights of commercial and non-profit journal publishers are not violated by government regulators disseminating their privately owned articles for free."
http://www.theatlantic.com/technology/archive/2012/01/why-is-open-internet-champion-darrell-issa-supporting-an-attack-on-open-science/250929/

In case you think Issa's staffers misrepresented the boss, or that Rosen misquoted the staffers, see Issa's own tweet from January 5: "[W]hat NIH currently does is post the final pre-publication draft, which is intellectual property, of a scholarly journal."
https://twitter.com/#!/DarrellIssa/status/155026410841452545

Issa believed that the NIH policy violates publisher copyrights. But this is false. It's not gray, ambiguous, or unsettled. To repeat the very familiar facts one more time: under the NIH policy, publishers never acquire full copyright to articles arising from NIH-funded research. These articles are not "privately owned", or at least they're not privately owned by publishers. Some of the rights are privately owned by authors even if the rest are privately owned by publishers. This mixed or divided ownership is exactly what publishers dislike about the NIH policy and exactly what they hoped RWA would fix. It's bad enough when publishers misrepresent this point, and paint themselves as the full owners of these articles when their full grievance is that they are not. But it's even worse when the bill's co-sponsor feeds the deception.

The Association of American Publishers (AAP) is on the record with the same kind of distortion. In its press release endorsing the bill, the AAP said, "The Research Works Act will prohibit federal agencies from unauthorized free public dissemination of journal articles...."
http://www.publishers.org/press/56/

The falsehood here is word "unauthorized". The NIH policy ensures that NIH-mandated OA is authorized by the copyright holders. The AAP might have been thinking that not all publishers would have authorized this OA. But that's exactly why the NIH policy requires grantees to retain key rights and keep this decision out out publisher hands. And of course the AAP knows that perfectly well. For the AAP, the problem with the NIH policy is that NIH-mandated OA is *authorized*, not that it is *unauthorized*.

Another example of a publisher distorting the NIH policy in order to support RWA is the February 16

letter to the editor of The Boston Globe from Lynne Herndon, former president and CEO of Elsevier's Cell Press: "To suggest that our passionate efforts [publishing scientific articles] belong to the government takes things too far." Of course what goes too far is to suggest that the NIH policy makes any articles "belong to the government" at all. These articles do not become the unqualified property of the government any more than they become the unqualified property of publishers. http://articles.boston.com/2012-02-16/letters/31063720_1_elsevier-universal-access-publishing

The Copyright Alliance piled on with its own false statements about the NIH policy: "Providing a federal grant to fund a research project should not enable the federal government to commandeer and freely distribute a subsequently published private sector peer-reviewed article. But a 2008 mandate at the National Institutes of Health requires just that..." There is no "commandeering" going on here. Nor for that matter does the NIH distribute the same versions that publishers publish. The two errors or deceptions are related: The NIH needn't commandeer anything when the rightsholders already authorize the OA in question for the versions in question. Finally, the Copyright Alliance says that the NIH policy constitutes a "reversal of centuries of copyright law" as if copyright law required authors to transfer all rights to publishers and retain none. Again, the Copyright Alliance knows perfectly well that copyright holders are empowered by copyright law itself to retain or transfer their rights, as they wish. http://copyrightalliance.org/news.php?id=130

(1.7) At this point we're thrown back on a familiar dilemma. Are these innocent misunderstandings or culpable misrepresentations?

Some policy-makers are misinformed. They're not experts in academic publishing or scholarly communication, and they often believe what publisher lobbyists tell them. At each of the previous Congressional hearings on OA (September 2008 on the Conyers bill and July 2010 on OA in general), we found members who honestly believed that scholarly journals bought articles from authors, because that's how publishing tends to work outside the academic world. Some believed that publishers of NIH-funded research were the full legal owners of the articles, not just co-owners with the authors. Some didn't realize that the NIH pays about $100 million/year in page and color charges to journal publishers, which is more than 25 times the cost of implementing the OA policy.

In these cases, we must blame dishonest lobbyists, not policy-makers. Or we must blame policy-makers not for lying but for listening to just one side of a contentious issue, or for listening credulously, or for listening with favor to the side which also happened to make financial contributions to their reelection campaigns. If Issa were new to these issues, the case that he made an innocent mistake would be stronger. But he co-sponsored the RWA-like Conyers bill both times it was introduced.

On the other side, Issa's authentic credentials in working for open data and open government suggest that he might have supported OA and the NIH policy if he had understood them properly. You decide how these factors netted out before he withdrew his support for RWA, and how they net out now, when he has expressly endorsed OA. (More in 1.15, below.)

But there's no need for charitable second-guessing about Elsevier and the AAP. They know very well that NIH-funded authors retain the right to authorize OA, and that publishers never acquire the full bundle of copyright to these articles. That's precisely what infuriates them. They know very well that authors co-own these articles with publishers by retaining key rights and transferring others. Publishers know this, and we know that they know it. As I've argued before, publishers "can't complain that [the NIH policy] violates a right they possess, only that it would violate a right they wish they possessed." http://www.earlham.edu/~peters/fos/newsletter/07-02-11.htm#copyright

Here's their PR plan in a nutshell: (1) Say in public that publishers are the copyright holders in these articles, without qualification, or that these articles are privately owned by publishers, without qualification, or that OA to these articles is unauthorized, (2) hope that uninformed listeners will take their word for it, and (3) and hope that journalists and legislators are still among the uninformed.

(1.8) Issa's co-sponsor of the OPEN Act is Ron Wyden (D-OR), who just happens to a Senate co-sponsor of FRPAA, the strongest pro-OA bill ever introduced in any legislature (more in Section 2, below). I can't help speculating on how they talked about their differences on OA, while working together on OPEN. If there was a fly on the wall for that conversation, it hasn't reported what it heard. If Wyden was even one factor in Issa's decision to drop RWA, we don't know it.

Issa also had ally problems with Carolyn Maloney, his co-sponsor of RWA. Maloney didn't break with Issa

on openness issues, as Wyden did, but she was one of the women legislators who stood up and walked out of Issa's contraception hearing when he didn't allow women to testify.
http://www.politico.com/news/stories/0212/72971.html

(1.9) The Association of American Publishers (AAP) endorsed RWA and lobbied for it in the name of its members.
http://www.publishers.org/press/56/

So far AAP hasn't publicly dropped its support for RWA, as Elsevier has. On the one hand, it may ever do so. It doesn't have to work directly with angry and alienated researchers, as Elsevier does. But on the other side, when Elsevier dropped its support, it spoke about the need to work productively with funding agencies (not researchers), and AAP has the same need.

The AAP didn't consult its members before endorsing RWA. Consequently some of its most influential members felt obliged to make public statements opposing the bill and disavowing the AAP position. MIT Press went first, and was quickly followed (among others) by Penn State University Press, Rockefeller University Press, University of California Press, the American Institute of Physics, Wiley & Sons, and most notably, by the Nature Publishing Group and Association for the Advancement of Science.

