April 17, 2020

Dr. Kelvin K. Droegemeier
Director
Office of Science and Technology Policy
Eisenhower Executive Office Building
1650 Pennsylvania Avenue, NW
Washington, DC 20504


Dear Dr. Droegemeier:

I submit these comments in my capacity as Chairman of the Senate Judiciary Committee Subcommittee on Intellectual Property. My comments arise from the Office of Science and Technology Policy’s (OSTP) recent proposal to require immediate free distribution of certain copyrighted journal articles. The Senate Judiciary Committee Subcommittee on Intellectual Property has substantive jurisdiction over copyright law, as well as oversight jurisdiction of the United States Patent and Trademark Office, United States Copyright Office, and all other functions of the full federal government as they relate to intellectual property.

As you know, I became aware in December 2019 that OSTP proposed an Executive Order requiring the immediate free distribution of privately funded and privately owned copyrighted scientific and medical journal articles if the article’s subject matter addressed research that was funded, at least in part, by a federal grant. On December 12, 2019, I wrote to Secretary Ross and Director Mulvaney raising significant concerns about this proposed change. I am thankful to OSTP for subsequently allowing for a needed review of the implications produced by such a drastic change in policy. I also appreciate you engaging in private stakeholder discussions and issuing the present request for information (RFI).

After further research on my part, and after hearing from many interested stakeholders, I remain very concerned about this proposed order. I believe that requiring the immediate free distribution of copyrighted journal articles would be harmful to American intellectual property interests and, as a result, would jeopardize the American exports, jobs, research, and innovation that our intellectual property system supports.
1. Copyright Provides Essential Incentives to Invest in the Production and Distribution of Peer-Reviewed Journal Articles

At the outset, it is critical to understand that peer-reviewed journal articles produced by private sector organizations are private property protected under U.S. copyright law. This is the case regardless of whether the articles are in “accepted manuscript” or “version of record” form. While copyright protection does not—and should not—extend to underlying data discussed in the articles, copyright protection unquestionably extends to expressive content in the articles. In this sense, copyright protection in peer-reviewed articles discussing federally funded research results is no different than copyright protection in newspaper articles, books, or movies that discuss federally funded research results. The fact that these copyrighted works may discuss non-copyrightable data, even if that data was produced in part with federal funding, does not diminish their status as copyrighted works.

Copyright protection in peer-reviewed articles serves the important purpose of enabling private sector organizations—including non-profit scientific and medical societies, as well as commercial publishers—to invest in the production, dissemination, and long-term stewardship of these articles. This is precisely the outcome that our intellectual property system is designed to achieve. In order to increase the return on investment from federal grant spending, we incentivize the private sector to leverage federally funded research results to invest in the creation of downstream consumer products that are sold to customers around the world, improving lives and contributing positively to the U.S. economy and the U.S. balance of trade in the process.

If OSTP requires the immediate free distribution of peer-reviewed articles that discuss federally funded research results, copyright protection would cease to provide any incentive at all for private sector investment in the production and distribution of these articles. This would not only set a dangerous precedent for American intellectual property rights in private sector-produced downstream products that build upon federally funded research, it would also appear to contravene Congress’ explicit guidance that the Administration, in developing open access policies, “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.”

2. Undermining Copyright Protection Could Result in Significant Harmful Economic Consequences

Eliminating copyright as a market-based incentive for the creation and distribution of peer-reviewed journal articles that discuss federally funded research results would risk immediate harmful consequences for American intellectual property exports, jobs, and research and innovation.

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Copyrighted works are one of our nation’s strongest exports,\(^2\) and peer-reviewed journal articles are an important component of this. We are the world leader in producing high-quality peer-reviewed journals, which are exported to subscribers in China and hundreds of other foreign countries, contributing positively to the balance of trade. If OSTP requires the immediate free online distribution of a large subset of these copyrighted works,\(^3\) current subscribers in China and elsewhere will have little incentive to continue paying to access this American IP and will likely choose instead to access it for free online. This would lead to an immediate and harmful reduction in American IP exports to China and other strategic competitors at the very moment that the Administration is focused on increasing American exports, particularly to China.

Several of my Republican colleagues in the Congress recently raised this very concern. In a letter to Acting OMB Director Vought, ten United States Representatives—including half of the Republican Representatives on the House Judiciary Committee—explained that OSTP's proposed policy would “allow countries like China easy access to our highly sought-after intellectual property and help China and other economic competitors to further encroach on our position as the leader in innovation and research.”\(^4\) In a separate letter to the President, eight United States Representatives with a background in medicine explained that OSTP’s proposed policy “would nationalize American intellectual property and force the researchers behind that intellectual property to give it away to the rest of the world for free.”\(^5\)

I am also concerned that if OSTP proceeds further with this mandate, the private sector will be unable to invest in producing and disseminating these articles, leaving taxpayers to bear the cost. This could occur through diverted funds from research grants or through new appropriations to finance the peer-review, editing, publication, and distribution of articles. If this occurs, not only would American taxpayers be saddled with an unnecessary new expense that was previously paid for by the private sector, American taxpayers would also effectively be subsidizing China’s and other competitors' free access to American IP that was previously exported at a valuable trade surplus.

