



Before the Office of Science and Technology Policy

**Public Access to Peer-Reviewed Scholarly
Publications, Data and Code Resulting
From Federally Funded Research**

ER Doc. 2020-06622

COMMENTS OF THE COPYRIGHT ALLIANCE

The Copyright Alliance appreciates the opportunity to submit the following comments in response to the [Request for Information](#) published by the Office of Science and Technology Policy in the Federal Register on February 19, 2020, regarding approaches for ensuring public access to the peer-reviewed scholarly publications, data, and code that result from federally funded scientific research.

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 to protect their creativity, efforts, and investments in the creation and distribution of new copyrighted works for the public to enjoy.

General Comments

The recent policy change proposed by the Office of Science and Technology Policy (OSTP) would eviscerate the copyrights of journal publishers throughout the country by requiring them to make their privately-owned and privately-produced copyrighted articles freely available to the public immediately upon publication when those articles discuss research funded in whole or in part by a government grant. Articles that discuss federally funded research are already subject to a strict copyright limitation put in place several years ago. Any further reduction in copyright protection afforded to these articles would severely harm the marketplace for peer-reviewed scholarly communications. While we appreciate efforts to make federally funded research readily accessible to the public, it is essential that any policy distinguish between research that is funded by the government, on the one hand, and downstream products (such as peer-reviewed articles) that discuss that research but that are funded and produced entirely by the private sector, on the other hand. OSTP's focus on making downstream peer-reviewed articles immediately freely available, by eliminating the already limited copyright protections that support the production and distribution of those articles, reveals an unfamiliarity and overly simplistic view of the role intellectual property plays in advancing research and innovation.

Current OSTP policy already overcompensates for alleged (but unproven) barriers to access by requiring that peer-reviewed journal articles discussing federally funded research be distributed to the public online for free no later than 12 months after publication. This policy represents a significant regulatory overreach into the private marketplace, effectively giving 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. Any further reduction of this 12-month embargo would significantly reduce the quality and quantity of peer-reviewed articles produced by U.S. scholars and publishers and would have grave consequences for American innovation, research, jobs, and global competitiveness.

It is particularly troubling that OSTP continues to propose this reduction in copyright protection even as the organizations that would be most negatively affected by it are playing a critical role in the COVID-19 relief effort. America’s medical professional and research societies are supporting doctors and researchers on the front lines of the battle against COVID-19, doing everything they can to expedite the publication of peer-reviewed articles related to COVID-19 and ensuring that the research community has immediate access to these articles.¹ Instead of supporting these critical organizations in the midst of this pandemic, OSTP is actively pursuing a policy change that would be devastating to their ability to produce high-quality, rigorous peer-reviewed articles. Furthermore, in a stunning failure to recognize the strain these organizations are currently under and the negative impact its proposed policy would have on them, as recently as last week OSTP convened a “final” stakeholder roundtable on its proposed policy—billed as including a broad range of stakeholders—but *did not invite a single medical professional society* to participate in this important invitation-only discussion.

Equally troubling is that the current proposal has been put forward with no evidence that this untested, one-size-fits-all immediate free distribution model is viable or sustainable across the broad range of authors and publishers that produce peer-reviewed journal articles. Nor has anyone presented evidence of failures in the current market for publishing peer-reviewed articles—a market that is in fact incredibly innovative, diverse, and competitive. In an attempt to hastily eliminate unproven barriers to access, the proposal to eradicate the 12-month embargo ignores the Constitutional purpose of copyright law in promoting the progress of science *by securing for limited times to authors the exclusive right in their writings*.

We hope that a better understanding of the relevance and value of copyright protection in these scholarly articles will persuade OSTP to abandon the current proposal and any similar future proposals.

Peer-Reviewed Articles that Discuss Federally Funded Research are Protected by Copyright, Regardless of Whether the Articles are in Draft or Final Form

At the center of the proposed policy appears to be a question of 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, we can say beyond a shadow of a doubt that these peer-reviewed 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, and regardless of whether they report on federally funded research.² Although 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 the documents and practices of the U.S. Copyright Office.

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 articles under copyright law, we strongly encourage OSTP staff to discuss their doubts with the expert

¹ See here: <https://www.the-scientist.com/news-opinion/journals-open-access-to-coronavirus-resources--671105>.

² 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 government, since they are not written by federal employees, they are not subject to the limitations on copyright for United States Government works.

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.” They understood that this goal would primarily be achieved by inducing and rewarding 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.³

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 data discussed in the articles may have initially been collected through support from federal research funding, copyright protection in the articles provides the incentive for publishers of all stripes—including non-profit medical and scientific societies as well as commercial publishers—to collectively invest billions of dollars in producing and disseminating the articles—improving them through the peer-review process, editing them, refining them, and distributing them through subscriptions in the U.S. and hundreds of foreign countries.

