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## The Impact of the NIH Public Access Policy On Professional and Scholarly Publishing

Mandated in 2008, the NIH public access policy requires that authors who have received grants from NIH must deposit any ensuing manuscripts written as a result of their research to NIH's PubMed Central for free public access within 12 months of publication.

### How do publishers view the NIH policy?

The **National Institutes of Health (NIH)** policy seeks to address a challenge or problem that has not been proven to exist. In doing so, the NIH policy introduces legal conflicts with an author's and publisher's copyright and undermines intellectual property rights and the economic incentive of publishers and rights holders. The policy makes their copyrighted material available without compensation in online sites, for dissemination to anyone, anywhere, anytime. Such mandatory open access erodes and disrupts the proven, balanced economic model that supports and sustains journals as dynamic and effective vehicles for promoting scientific communication for centuries. It removes the substantial safeguards that journal publishers take to protect their journals from unauthorized misappropriation.

North American-based science and technology publishers account for upwards of 40% of all peer-reviewed scientific research papers published annually. Therefore, mandatory public access policies will disproportionately impact U.S. publishers. By severely restricting the scope of protection for a critical class of copyrighted works, the NIH policy deprives both authors and publishers of their free choice to use the business model best suited for disseminating content and could ultimately reduce incentives to make substantial investments in peer reviewing, publishing, and disseminating scientific research.

At the same time, the primary beneficiaries will largely be non-US entities who neither fund nor invest in research but will have free access to the information in the copyrighted journal articles. U.S. publishers have already gathered evidence that companies in China and India are planning to resell and distribute without authorization articles downloaded from NIH's PubMed Central database — material produced by U.S. publishers at their own expense.

### Does the NIH public access policy affect copyright?

Yes. The NIH policy raises numerous important questions with regard to copyright principles, policy, and law. Copyright in the modern world of electronic dissemination is a complicated issue. The rights recognized under the U.S. Constitution remain fundamental. Article I empowers Congress "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries".

When an author asks a publisher to publish a research article, the author agrees to transfer copyright so the publisher will undertake the effort and expense of preparing the article for final publication. The publisher relies on holding copyright to enable it to recoup publication costs and continue to invest in scientific communication. The full benefit of copyright protections is weakened when authors are required to permit NIH to make their journal articles available to the public for free. Moreover, the mandated access policy gives publishers little or no subsequent safeguards from piracy. Scientists should not be limited to publishing in a few compliant journals. Doing so inhibits intellectual freedom and scholarly independence and is, quite simply, against the public interest.

### Isn't the NIH policy compatible with copyright since Section 105 of the Copyright Act says that copyright protection is not available for any work of the United States Government?

No. Section 105 bars copyright in "work[s] of the United States Government," which are defined in the Section 101 as works of "employees" and "officers" of the U.S. Government as part of that person's "official duties." Congress did not design these provisions to cover works created by U.S. Government contractors and grantees. In the legislative history of the 1976 Copyright Act, a committee of the House of Representatives explicitly acknowledged copyright could be an important incentive to both creation and dissemination of works by contractors and grantees. The committee recognized that there are many "cases where the denial of copyright protection would be unfair or would hamper the production and publication of important works."

The NIH policy has had this negative effect.

## Will the NIH policy harm the U.S. publishing industry?

The concern is that it will, and industry research supports this conclusion. Factors such as price and reliability of access affect librarians' decisions to keep a journal subscription or cancel it, according to a study by the Publishing Research Consortium. The survey reveals a significant number of librarians would be likely to cancel subscriptions and stop paying for a journal if they could access its articles for free online — even if the articles were not available for a year and even if not all articles are available via open access. When given the choice of subscribing to a journal or waiting twelve months for free access, many libraries will cancel their subscriptions and wait.

In the life sciences, on average, only 60% of an article's lifetime usage takes place in the first year of publication, leaving 40% commercial value of an article lost when it is available free 12 months after publication, according to another study published by the Special Libraries Association. Finally, only 15% of the value of an article in American Psychological Association (APA) journals is recouped after the first year of publication according to the APA.

With the potential loss of so much subscription revenue, publishers worry about their ability to recover costs associated with publication. Moreover, if the NIH policy were to be adopted by other federal agencies, the number of threatened journals would increase dramatically. This is particularly true in fields like mathematics, physics, and chemistry where many articles find their highest level of usage in the third to fifth year after publication.

Neither scientific research nor journal publishing is driven by a single economic or business model. Publishers follow a variety of models and their positions on public access policies vary. A "one-size-fits-all" policy is not appropriate for most journal publishing where specialized disciplines and different types of articles (e.g., primary research, reviews, letters, methods, reports, case studies, etc.) have a wide range of time-to-value ratios.

## Are there alternatives to the NIH policy?

Yes. There are better models for providing for access to taxpayer-funded research without infringing upon copyright concerns. For example, in the 2007 America COMPETES Act, the NSF was directed to adopt a policy that provides public access to final reports, summaries and citations related to research projects the NSF funded. This process makes results of federally funded research publicly available without jeopardizing authors, publishers, scientists, and researchers interests the organized publishing process.

Publishers widely support the kind of public access that the NSF has adopted. It demonstrates an acceptable way for the federal government to promote the research it funds without undermining publishers or infringing upon the copyright protections that have sustained scientific communication for more than one hundred years.

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