By the time the bill died, I counted 19-22 publishers who publicly opposed RWA, of which 15 were members of the AAP. (I must use a range instead of a single number because some of the public statements were unclear.) I also counted 146 notable non-publisher opponents of RWA, including the Association of American Universities and the Association of Public and Land-grant Universities.

For names of the RWA-opposing organizations and links to their public statements, see my list at the Harvard Open Access Project.
http://cyber.law.harvard.edu/hoap/Notes_on_the_Research_Works_Act

In contrast to these 19-22 publishers and 146 non-publishers on the record against RWA, there were almost no publishers other than Elsevier on the record in its favor. If the bill were not already dead, we could call the AAP bluff with an open challenge. Can it find more publishers willing to say in public that they support the RWA than have already said in public that they oppose it? Can it find more than 19? More than 10? More than 5?

(1.10) Here's one measure of our progress: In the three months after the AAP launched PRISM (Partnership for Research Integrity in Science & Medicine) in August 2007, nine publishers stepped forward to disavow it.
http://www.earlham.edu/~peters/fos/2007/10/mit-press-dissociates-itself-from-prism.html

In the three months since RWA was introduced, more than twice as many publishers stepped forward to disavow it. I don't think RWA sank faster than PRISM because it's more despicable than PRISM. That's actually a close call. I think the full explanation has at least seven factors:

1. The NIH policy has proven its worth.

2. Publisher-opponents of the NIH policy predicted that the sky would fall. But the sky did not fall. (In fact, Elsevier's profits are up; more in 1.11, below.)

3. All stakeholders except some publishers acknowledge the legitimacy of requiring OA to publicly-funded research.

4. More publishers now than five years ago acknowledge that legitimacy too, even if they haven't yet adapted to OA.

5. More publishers now than five years ago are actually adapting to OA.

6. The AAP and Elsevier have five more years of track record in overplaying their hand and alienating natural allies.

7. There is a fast-growing and organic spread of anger against Elsevier among working researchers.

If you don't remember PRISM, here's some background.

http://www.earlham.edu/~peters/fos/2007/08/publishers-launch-anti-oa-lobbying.html
http://goo.gl/QbjnH

(1.11) Tom Allen, President and CEO of the AAP, made this claim in support of RWA: "At a time when job retention, U.S. exports, scholarly excellence, scientific integrity and digital copyright protection are all priorities, the Research Works Act ensures the sustainability of this industry."
http://www.publishers.org/press/56/

This echoes a line the AAP has taken many times over the years, for example, in opposing the NIH policy and FRPAA, and supporting the Conyers bill. But it has never offered evidence that OA policies threaten jobs, sustainability, excellence, or integrity. I've argued elsewhere against the AAP's unargued claims about the threats to excellence and integrity. Here are five arguments against its unargued claims about jobs and sustainability.

1. The NIH has had an OA mandate in place since April 2008. At two Congressional hearings since then, members of Congress directly asked publishers who opposed the NIH policy whether they could point to any harm the policy had caused. Both times, publishers were unable to point to any harm such as journal cancellations or lost jobs.

See the hearing before the House Judiciary Committee in September 2008 and the hearing before the House Committee on Oversight and Government Reform Subcommittee on Information Policy, the Census and National Archives in July 2010.
http://goo.gl/s0d2Q
http://goo.gl/PxKHV

Just yesterday, financial analyst Claudio Aspesi summarized the (lack of) evidence to date in an interview with Richard Poynder:
http://poynder.blogspot.com/2012/03/scholarly-publishing-where-is-plan-b.html

> I find it somewhat difficult to believe that any academic or research library has cancelled a single subscription to a medical or life sciences journal because it would be able to access, twelve months later, a relatively modest percentage of the articles published in any one issue of that journal. To argue otherwise invites disbelief and cynicism. It may be true that, at the margin, some articles which would have been sold as an individual download were not downloaded, but once again to argue that this makes a material difference to Elsevier's revenues or profits can only irritate and antagonize even more the academic community. I am always happy to learn where I make mistakes and improve my analysis, and would be delighted if Elsevier produced evidence to disprove my scepticism....After all, if Elsevier and the other publishers demand or oppose changes in public policy, they should provide factual evidence that they will be harmed.

2. If the NIH policy will cause harm in the future, publishers have the power to protect themselves without new legislation. Under the NIH policy, publishers retain the fundamental right to refuse to publish any work for any reason, including NIH-funded work. Whenever they believe that the costs to them of publishing NIH-funded authors exceed the benefits to them, they may refuse to publish those authors. To date, however, 100% of surveyed publishers accommodate the NIH policy. Not a single surveyed publisher refuses to publish NIH-funded authors on account of its OA policy.
http://oad.simmons.edu/oadwiki/Publisher_policies_on_NIH-funded_authors

We don't need legislation to protect publishers when they have the means to protect themselves and choose not to take advantage of them.

3. Many subscription-based or non-OA publishers voluntarily do more to provide OA than the NIH policy requires. There are three kinds of examples:

--journals participating in PubMed Central, many with embargo periods shorter than the NIH-allowed 12 months
http://goo.gl/U4JHV

--journals providing OA to the published editions of articles by NIH-funded authors, and not just the unedited peer-reviewed manuscripts
http://goo.gl/0p2Hk

--journals depositing their articles in PubMed Central, under open licenses rather than all-rights-reserved copyrights, and whether or not their authors are NIH-funded
http://goo.gl/bGpmR

If the NIH policy were already causing harm, no publishers would voluntarily increase the harm.

4. The profit margins in the journal divisions of Elsevier, Informa, and Wiley were 30-35% in 2011.
http://goo.gl/aPltZ

In January, less than a month after the RWA was introduced, Simba Information released its financial analysis of the STM journal publishing industry. Among its findings: "Amid budgetary pressures and a slow economic recovery, the combined markets for science, technical and medical (STM) publishing grew 3.4% to $21.1 billion in 2011."
http://www.simbainformation.com/about/release.asp?id=2503

In February, the NIH itself updated its own evidence that its policy has caused no harm to date. "The [NIH] Public Access requirement took effect in 2008. While the U.S. economy has suffered a downturn during the time period 2007 to 2011, scientific publishing has grown: [1] The number of journals dedicated to publishing biological sciences/agriculture articles and medicine/health articles increased 15% and 19%, respectively. [2] The average subscription prices of biology journals and health sciences journals increased 26% and 23%, respectively. [3] Publishers forecast increases to the rate of growth of the medical journal market, from 4.5% in 2011 to 6.3% in 2014...."
http://publicaccess.nih.gov/public_access_policy_implications_2012.pdf

Also in February, Elsevier revealed that its sales and profits both increased in 2011. "The science and technology field performance particularly stood out...."
http://www.thebookseller.com/news/elsevier-increases-sales-and-profits.html

See Elsevier's own summary of its 2011 financial results. "Underlying revenue up 2%....Underlying adjusted operating profit up 5%; up 4% at constant currencies....[W]e expect to deliver another year of underlying revenue and profit growth in 2012...."
http://www.reedelsevier.com/mediacentre/pressreleases/2012/Pages/reed-elsevier-2011-results-announcement.aspx

Not all academic publishers are doing as well as Elsevier. But the ones doing better than Exxon-Mobil seem to be the ones steering the ship at AAP.

