



February 18, 2020

President Donald J. Trump
The White House
1600 Pennsylvania Avenue, NW
Washington, DC 20500

Dear President Trump:

I am writing to express our concerns about a policy proposal that is being considered by the White House Office of Science and Technology Policy (OSTP) that would eviscerate the copyrights of journal publishers throughout the country by requiring them to make peer-reviewed articles that report on federally funded scientific research freely available to the public immediately upon publication.

The Copyright Alliance is a non-profit, non-partisan public interest and educational organization representing the copyright interests of over 1.8 million individual creators and over 13,000 organizations in the United States, across the spectrum of copyright disciplines. The Copyright Alliance is dedicated to advocating policies that promote and preserve the value of copyright and to protecting the rights of creators and innovators. The individual creators and organizations that we represent rely on copyright law and the Copyright Office to protect their creativity, efforts, and investments in the creation and distribution of new copyrighted works that inform and entertain the public.

We understand that the policy being proposed may have come about because there are some within OSTP who question whether peer-reviewed manuscripts that report on federally funded research are protected under U.S. copyright law. As the only association in the United States devoted exclusively to copyright, I can tell you beyond a shadow of a doubt that these peer-review manuscripts are protected by copyright. As copyrighted works, these manuscripts are valuable American intellectual property, privately owned and produced by hundreds of publishers across the country.

Copyright protects original works of authorship. Just about anything that can be fixed in a tangible form and constitutes a creator's expression is protectable as a work of authorship under the Copyright Act. This includes literary works, such as peer-reviewed journal articles, regardless of whether they are published or unpublished or in draft or final form.¹ Although

¹ To be clear, we are not suggesting that the underlying data and/or the results of the research itself are protected by copyright, but rather that the expressive works that discuss the research—i.e. the journal articles—are protected. Furthermore, even though these journal articles discuss research that was funded in part by the federal

prior to 1978, federal copyright protection generally was available only for published works, such protection is now available for unpublished works as well. The Copyright Act makes that abundantly clear throughout the text of the Act and through Copyright Office practices.

To be protected by copyright these articles need only meet three basic requirements: originality, creativity, and fixation. Out of the wide variety of creative works that fall within the subject matter of copyright—such as literary works— very few fail to satisfy these requirements. When considering the applicable criteria, *it is incontrovertible that copyright subsists in peer-reviewed journal articles from the moment the earliest drafts of these articles are written.* If OSTP continues to have any doubts about the protections afforded to peer-reviewed journal article under copyright law, we strongly encourage OSTP staff to discuss their doubts with the expert agencies on copyright law within the U.S. Government—the U.S. Copyright Office and the U.S. Patent and Trademark Office.

The basis for copyright protection stems directly from the U.S. Constitution. The Framers believed that securing for limited times the exclusive rights of authors to their writings would “promote the progress of science and useful arts.” The primary objective of copyright is to induce and reward creators of all types, through the provision of property rights, to create new works. By granting certain exclusive rights to copyright owners that allow them to protect their works against others using them without their permission, copyright owners receive the benefit of economic rewards and the public receives the benefit of the works that might not otherwise be created or disseminated without copyright protection.²

In this regard, a peer-reviewed journal article is no different than a movie, a song, a photograph, a computer program or any other copyrighted work. Copyright—as a property right—forms the foundation for the market for creative works, providing the incentive to invest in the creation of new works, as well as the incentive to invest in commercializing works through development, refinement, and distribution to the public. In the case of peer-reviewed journal articles, while the underlying research discussed in the articles may have occurred because of federal funding, copyright protection in the articles provides the incentive for publishers to invest billions of dollars improving them through the peer-review process, editing

government, since they are not written by federal employees, they are not subject to the limitations on copyright for United States Government works.

² While the copyright law is intended to serve the purpose of enriching the general public through access to works, it is important to understand that the copyright law imposes no obligation upon copyright owners to make their copyrighted works available. As a result, an unpublished work that is never distributed to the public receives the same copyright protection that a published work would receive.

them, refining them, and distributing them through subscriptions in the U.S. and hundreds of foreign countries.