All of this would risk negative consequences for the hundreds of thousands of American jobs that directly or indirectly support the publication and distribution of peer-reviewed journal articles, or that directly or indirectly benefit from ongoing substantial private sector investment in creating and disseminating this reliable and verified scientific and medical content. A decrease

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\(^2\) “Sales of select U.S. copyright products in overseas markets amounted to $191.2 billion in 2017.” Stephen E. Siwek, 2018 Report on “Copyright Industries in the U.S. Economy” at 3, available at https://ripa.org/files/uploads/2018/12/2018CpyrtRptFull.pdf. Notably, this contrasts with lower foreign sales for “electronic equipment, appliances and components ($174.2 billion); agricultural products ($138.2 billion); chemicals (excluding pharmaceuticals & medicines) ($137.0 billion); aerospace products and parts ($134.4 billion); and pharmaceuticals and medicines ($55.8 billion).” \(^4\) Id.

\(^3\) As a point of reference, according to Scopus there were 224,000 articles in 2018 that acknowledged federal grant funding to support some portion of the underlying research discussed in the articles.

\(^4\) April 9, 2020 letter to Acting Director Vought from ten Republican House Members.

\(^5\) February 18, 2020 letter to President Trump from eight Republican House Members with a medical background.
in this investment would also risk more general harmful consequences to American research and innovation.

Many of the scientific and medical professional and research societies that are critical in supporting and nurturing our nation’s doctors, scientist, and engineers are the same organizations that produce America’s world-renown peer-reviewed journals. Requiring these organizations to give away their intellectual property rights for free could jeopardize their ability to continue producing high-quality peer-reviewed journals, as well as their ability to support the millions of American medical and scientific professionals that are fundamental to our country’s leadership in research and innovation. In a letter to the President late last year, more than 140 organizations—most of them medical and scientific societies—explained that OSTP’s proposed policy “would significantly harm the system of peer-reviewed scholarly communication that fuels America’s leadership in research and innovation” and could “result in some scientific societies being forced to close their doors or to no longer be able to support the publication of U.S.-sponsored science that is key to ensuring that the U.S. remains the world leader in science and technology.”

3. Conclusion

OSTP’s proposal to require the free online distribution of copyrighted peer-reviewed manuscripts earlier than one year after publication is a mistake. Ignoring Congress’ guidance, this policy would undermine American copyright incentives and set a dangerous precedent for American intellectual property rights in private sector-produced downstream products that build upon federally funded research. In the process, this policy could lead to substantial harmful consequences for American intellectual property exports, jobs, and research and innovation.

Dozens of Members of Congress and hundreds of organizations have raised these concerns since OSTP initially proposed this policy. Given this, I hope that you will suspend this policy process. Please know that once the COVID-19 pandemic passes, I would be happy to work with you and others to ensure that the public is provided access to the results of federally funded research in a

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6 December 18, 2019 Letter to President Trump from 142 organizations, including (among many others) the American Academy of Pediatrics, American Association for Cancer Research, American Association of Immunologists, American Cancer Society, American Chemical Society, American College of Surgeons, American Diabetes Association, American Heart Association, American Institute of Aeronautics and Astronautics, American Institute of Chemical Engineers, American Medical Association, American Society for Radiation Oncology, American Society of Agricultural and Biological Engineers, American Society of Agronomy, American Society of Animal Science, American Society of Civil Engineers, American Society of Clinical Oncology, American Society of Mechanical Engineers, Council of Medical Specialty Societies, Infectious Diseases Society of America, Institute of Food Technologists, Institute of Industrial and Systems Engineers, National Kidney Foundation, and the New England Journal of Medicine. Available at: https://presspage-production-content.s3.amazonaws.com/uploads/1508/lettertothepresidentfrom140researchandpublishingorgs-2.pdf?10000.

7 In addition to hundreds of scientific and medical societies who have voiced these concerns, several trade associations—including the U.S. Chamber of Commerce, the Association of American Publishers, the Copyright Alliance, and the Software and Information Industry Association—as well as many commercial publishers have voiced the same concerns.
manner that respects intellectual property rights and allows for continuing private sector investment in the production and dissemination of peer-reviewed journals.

Sincerely,

Thom Tillis
Chairman
Senate Judiciary Committee Subcommittee on Intellectual Property