Other successful non-OA publishers didn't see the need to join Elsevier in demanding legislative protection against the threat of OA. For example, both Science and Nature opposed the RWA. Science reiterated its support for the NIH policy, saying that the policy "provides an important mechanism for ensuring that the public has access to biomedical research findings" and "provides appropriate support for the intellectual property rights of publishers who have invested much in science communication."
http://www.aaas.org/news/releases/2012/0118rwa.shtml

Nature made clear, again, that it doesn't merely allow green OA, which the NIH requires. It positively encourages green OA and has seen no threat to its revenues or sustainability as a result. Nature cited its January 2011 position statement on OA in which it said, "We have, to date, found author self-archiving compatible with subscription business models, and so we have been actively encouraging self-archiving since 2005."
http://www.nature.com/press_releases/rwa-statement.html
http://www.nature.com/press_releases/statement.html

Even The Lancet, owned by Elsevier, called the RWA "startlingly ill-considered" and "a damaging threat to science." Its editorial against the bill continued: "Science is a public enterprise. A scientific publisher's primary responsibility is to serve the research community. Their own interests financial and reputational depend upon the trust the public has in science. Obstructing the dissemination of publicly funded science will damage, not enhance, that trust. The RWA brings publishers and publishing into disrepute....The Lancet...strongly opposes this Bill."
http://www.thelancet.com/journals/lancet/article/PIIS0140-6736(12)60125-1/fulltext

Entirely apart from these thriving non-OA journals, thriving OA journals also attest that the revenues

required for quality and sustainability do not require legislation. BioMed Central's statement opposing the RWA made this point perfectly: "[T]he success of open access publishers such as BioMed Central clearly demonstrates the invalidity of the arguments, made by supporters of the RWA, that public access undermines the ability of publishers to seek fair recompense for the service they provide...."
http://poynder.blogspot.com/2012/01/biomed-central-opposes-research-works.html

5. Finally, providing OA to publicly-funded research creates jobs, and creates economic benefits far exceeding the costs. The evidence is voluminous and I'd have to double the length of this article just to summarize it here. But see the eight-page summary of the evidence in Harvard's response to the first question in the recent White House call for comments on OA to peer-reviewed scholarly publications resulting from federally-funded research.
http://osc.hul.harvard.edu/stp-rfi-response-january-2012

(For a longer version of my argument in this subsection, going beyond publisher claims about lost revenue to claims about excellence and integrity, see my article from September 2007.)
http://dash.harvard.edu/handle/1/4322578

Bottom line: This is not an industry that needs protection, especially not if the protection would come at the expense of research, researchers, research institutions, taxpayers, and the public-interest missions of the federal funding agencies.

On the contrary, as publisher Tim O'Reilly put it in his open letter to Congress, RWA "is a classic example of 'regulatory capture' by an industry that is feeding off of government largesse."
https://www.popvox.com/bills/us/112/hr3699/comment/263013

(1.12) It's no surprise, then, that RWA elicited strong reactions from researchers. One of the strongest was a piece in The Guardian by Mike Taylor of Bristol University: "Academic publishers have become the enemies of science....This is the moment academic publishers gave up all pretence of being on the side of scientists...."
http://www.guardian.co.uk/science/2012/jan/16/academic-publishers-enemies-science

Graham Taylor, director of academic, educational and professional publishing at the UK Publishers Association (and no relation to Mike Taylor that I know of), criticized the language as offensive and inaccurate.
http://www.guardian.co.uk/science/2012/jan/27/academic-publishers-enemies-science-wrong

Extraordinarily, however, The Lancet opened its editorial against the RWA with the Mike Taylor language ("Academic publishers have become the enemies of science"), but then said nothing to distance itself from it. The editorial then criticized the RWA, not Taylor. This Elsevier journal effectively endorsed the Mike Taylor language.
http://www.thelancet.com/journals/lancet/article/PIIS0140-6736(12)60125-1/fulltext

In my blog I endorsed the language with one qualification more than The Lancet: "This strongly-worded piece is accurate. The only qualification I'd make is that publishers are not monolithic. On this front, for example, some support the RWA and some don't...."
https://plus.google.com/109377556796183035206/posts/RgrCDag7mEE

On reflection, I'd make a second qualification: The moment when some academic publishers gave up all pretense of being on the side of scientists came with the launch of PRISM in 2007, or with the panicked vitriol against the first proposal of the NIH policy in 2004, or with the persecution of Heinz Barschall and the American Mathematical Society in the 1980's and 1990's for publishing surveys of journal prices.

In a Richard Poynder interview from October 2007, I put the PRISM chapter of the lost-pretense story this way: "I call it disinformation....I have no problem with publishers defending their own interests, and no problem acknowledging that one of their interests is revenue and profit....What bothers me is the dishonesty of some of the arguments....What's ironic and frankly astonishing is that academic publishers should be making these arguments, or allowing their lobbyists to make them. They should be trying to prove that they are especially careful with reasoning and evidence, and deserve to be entrusted with the management of peer review. But the ones behind the PRISM campaign [and RWA] are proving that they are careless with truth and do not deserve that trust...."
http://poynder.blogspot.com/2007/10/basement-interviews-peter-suber.html

(1.13) The strongest supporters of OA have always included working researchers. But a long-running complaint among OA supporters is that too few working researchers were paying attention.

Then on January 21, 2012, Fields medalist Timothy Gowers wrote a blog post in which he asserted, "I am not only going to refuse to have anything to do with Elsevier journals from now on, but I am saying so publicly. I am by no means the first person to do this, but the more of us there are, the more socially acceptable it becomes, and that is my main reason for writing this post." One of Gowers' four objections was Elsevier's support for the RWA.
http://gowers.wordpress.com/2012/01/21/elsevier-my-part-in-its-downfall/

Soon after, Gowers' student Tyler Neylon created a web site where researchers could sign on to a Gowers-type pledge. From that moment the Gowers-inspired Elsevier boycott began growing rapidly.
http://thecostofknowledge.com/

(Glyn Moody was kind enough to credit the boycott to me. But though I made a similar pledge on January 7, I'm not a Fields medalist and I know influence when I see it.)
http://www.techdirt.com/articles/20120130/13030217589/will-academics-boycott-elsevier-be-tipping-point-open-access-another-embarrassing-flop.shtml
https://plus.google.com/u/0/109377556796183035206/posts/cspR3h4ZAv4

At first the petition/boycott was limited to mathematicians, but it's now open to researchers in any field. It remains limited to Elsevier, unfortunately, though Gowers himself said in his original post, "Elsevier is not the only publisher to behave in an objectionable way. However, it seems to be the worst."

As I go to press, the petition has more than 7,700 signatures, including my own. Alongside my signature I added this comment: "I appeal to the signatories of this list: make your own work open access (OA), through a journal (gold OA) or a repository (green OA). Don't limit your action to protesting bad publisher behavior."