Requiring the immediate free distribution of peer-reviewed journal articles would effectively remove the incentives provided by copyright and remove publishers' ability to make these billions of dollars in private sector investments.

Since 2013, OSTP's policy has been that peer-reviewed journal articles that report on federally funded scientific research must be made freely available to the public 12 months after publication. That policy represents a significant regulatory intervention in the private marketplace that essentially gives copyright owners only one year—rather than a full copyright term of the author's life plus 70 years—to recoup their investment before being forced to give their property away for free.

We have long voiced concerns about this government regulation of copyrighted journal articles. We do not think the government should be undermining the Constitution and the Copyright Act by effectively reducing the level of copyright for any type of copyrighted work, including peer reviewed articles that discuss federally funded research. But at least the 2013 OSTP policy was the result of extensive public discussions and negotiations with stakeholders, and the 12-month embargo period provides an essential (albeit narrow) time period for journal publishers to recoup the substantial investments they make in the peer-review and publication process. If OSTP reduces or eliminates this embargo period, it would essentially repudiate the difficult compromise that was reached in 2013, and the whole ecosystem for publishing peer-reviewed articles would fall apart.

We strongly object to this approach. Today the government eviscerates copyright protection for peer-reviewed journal articles. What's next tomorrow? Works of art, iconic photographs, documentaries?

We know the Administration has been contacted by numerous journal publishers—including hundreds of scientific and medical societies—discussing the tremendous private sector investment made by these organizations in the peer-review and publication process. We won't discuss in great length the peer-review process or the investments that are crucial to that process because they will do a better job than we ever can. But we want to emphasize that these investments in peer-review and publication are crucial to bringing these important copyrighted articles to the public.

There has been widespread opposition to OSTP proposal, not only from stakeholders but also from Congress. Senator Thom Tillis (R-NC), who chairs the Senate Judiciary Committee's

Intellectual Property Subcommittee recently sent a letter to Commerce Secretary Wilbur Ross and OMB Director Mick Mulvaney voicing his concern that the proposal “would undermine the incentives for journal publishers to invest in the publishing and archiving of scientific journal articles” and “could diminish the high quality of scientific and other scholarly research in the United States, as well as endanger an estimated 40,000 America jobs within the publishing industry.”

We agree with Chairman Tillis and believe that OSTP’s proposed policy will also have a ripple effect through the federal government, the marketplace, and research and innovation. It will result in American taxpayers being forced to pay for peer-review. Since publishers will no longer be able to recoup their investments, they will look to researchers to pay them to have their articles peer-reviewed and published. These researchers will then look to the federal government to finance this new expense or will divert monies from their existing federal research grants to finance it, which means ultimately it will be American taxpayers that are paying the bill.

Moreover, copyrighted products are one of our nation’s top exports, and American peer-reviewed articles are an important part of this. They are licensed in hundreds of foreign countries, generating billions of dollars in U.S. exports and contributing positively to our balance of trade. Requiring free distribution of these articles would erase those exports and amount to a U.S. subsidy of the rest of the world’s consumption of this valuable American intellectual property.

In sum, upending the marketplace—as OSTP is proposing—makes no fiscal or policy sense. America’s federal research grant programs are based on the understanding that the best way to spend federal money is to incentivize private actors to invest in the results of the federal grants. Nothing has changed over the past several years to justify altering that successful approach. We therefore implore the Administration not to change the current policy and to retain the 12-month embargo period on the government-mandated free distribution of peer-reviewed journal articles reporting on federally funded research.

Sincerely,



Keith Kupferschmid
Chief Executive Officer
Copyright Alliance

cc: The Honorable Russel Vought, Acting Director, Office of Management and Budget
Joe Grogan, Assistant to the President for Domestic Policy
Larry Kudlow, Director, National Economic Council
The Honorable Kelvin Droegemeier, Director, Office of Science and Technology Policy