Requiring the immediate free distribution of copyrighted peer-reviewed journal *articles*—as opposed to any underlying *data* the government may have actually funded—would set a dangerous precedent by effectively removing the incentives provided by copyright to invest in producing and disseminating these articles. Such a policy also suggests that if government funding can be associated with anything discussed in a copyrighted work, the government can claim ownership over *the entire work*, even if it the government has invested nothing in producing the copyrightable elements of the work. This is an incredibly slippery slope, and this logic could be used to justify eliminating copyright protections across millions of creative works that highlight, discuss, report on, or comment on research or activities funded by the government.

The Current 12 Month Embargo Already Undermines Intellectual Property Rights

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 intrusion into 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. The government should not be undermining the Constitution and the Copyright Act by effectively reducing the level of copyright protection 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 further reduces or eliminates this embargo period, it would essentially repudiate the difficult

³ 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.

compromise that was reached in 2013, and the whole ecosystem for publishing peer-reviewed articles as it exists today would collapse.

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, news reports, historical writings?

It is even more troubling that OSTP is considering this approach in the midst of a global pandemic that is causing economic distress across a wide range of creative, information, and research industries. At the very moment that our society more than ever needs organizations to continue investing in producing high-quality, reliable peer-reviewed journal articles, OSTP is moving towards a policy that would cripple investment in these articles. The result would be that our doctors and scientists would have fewer—and lower quality—peer-reviewed reviewed articles to guide their vital decisions in treating patients and combatting disease. OSTP's proposed approach would be a serious mistake under normal circumstances; its push for it during the current crisis is nothing short of reckless.

As the world continues to face unprecedented challenges brought by the novel coronavirus, initial reports from countries most affected by the pandemic show that piracy of copyrighted works online has increased substantially over the past few months. This increase in infringement, coupled with the near complete shutdown of many copyright-based industries has resulted in massive disruptions in global creative ecosystems. Without the assurances that intellectual property rights provide, incentives to invest will diminish, more jobs will be lost, and the future production of copyrighted works spanning all genres will be threatened.

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.⁴ 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's proposal, not only from stakeholders but also from Congress. Late last year, Senator Thom Tillis (R-NC), who chairs the Senate Judiciary Committee's Intellectual Property Subcommittee 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.”⁵ In February, Eight Republican Members of Congress with backgrounds in medicine sent a letter to the President raising concerns that OSTP's proposed policy “would undermine American jobs, exports, innovation, and intellectual property” and would “likely result in a cost shift, placing billions of dollars of burden on taxpayers.”⁶

Last month, ten Members of Congress—including half of the Republican Members on the House Judiciary Committee (which has jurisdiction over intellectual property issues)—sent a letter to the Acting Director of OMB warning that OSTP's proposed policy change “would be a costly mistake for American scientific research, intellectual property, and for the economy as a whole.”⁷ The letter echoes concerns surrounding the elimination of publishing incentives, explaining that the proposed policy would upend the entire peer-review process and jeopardize “the most trusted form of scientific communication.” At a time when the quality and reliability of articles reporting on scientific and medical breakthroughs is absolutely critical, undermining the process by which these works are developed, reviewed, and distributed would have grave consequences.

⁴ December 18, 2019 [letter](#) to President Trump from More than 125 scientific societies and journal publishers.

⁵ December 12, 2019 [letter](#) to Secretary Wilbur Ross and OMB Director Mick Mulvaney from Senator Thom Tillis.

⁶ February 18, 2020 [letter](#) to President Trump from eight Republican House Members with a medical background.

⁷ April 9, 2020 [letter](#) to OMB Acting Director Russell Vought from ten Republican House Members.

Finally, in response to the current RFI, Senator Tillis recently sent a letter to OSTP Director Droegemeier expressing serious concerns with the proposed policy.⁸ Senator Tillis confirms, as these comments do, that peer-reviewed journal articles produced by private-sector organizations are protected by U.S. copyright law, regardless of whether they are in draft or final form. The letter explains that while copyright protection does not extend to underlying data discussed in the articles, the great deal of expressive content that goes into the articles qualifies them for protection. In this way, the journal articles are no different than newspaper articles, books, television programs, or films that comment on or discuss federally funded research.

We agree with these Members of Congress that the proposed policy will also have a ripple effect through the federal government, the marketplace, and research and innovation. For one thing, 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 to have their articles peer-reviewed and published. These researchers will then look to the federal government to finance this new expense or, when possible, may divert monies from their existing federal research grants to finance it, which means ultimately it will be American taxpayers who 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 make follow-on investments that leverage and build upon the results of federal grants. Nothing has changed over the past several years, and no evidence has been offered to justify altering that successful approach.

We therefore implore OSTP 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 that discuss federally funded research.

Conclusion

The Copyright Alliance thanks the Office of Science and Technology Policy for the opportunity to share our views on this matter. We look forward to answering any further questions the Office may have.

Respectfully submitted,

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⁸ April 17, 2020 [letter](#) to OSTP Director Kelvin K. Droegemeier from Senator Thom Tillis.