The petition and boycott are now accompanied by:
--a long-form statement on their purpose, from 34 of the original signatories
http://gowers.files.wordpress.com/2012/02/elsevierstatementfinal.pdf
--a wiki on publishing reforms
http://michaelnielsen.org/polymath1/index.php?title=Journal_publishing_reform
--a blog
http://blog.thecostofknowledge.com/
--and a poster
http://math.ucr.edu/home/baez/elsevier_boycott_poster.pdf

The online buzz is intense. For a sense of this, dip into any of these tag libraries from the OA Tracking Project.
--"oa.boycotts"
http://www.connotea.org/tag/oa.boycotts
--"oa.elsevier"
http://www.connotea.org/tag/oa.elsevier
--"oa.petitions"
http://www.connotea.org/tag/oa.petitions
--"oa.pledges"
http://www.connotea.org/tag/oa.pledges

(1.14) Then on February 27, 2012, Elsevier, Issa, Maloney, all dropped their support for RWA.

Elsevier spoke first:
http://www.elsevier.com/wps/find/intro.cws_home/newmessagerwa

> At Elsevier, we have always focused on serving the global research community and ensuring the best possible access to research publications and data. In recent weeks, our support for the Research Works Act has caused some in the community to question that commitment. We have heard expressions of support from publishers and scholarly societies for the principle behind the legislation. However, we have also heard from some Elsevier journal authors, editors and reviewers who were concerned that the Act seemed inconsistent with Elsevier's long-standing support for expanding options for free and low-

> cost public access to scholarly literature. That was certainly not our intention in supporting it. This perception runs counter to our commitment to making published research widely accessible, coming at a time when we continue to expand our access options for authors and develop advanced technologies to enable the sharing and distribution of research results....While we continue to oppose government mandates in this area, Elsevier is withdrawing support for the Research Work Act itself. We hope this will address some of the concerns expressed and help create a less heated and more productive climate for our ongoing discussions with research funders....

Of course we'd all like to discuss these issues in a "less heated and more productive climate". But pertinent part of the climate here was heated almost entirely by Elsevier and the RWA. The RWA was a radical bill supported by dishonest rhetoric. If Elsevier doesn't realize that, then its next steps will simply reheat simmering, justified anger. Withdrawing support for the RWA is in fact a step toward a more constructive discussion of the issues. But everyone should be clear on why researchers questioned Elsevier's "commitment" to "serving the global research community and ensuring the best possible access to research publications and data."

Apart from that, did the Elsevier statement succeed in reducing the temperature? In particular, did it satisfy the Elsevier boycotters? The answer so far, based only on public evidence (there may be many privately satisfied boycotters not speaking up), is no. And the answer is no because another part of its public statement, Elsevier said this:

> [W]e continue to oppose government mandates in this area...[D]ifferent kinds of journals in different fields have different economics and models. Inflexible mandates that do not take those differences into account and do not involve the publisher in decision making can undermine the peer-reviewed journals that serve an essential purpose in the research community. Therefore, while withdrawing support for the Research Works Act, we will continue to join with those many other nonprofit and commercial publishers and scholarly societies that oppose repeated efforts to extend mandates through legislation.

Leave aside that Science, Nature, and The Lancet didn't perceive the threat to peer-reviewed journals, and that virtually no other publishers were willing to join Elsevier's lonely public stand for the RWA. Elsevier is not backing away from its core position. Elsevier may have dropped RWA as one strategy for opposing OA mandates, but it will look for other strategies. It was this statement which led so many of the boycott signatories to say that Elsevier's response was inadequate and that they would continue their boycott. For example:

--Henry Cohn, a Microsoft researcher, quoted in Inside Higher Ed: "'The Research Works Act offended many researchers and Elsevier's support for it was symbolic of broader issues, but the bill wasn't likely to pass anyway at this point, so withdrawing their support is mainly a PR move for Elsevier.' Cohn added that the company's caveat about open-access mandates indicates that its decision to ditch the Research Works Act was a matter of changing strategy, not changing principles. 'I'm afraid the lesson Elsevier may have learned is that lobbying should be done behind closed doors. IIf they continue to work against the interests of the research community, then their public position means little.'" http://www.insidehighered.com/news/2012/02/28/major-publisher-bends-under-pressure-frustrated-scholars

--Randall J. LeVeque, a professor of applied mathematics at the University of Washington, another signatory to the boycott, quoted in same IHE article: Elsevier's continuing opposition to OA mandates "indicates they will still probably support the next such bill to come along....I don't think anyone is declaring victory or dropping the boycott anytime soon unless there [are] a lot more substantive changes."

--Joel Adamson, biology PhD studentn at the University of North Carolina, quoted in TheScientist: "[The withdrawal of support for RWA] is a good thing, but it still doesn't go all the way toward what I would call a real solution to the problem...It shows me that they are a predictable corporation; in other words that they're capable of being scared that something might affect their profits."

--Brett Abrahams, geneticist at Albert Einstein College of Medicine, quoted in the same issue of TheScientist: "They're still anti open-access....They've just taken a very far reaching outrageous position and backed off it a little bit."
http://the-scientist.com/2012/02/28/elsevier-abandons-anti-open-access-bill/

--Mike Taylor, an Earth Scientist at the University of Bristol: "It's apparent that this is a strategic manoeuvre rather than a a fundamental shift....[I]t is basically a manifesto for fighting against the Federal Research Public Access Act the very thing that a publisher who is truly on the side of science would not do."
http://svpow.wordpress.com/2012/02/28/can-elsevier-save-itself/

--Alex Holcombe, a psychologist at the University of Sydney: "I predicted [that Elsevier] would drop the law, but didn't expect them to admit its a completely cynical act -- that they still actually believe in the law, but are simply trying to placate the misguided concerns of some researchers."
https://plus.google.com/113040210411045341720/posts/Sg4L4pQBEHG

My own position is little different and no secret. In fact, earlier in February when the RWA was still alive, Springer published an interview I gave them back in late 2011. In the interview I criticized publishers who lobby against OA mandates, including Springer and Elsevier:
http://www.springer.com/authors/author+zone?SGWID=0-168002-12-925304-0

> Some publishers, including Springer..., lobby against OA mandates at public funding agencies. But...that's equivalent to arguing that public agencies should put the private interests of publishers ahead of the public interest in research, or that the public should compromise and publishers should not compromise. Governments and policy-makers see the need for public agencies to put the public interest first and provide OA to publicly-funded research....I don't know whether Springer makes clear in its lobbying that it accepts the legitimacy of mandating OA for publicly-funded research, and only opposes short embargoes. If so, then its lobbying is appropriately surgical, and I welcome a public debate about the best length of a funding agency's permissible embargo. If it opposes OA mandates for publicly-funded research as such, regardless of the length of the embargo, then its lobbying is not appropriately surgical, and unjustifiably attempts to put the company's private interest ahead of the public interest.

(1.15) After Elsevier made its public statement, Issa and Maloney made theirs.
http://maloney.house.gov/press-release/issa-maloney-statement-research-works-act

The main point is short and clear: "[W]e will not be taking legislative action on HR 3699, the Research Works Act." They could have stopped there. But to avoid leaving the impression that they had made a mistake in the first place, they added, "This conversation [about federal OA policy] needs to continue and we have come to the conclusion that the Research Works Act has exhausted the useful role it can play in the debate."

Forget the fact that the bill played no useful role in the debate, at least not for its supporters. The only role it played was to unify opposition to Elsevier, the AAP, Issa, Maloney, and attempts to undermine the NIH policy or derail FRPAA. I'd call that very useful, but it's obviously not what the bill's co-sponsors intended. Hence, also forget the fact Issa and Maloney would have been smarter to suggest that they did make a mistake in the first place and regretted it.

What's most notable about the Issa/Maloney public statement is that it takes one giant step further: "As the costs of publishing continue to be driven down by new technology, we will continue to see a growth in open access publishers. This new and innovative model appears to be the wave of the future. The transition must be collaborative, and must respect copyright law and the principles of open access. The American people deserve to have access to research for which they have paid."

This is much more than they had to say to withdraw the bill. It's an explicit endorsement of OA, and even an endorsement of OA mandates for publicly-funded research. At least implicitly, then, it's an endorsement of the NIH policy and FRPAA.

We don't have to take it face value. But it demands some kind of interpretation. Among other things, it suggests that Issa and Maloney do believe they made a mistake and that RWA moved in exactly the wrong direction. Looking forward, the more important question is whether it also suggests that they will support FRPAA. Perhaps they won't. Perhaps their endorsement of OA and OA mandates was insincere. But I keep coming back to the fact that it was unnecessary for them to go that far. Elsevier didn't go that far, and made a point of reaffirming its opposition to OA mandates. If the OA endorsement were hand-waving (for example, the bill "exhausted the useful role it can play in the debate"), then we

couldn't put much weight on it. But it looks like more than hand-waving. This part of the statement is precise, entirely optional, and (as lawyers say) against interest. If they contradict it in the future, they can be accused of contradiction, which careful PR campaigns try to avoid. It's what they would say if they were persuaded, not what they would say if they were merely shifting tactics.

I still don't know what to make of it. But here's why it matters. Issa chairs the committee to which RWA was referred, which happens to be the same committee to which the House version of FRPAA was referred. As long as he was on the record in support of RWA, it looked like he wouldn't move on FRPAA. Now there's a chance that he might. Is it likely? I don't know. But it wasn't likely that the co-sponsor of the OPEN Act would also co-sponsor RWA. If he supports FRPAA, or at least lets it out of his committee for a vote, this could be read not so much as a flip to openness but as a return.

(1.16) Why did Elsevier, Issa, and Maloney reverse course?

Elsevier explained in the Chronicle of Higher Education that the company knew about the boycott, but withdrew its support for RWA in response to other voices. "Alicia Wise, Elsevier's director of universal access, played down the boycott's effect. 'It's something that we're clearly aware of,' she said. But she emphasized that Elsevier had been sounding out the authors, editors, and reviewers who continue to work with it. 'Those are the voices we have been listening to,' she said."

However, that's hard to square with the boycott's online buzz, which exceeded that of most of the high-profile publisher defections from the Elsevier/AAP position. It's also hard to square with the fact that on the same day as its public statement withdrawing support for RWA, Elsevier published an open letter to the mathematics community, outlining its responses some of the grievances described in the petition.
http://www.elsevier.com/wps/find/P11.cws_home/lettertothecommunity

(On February 28, when 81% of the petition signatories were from non-mathematicians, Dave Solomon asked, "What's Elsevier's response to the [rest] of us?")
https://plus.google.com/109377556796183035206/posts/RUGfLs3oAXn

My reading is that Elsevier withdrew its support for RWA in part because of the boycott, in part because major TA publishers and TA journals were publicly repudiating RWA, in part because no notable TA publishers were standing with Elsevier, and in part because the bill appeared to have no chance of passing anyway. RWA was politically toxic and it was time for Elsevier to cut its losses. Issa and Maloney withdrew their support for all the same reasons plus one: Elsevier had withdrawn its support. If RWA had significant support beyond Elsevier, then Issa and Maloney would not have caved so soon after Elsevier caved.

All these factors are important, and we'll need to marshal them all to fight future attempts to repeal the NIH policy and to enact positive bills like FRPAA. But note that if the boycott was even one factor in the mix, then it has already notched one success. This is important not only to counter Elsevier's attempt to minimize the boycott's impact, or to counter the lingering impression of failure left by the PLoS-inspired boycott a decade ago. It's important because it shows that researchers hold power here. As Richard Smith, former editor of BMJ, once put it (source wanted!), "I think you will quickly discover that journals (even the arrogant ones) need authors more than authors need them."

Elsevier didn't want to cave. As criticism mounted, it doubled down and reaffirmed its support for RWA in three public statements before finally pulling the plug. The first public statement was from Chrysanne Lowe, Elsevier's VP for Global Marketing Communications, undated but around February 2, 2012. The second was an unsigned corporate communiqué on February 3, 2012. The third was from Alicia Wise, Elsevier's Director of Universal Access, in her interview with Richard Poynder on February 8, 2012.
http://libraryconnect.elsevier.com/blogs/2012-02/exciting-world-research-information
http://goo.gl/x5PAZ
http://poynder.blogspot.com/2012/02/elseviers-alicia-wise-on-rwa-west-wing.html

(The second of these statements has been taken offline but can still be discovered in the Google cache.)
https://plus.google.com/109377556796183035206/posts/UwCANoP573q

During the period when Elsevier was standing firm for the RWA, Jan Velterop, the former publisher of BMC, told Richard Poynder in a recent interview, "I truly don't understand how a sophisticated industry could get itself into a PR disaster like the RWA." Claudio Aspesi wrote in his financial analysis of Elsevier for Bernstein Research European, "We think that investors should ask management of Reed Elsevier how

a PR incident of this kind could happen, why crisis management has been so tentative and what other steps management intends to take the handle the protest...."
http://poynder.blogspot.com/2012/02/open-access-interviews-jan-velterop.html
http://m.paidcontent.org/article/419-academics-revolt-against-elseviers-journal-pricing/

I stand by my assessment from the day of the plug-pulling: "This is a victory for what The Economist called Academic Spring. It shows that academic discontent -- expressed in blogs, social media, conventional media, boycotts, and open letters to Congress -- can defeat legislation supported by a determined and well-funded lobby. Let's remember that, and let's prove that this political force can go beyond defeating bad legislation, like RWA, to enacting good legislation, like FRPAA."
https://plus.google.com/109377556796183035206/posts/EXCkaSqAv5e

Even if Elsevier is looking for other strategies to undermine the NIH policy and block FRPAA, the fall of RWA is a ratchet-click of progress for OA. It shows that the NIH policy has become politically untouchable. Those who attempt to repeal it will be burned.

It also shows that support for the NIH policy and FRPAA has spread to a growing mass of working researchers, the most critical slice of the coalition for OA, and that working researchers are demanding OA mandates. Like the growing number of unanimous faculty votes for university-level OA mandates, these demands undermine publisher claims that researchers must be coerced to accept OA policies.
http://oad.simmons.edu/oadwiki/Unanimous_faculty_votes

These demands reestablish OA mandates as the primary mechanism for advancing the interests of researchers and research institutions. And they pave the way for more to come.

(2) The Federal Research Public Access Act (FRPAA)

(2.1) FRPAA would strengthen the OA mandate at the NIH, by reducing the maximum embargo to six months, and then extend the strengthened policy to all the major agencies of the federal government. In that sense, it's the opposite of the RWA.

It was introduced on February 9, 2012 in the House and Senate. The House co-sponsors are Mike Doyle (D-PA), Kevin Yoder (R-KS), and William Lacy Clay (D-MO), and the Senate co-sponsors are John Cornyn (R-TX), Kay Bailey Hutchison (R-TX), and Ron Wyden (D-OR).

FRPAA in the House of Representatives (HR 4004)
http://hdl.loc.gov/loc.uscongress/legislation.112hr4004

FRPAA in the Senate (S. 2096)
http://hdl.loc.gov/loc.uscongress/legislation.112s2096

See my reference page on FRPAA at the Harvard Open Access Project.
http://cyber.law.harvard.edu/hoap/Notes_on_the_Federal_Research_Public_Access_Act

(2.2) FRPAA uses the term "free online public access" without definition. But for convenience I'll say here that FRPAA requires "OA".

It requires agencies to come up with their own OA policies within the general guidelines laid down in the bill. It's not a one-size-fits-all solution and agencies are free to differ on the details. If the bill passes, they'll have one year to develop their policies (Section 4.a).

But agencies must mandate OA to agency-funded research. The must mandate OA "as soon as practicable" after publication (4.b.4), but no later than six months after publication. The guidelines do not stipulate the timing of deposits, only the timing of OA. For researchers employed and not merely funded by the federal government, FRPAA allows no embargo at all (4.c.2).

Like the NIH policy, FRPAA applies to the authors' peer-reviewed manuscripts (4.b.2), not to the published editions of their articles. Like the NIH policy, it allows consenting publishers to replace the peer-reviewed manuscripts with the published editions (4.b.3). It does not apply to classified research or royalty-producing work such as books (4.d.3). It also exempts patentable discoveries, but only "to the extent necessary to protect a...patent" (4.d.3).

Unlike the NIH policy, FRPAA doesn't specify the OA repository in which authors must deposit their manuscripts, the way the NIH specifies PubMed Central. Agencies could host their own repositories or make use of existing repositories, including the institutional repositories of their researchers. FRPAA only requires that the repositories meet certain conditions of OA, interoperability, and long-term preservation (4.b.6).

FRPAA and the NIH policy differ slightly in how they secure permission for the mandated OA. The NIH requires grantees to retain the non-exclusive right to authorize OA through PubMed Central. If a given publisher is not willing to allow OA on the NIH's terms, then grantees must look for another publisher. FRPAA requires agencies to "make effective use of any law or guidance relating to the creation and reservation of a Government license that provides for the reproduction, publication, release, or other uses of a final manuscript for Federal purposes" (4.c.3). The FRPAA approach gives agencies more flexibility. Agencies may use the battle-tested NIH method if they wish. They may use a federal-purpose license such as that codified in 2 CFR 215.36(a) (January 2005) if they wish. Or they may make use of "any [other] law or guidance" that would be "effective" in steering clear of infringement.

FRPAA does not amend copyright or patent law (4.e).

FRPAA applies to all unclassified research funded in whole or part (4.b.1) by agencies whose budgets for extramural research are $100 million/year or more (4.a). This includes the Department of Agriculture, Department of Commerce, Department of Defense, Department of Education, Department of Energy, Department of Health and Human Services, Department of Homeland Security, Department of Transportation, Environmental Protection Agency, National Aeronautics and Space Administration, and the National Science Foundation.

The House and Senate versions of the bill are identical. FRPAA was introduced twice before (in 2006 and 2009-10), and is essentially identical to both previous versions.

(2.3) FRPAA is not perfect. For me its two main weaknesses are that it doesn't require deposit at the time of publication, and that it doesn't require libre OA. In the first respect, it's weaker than the NIH policy. But in every other respect it's stronger than the NIH policy. Its special strengths are to shorten embargos for extramural research, eliminate embargoes for intramural research, extend OA mandates across the federal government, create flexibility in the locus of deposit, and create flexibility in the method for securing permission.

In August 2009, I wrote that "FRPAA would mandate OA for more research literature than any other policy ever adopted or ever proposed. It would significantly increase both the corpus of OA literature and the worldwide momentum for funder OA mandates. It would come as close as any single step could to changing the default for the way we disseminate new scientific work, especially publicly-funded work." That's still true today.
http://www.earlham.edu/~peters/fos/newsletter/08-02-09.htm#frpaa

(2.4) FRPAA permits libre OA but doesn't require libre OA. If it passes, agencies will have a year to adopt their own policies, and we can then use that time to press them to require libre.

There would be two ways to go at that point. One is to follow the lead of the Wellome Trust and the UK Funders Group. Agencies could require libre OA under an open license whenever the funder pays any part of the publication cost for an article, as opposed to paying only for the underlying research.

The other way is to jack up the terms that grantees must demand from publishers. Currently, NIH-funded authors must retain the non-exclusive rights to authorize gratis OA within 12 months of publication, and publishers who accept their work must accommodate those terms. (If publishers don't, NIH grantees must look for another publisher.) Under FRPAA, agencies could require grantees to retain the non-exclusive rights to libre OA, under a CC-BY license, within six months of publication, and publishers who accept their work would have to accommodate those terms. If only one or two agencies adopted this kind of libre mandate, some publishers might refuse to publish the work they funded. But if this kind of libre mandate became the norm, publishers would have to accommodate it.

But this is strategizing two moves in advance. FRPAA wouldn't require libre OA even if it passes, and it still hasn't passed.

(2.5) In the current session of Congress, RWA was introduced first and FRPAA second. Some journalists

said that FRPAA was a reaction to RWA. But this is FRPAA's third time around, and it was first introduced (May 2006) long before RWA or even RWA's predecessors were on the scene. The truth is that RWA was a reaction to FRPAA and the NIH policy.

Both RWA and FRPAA have bipartisan co-sponsors. But RWA had only two and FRPAA already has six.

RWA was introduced only in the House. FRPAA was introduced in both the House and the Senate.

The first time around (May 2006), FRPAA was only introduced in the Senate, not the House. But the second time around, it was introduced in both chambers, ten months apart (June 2009 and April 2010). This time around it was introduced in both chambers simultaneously. These are signs of significantly rising support.

In the House, FRPAA was referred to the same committee to which RWA has been referred, the Committee on Oversight and Government Reform chaired by Darrell Issa. Whether or not Issa's reversal on RWA means that he might support FRPAA, the best way to get FRPAA out of committee is to pressure the committee members. Here are all the members and their contact info. If one of them represents your district, please get on the phone or send a message.
http://www.congressmerge.com/onlinedb/cgi-bin/newcommittee.cgi?site=congressmerge&lang=&commcode=hgovrefrm

RWA and the latest incarnation of FRPAA co-existed in the House for 18 days (from the introduction of FRPAA on February 9 to the withdrawal of RWA on February 27). The second incarnation of FRPAA coexisted in the House with the second incarnation of the Conyers bill from April 2010 until January 2011; neither bill came up for a vote and there was no explosion. It's not like matter and anti-matter. It's more like a bad movie and a good movie running on different cable channels at the same time, vying for your vote.

Today FRPAA is alive and RWA is not. But there are more pieces to the puzzle. FRPAA coexists with the White House deliberations over OA policy in the wake of the RFI that ended in January 2012. First, it's clear that legislative action for OA, through FRPAA, is entirely compatible with executive action for OA, for example, through an executive order. We faced the same situation with the first White House RFI on OA policy, ending in January 2010. That RFI was launched while FRPAA was pending in the Senate, and three months after the RFI closed FRPAA was also pending in the House.

The situation today is the same as the situation in April 2010:
http://www.earlham.edu/~peters/fos/newsletter/05-02-10.htm#frpaa

> OSTP [White House Office for Science and Technology Policy] is still digesting the comments and we don't know what it will recommend. One breakthrough possibility is an executive order to do roughly what FRPAA would do. At least the bicameral push for FRPAA in Congress doesn't make that less likely. On the contrary, Congress and the White House could see the two initiatives as complementary. If we had a strong OA policy from the White House, then we'd still need legislation like FRPAA to make it permanent, since an executive order could be repealed by the next President. If we had momentum for a strong OA policy from Congress, then we'd still need an executive order, because it would deliver the strong OA policy faster. President Obama could act as soon as OSTP finishes digesting the public comments [while agencies wouldn't have working OA policies for at least a year after FRPAA passes].
>
> A White House policy could be stronger or weaker than FRPAA. It could be stronger by applying to more than the 11 largest federal agencies. It could ask agencies to pay reasonable publication fees at fee-based OA journals when grantees choose to publish in such journals, and it could require libre OA when agencies pay any part of the cost of publication. It could be weaker by allowing embargoes longer than six months or loopholes for unwilling publishers. (There's no evidence that the White House is leaning for or against any of these possibilities; I mention them only to show how the White House policy could be stronger or weaker than FRPAA.)

Moreover, FRPAA and the White House deliberations both coexist with the deliberations of the Interagency Public Access Committee created in late 2010 by the America COMPETES (America Creating Opportunities to Meaningfully Promote Excellence in Technology, Education, and Science Act)

Reauthorization Act. The interagency committee was instructed by the Section 103 of statute "to coordinate Federal science agency research and policies related to the dissemination and long-term stewardship of the results of unclassified research, including digital data and peer-reviewed scholarly publications, supported wholly, or in part, by funding from the Federal science agencies" and (among other things) to "solicit input and recommendations from, and collaborate with, non-Federal stakeholders, including the public, universities, nonprofit and for-profit publishers, libraries, federally funded and non federally funded research scientists" and "take into consideration the role that scientific publishers play in the peer review process in ensuring the integrity of the record of scientific research, including the investments and added value that they make."

America COMPETES Act of 2010
http://hdl.loc.gov/loc.uscongress/legislation.111s3605

The Committee hasn't issued its report yet. On the one hand, the report won't bind the White House or Congress. On the other, however, both branches of government will give it weight and neither will want to act before the report comes out. If the report recommends policies weaker than FRPAA, and weaker than those supported by the bulk of respondents to the White House RFI, publishers will cite it as a marker for compromise. But FRPAA and the White House RFI have their own stakeholder support and may trump weak recommendations from the Interagency Committee. However, if the Interagency Committee issues strong OA recommendations, that's game-over for the publishing lobby.

(2.6) Because FRPAA has been introduced twice before, publishers have had plenty of time to hone their lobbying approach to it. In both cases they chose to misrepresent copyright law and the NIH policy, and to pretend to speak for authors, rather than speak honestly about their own interest in revenue. The same is likely to happen this time.

In the past I published a list of twelve reminders of what FRPAA really says, as a vaccine against high-profile distortions. I've updated the list and posted it to the FRPAA reference page at the Harvard Open Access Project. I won't reprint it here, but I urge you to take a look. It will be especially relevant if your institution is inclined to issue a public statement in support of FRPAA but is unsure how to respond to spin from the publishing lobby.
http://cyber.law.harvard.edu/hoap/Notes_on_the_Federal_Research_Public_Access_Act#Reminders

(2.7) When RWA was introduced, some people speculated that it was merely a marker designed to move any legislative compromise closer to the copyright maximalist end of the spectrum. For that purpose its extremism was a feature, not a bug. And of course if it remained alive, it might have been used that way, whether or not it was intended that way. But now that it is dead, it has no gravitational pull at all.

We'll probably end up with a compromise of some kind. That's the way politics works. But the compromise we end up with will not be weakened by some attempt to satisfy the clamor for RWA. (What clamor?)

As FRPAA moves forward, we must remind everyone of the important fact that the NIH policy and FRPAA are already compromises with the public interest. They contain three significant concessions to the publishing lobby. First, they allow embargoes and do not require immediate OA. Second, they apply to the final version of the author's peer-reviewed manuscript, not to the published edition. Third, they mandate gratis rather than libre OA.

We should work to strengthen the NIH policy and FRPAA in all three respects. For example many of us argued for all three kinds of improvement in our responses to the White House RFI in January. But no matter what happens, we cannot allow legislators to forget the compromises already embodied in FRPAA. Mike Doyle, the lead sponsor of FRPAA in the House made clear to the New York Times last week that he sees FRPAA and the NIH policy as compromises: "My purpose [in sponsoring FRPAA] is not to go to complete open-access. We see the bill as a reasonable middle ground. The N.I.H. is proving that it works."
http://www.nytimes.com/2012/02/28/science/a-wide-gulf-on-open-access-to-federally-financed-research.html?_r=1&pagewanted=all

(2.8) Will FRPAA pass?

We don't know, of course. Several factors weigh against it: This is an election year. Congress is as gridlocked and incapacitated as it has ever been, even for legislation with bipartisan support. Many

policy issues have a higher priority in Congress than OA.

But several factors boost its chances. This is FRPAA's third time around, and the first two times did a lot of the hard work in educating policy-makers about the issues. The first two times around also gathered some significant endorsements, for example, more than 120 US college and university presidents and provosts, 41 Nobel laureates, major library and public-interest organizations, and at least two non-academic, business-oriented organizations, NetCoalition and the Committee for Economic Development. The White House RFI responses are generally stronger than FRPAA; they're already public and may soon appear in Interagency Working Group reports and White House action.

Finally we can't overlook the RWA shipwreck and the rising tide that beached it. The same forces that brought down RWA are now refocusing on raising up FRPAA. The same forces that protect the NIH policy from repeal now want to see it strengthened and extended to other agencies. The Congressional offices which have begun to understand the issues are heartily tired of publisher misrepresentations.

The RWA, COMPETES Act, FRPAA, and the White House RFI can be put in roughly this order: anti, weak, strong, and stronger. Subtract anti and what do you have? Unambiguous good news. Only time will tell how good it is. And that's where you come in.

(3) What you can do

FRPAA in the House was referred to the House Committee on Oversight and Government Reform. Here are the members and their contact info.
http://www.congressmerge.com/onlinedb/cgi-bin/newcommittee.cgi?site=congressmerge&lang=&commcode=hgovrefrm

FRPAA in the Senate was referred to the Committee on Homeland Security and Governmental Affairs. Here are the members and their contact info.
http://www.congressmerge.com/onlinedb/cgi-bin/newcommittee.cgi?site=congressmerge&lang=&commcode=sgov

If you are a US citizen, please write to your Congressional delegation. Ask them to support FRPAA. Even better, ask them to co-sponsor FRPAA. Time permitting, take the extra step of writing to the FRPAA co-sponsors in the House and Senate to thank them. Write to the members of the relevant committees, even if they do not represent you, and ask them to support FRPAA.

You can write your own letters or adapt a draft from the Alliance for Taxpayer Access.
http://www.congressweb.com/cweb2/index.cfm/siteid/sparc

Ask your university to issue a public statement in support of FRPAA. If you belong to a scholarly society, ask it to do the same.

Sign the two petitions for FRPAA:
--One is from the Alliance for Taxpayer Access.
http://www.congressweb.com/cweb2/index.cfm/siteid/SPARC/action/TakeAction.Petition/lettergroupid/11
http://www.taxpayeraccess.org/action/action_frpaa/FRPAApetition.shtml
--One is from the White House. If the petition gathers 25k signatures, the Obama administration will review it and issue an official response.
https://wwws.whitehouse.gov/petitions/!/petition/strengthen-public-access-publicly-funded-research-and-support-federal-research-public-access-act/jF4mxRc4

Sign the CostOfKnowledge petition.
http://thecostofknowledge.com/

Put pro-FRPAA banners for your blog or web site.
http://goo.gl/ROgVc

Follow the FRPAA pages from the Alliance for Taxpayer Acccess...
http://www.taxpayeraccess.org/action/FRPAA2012.shtml
...and the Harvard Open Access Project
http://cyber.law.harvard.edu/hoap/Notes_on_the_Federal_Research_Public_Access_Act
...for other action ideas that arise later.

And spread the word! Use the networking that stopped SOPA and RWA to support FRPAA.

(4) Postscript. Initially I wanted to devote this issue to the tenth anniversary of the Budapest Open Access Initiative, looking back over the last ten years and looking forward to the next ten. But in December I changed my mind and decided to devote it to a growing cluster of OA developments in the US federal government. (However, the BOAI makes an appearance in the section on "Ten years ago in SOAN".) In January when RWA came to light, I changed my mind again and decided to devote the issue to RWA. In February when FRPAA was re-introduced, I decided to make RWA share the space with FRPAA. Here in this postscript I'd like to nod in passing to the other recent federal OA developments which almost got an issue of SOAN to themselves. I'm not even counting SOPA, PIPA, and ACTA.

* The White House Office for Science and Technology Policy issued a request for information (RFI) on OA to publications and data arising from publicly-funded research. The call for public comments was open from December 3, 2011, until January 12, 2012. All the comments are now online. This was big in part because it was from the White House, and in part because it came two years after a very similar White House call for public comments (December 2009 - January 2010). The White House had all the information and public support it needed for action back in January 2010. It has more than enough now.
--The new RFI on publications
http://www.federalregister.gov/articles/2011/11/04/2011-28623/request-for-information-public-access-to-peer-reviewed-scholarly-publications-resulting-from
--The new RFI on data
http://www.federalregister.gov/articles/2011/11/04/2011-28621/request-for-information-public-access-to-digital-data-resulting-from-federally-funded-scientific
--All the comments received
http://www.whitehouse.gov/administration/eop/ostp/library/publicaccess

* The National Science Board issued a call for comments on open-data policy at the National Science Foundation. In this case the call for public comments was initially open for less than two weeks (December 30, 2011 - January 10, 2012), and then extended by a week (until January 18, 2012). It didn't help that it used an invalid URL for the report on which it sought comments. As far as I know, the comments received are not online.
http://www.nsf.gov/news/news_summ.jsp?cntn_id=122702
--See my G+ post on this RFI, with a fix to a broken link in the original RFI.
https://plus.google.com/u/0/109377556796183035206/posts/VBuzzBDL2Pw
--John Wingfield, the new head of the NSF's Directorate for Biological Sciences revealed in an interview that open-data mandates are coming the NSF.
http://www.jstor.org/stable/10.1525/bio.2012.62.1.6

* The National Oceanic and Atmospheric Administration (NOAA) asked Congress for permission to launch an OA one-stop-shop for climate data. No new funds were needed. House Republicans said no. According to Rep. Andy Harris (R-MD), "Our hesitation is that the climate services could become little propaganda sources instead of a science source."
http://www.washingtonpost.com/national/health-science/congress-nixes-national-climate-service/2011/11/18/gIQAxYvIgN_story.html

* Budget cuts led to the defunding and termination of the OA National Biological Information Infrastructure (NBII), formerly hosted by theUS Geological Survey.
http://www.nbii.gov/termination/index.html

* Ron Wyden continued to press his argument that ACTA is a treaty that cannot become law without Senate ratification, not an executive order under the sole discretion of the President. (Most observers predict that the Senate would not ratify ACTA.) Ron Wyden is also one of the Senate co-sponsors of FRPAA.
http://infojustice.org/archives/7031

* Carl Malamud's "YesWeScan" petition asked the White House to launch a one-year study of a proposal to digitize and provide OA to virtually all federal government information.
https://wwws.whitehouse.gov/petitions/!/petition/start-national-effort-digitize-all-public-government-info/15vthgVB

* The US Supreme Court allowed retroactive copyrights, a.k.a. piracy from the public domain.

http://www.supremecourt.gov/opinions/11pdf/10-545.pdf

* A House appropriations bill would have defunded and terminated the libre OER mandate from the Departments of Labor and Eduation, Trade Adjustment Assistance Community College and Career Training (TAACCCT). The defunding language was later dropped from the omnibus funding bill.
http://appropriations.house.gov/UploadedFiles/FY_2012_Final_LHHSE.pdf

* In January the US Patent and Tradmark Office (USPTO) revealed that companies were complaining that some reports of prior art, which would invalidate patents, violated their copyrights. In February it ruled that copying for the purpose of reporting prior art is protected as fair use.
http://www.uspto.gov/about/offices/ogc/USPTOPositiononFairUse_of_CopiesofNPLMadeinPatentExamination.pdf
http://www.techdirt.com/articles/20120207/07424717685/uspto-says-copies-academic-articles-submitted-as-prior-art-are-covered-fair-use.shtml

* Finally, we saw the rise and fall and rise of Rick Santorum, the first fractionally serious presidential candidate with a seriously corrupt track record on OA.
https://plus.google.com/u/0/109377556796183035206/posts/1tA6Fta1Ny4

Read this issue online
http://dash.harvard.edu/bitstream/handle/1/8335492/03-02-12.htm

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http://www.dclab.com/public_access.asp

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