

May 6, 2020

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

RE: AAP Response to OSTP RFI Concerning “Public Access to Peer-Reviewed Scholarly Publications, Data and Code Resulting From Federally Funded Research,” FR Doc. 2020-06622

Dear Dr. Droegemeier:

The Association of American Publishers (AAP) represents the leading book, journal, and education publishers in the United States on matters of law and policy. We believe strongly in the role of publishing in a democratic society, and advocate for outcomes that incentivize the publication of creative expression, professional content, and learning solutions to the benefit of the public. As key contributors to the American economy and U.S. exports, publishers invest in valuable intellectual property that furthers the scientific progress and intellectual advancements that are at the core of the research enterprise.

AAP’s membership is diverse but united by the goal of disseminating knowledge, particularly in the realm of professional and scholarly publishing. From scientific societies to university presses to commercial publishers, our members collectively publish thousands of scholarly journals, covering nearly every academic and professional field in science, technology, medicine, social sciences, and the humanities. Publishers not only invest in content, but also in the tools by which to make it available, making billions of dollars in private-sector investments to produce high-quality articles and disseminate them to readers around the world. Dissemination of knowledge is the purpose of the publishing industry.

In fostering dissemination, publishers support open science and have been essential to its evolution by developing an ever-increasing array of open access and public access models in the marketplace, as well as tools to enhance the dissemination and impact of publications. Through these innovations, publishers are continuously creating options by which researchers can communicate their ideas and discoveries to the world, while also ensuring the accuracy and peer-review that are indispensable to the process.

The importance of the marketplace was highlighted earlier this year as publishers across the country took the initiative to implement policies that ensure immediate and widespread free access to a great diversity of high-quality journal articles and other materials pertaining to the COVID-19 outbreak. These leaders—who publish some of the most respected research journals in the world—were able to make this invaluable contribution to the global pandemic response because, and only because, they had invested in and produced the journals in the first place. This shows that the private sector performs a different role than government, and more precisely that the private publishing industry is an important government partner.

As OSTP considers its policy priorities, we urge you to take special care to avoid policies that would reduce incentives for publishers to invest in high-quality content or would curtail the growing number of innovative open access and public access business models that are currently being developed in the marketplace through new agreements between publishers and their customers. We are particularly concerned by recent discussions proposing to curtail the marketplace through government-mandated free distribution of peer-reviewed manuscripts earlier than twelve months after publication.

We also hope that OSTP will give equal consideration to the broad diversity amongst research fields, and the associated diversity in the means, needs, and preferences of authors who write peer-reviewed journal articles and readers who consume them. It would be bad policy to mandate a one-size-fits-all framework that would force all publishers into one business model that may work for some author and reader communities, but not for others. In particular, we urge OSTP not to pursue policies that would leave

authors no alternative other than to pay in order to publish their works in peer-reviewed journals, as would almost certainly occur if authors were required to make peer-reviewed manuscripts freely available earlier than twelve months after publication. This concern would be further exacerbated by insufficient funding for researchers to support open access publishing.

The success of America's federal grant programs is grounded in the understanding that government can only do so much. To truly harness the value of federal grant dollars, the government incentivizes the private sector to invest in and commercialize research outcomes, most notably through the Bayh-Dole Act, which this year celebrates 40 years of promoting American research and innovation. A key insight behind the success of the Bayh-Dole Act is that in order to maximize the return on government investment in research, private sector incentives and partnerships are a vital ingredient in bringing scientific discoveries and innovation to the public in the form of downstream, value-added products.

For publishers, copyright protection (rather than patent protection under Bayh-Dole) enables investment in high-quality peer-reviewed publications that discuss and analyze grant-funded research results. These publications exist as important downstream value-added products only because of the intellectual property incentives that enable hundreds of publishers across the country to make billions of dollars in private sector investments. Within this framework, since the very founding of our country, publishers have fostered the discovery and use of scientific advances to the benefit of the American public.

As OSTP continues to “explore opportunities to make the knowledge, information and data generated by federally funded research more readily accessible,” we encourage you to recognize the essential role of the American publishing industry as government partners and global innovators.

Thank you for the opportunity to respond to this RFI, and we look forward to further discussions.

Question 1: What current limitations exist to the effective communication of research outputs (publications, data, and code) and how might communications evolve to accelerate public access while advancing the quality of scientific research? What are the barriers to and opportunities for change?

When it comes to public access to research outputs, there is a significant difference between the current state of access to publications and the current state of access to data. With respect to the former, there are multiple ways for researchers and the public to immediately access any journal article—for example through subscriptions, inter-library loan, purchasing access to articles, and publisher or other publicly available websites where articles have been made freely available via publisher open access programs.

In most cases researchers and practitioners who need access to peer-reviewed articles do not need to personally purchase subscriptions; many have access through institutional subscriptions or membership in professional societies. Where these options are insufficient, researchers and practitioners—along with the general public—can freely access articles at thousands of libraries throughout the country.

Additionally, millions of peer-reviewed manuscripts are available for free online, either immediately upon publication or after a short embargo period. AAP's members have taken major steps to help make the federal government's public access policies—as mandated in the 2013 OSTP memorandum on “Increasing Access to the Results of Federally Funded Scientific Research” (the “OSTP Memo”)—a success for federal agencies and the public. Among other things, AAP's members have adjusted their publishing policies and are working with several agencies under the CHORUS partnership to facilitate access to journal articles that discuss federally funded research. But they have only been able to do this because the OSTP Memo includes safeguards and built-in flexibility designed to protect sustainable business models and the quality of published articles in the long term.¹

In short, AAP is not aware of any credible evidence that researchers, practitioners, or other consumers who need access to peer-reviewed journal articles suffer from meaningful lack of access. And this is not

¹ Among other things, the OSTP Memo notes that “publishers provide valuable services, including the coordination of peer review, that are essential for ensuring the high quality and integrity of many scholarly publications. It is critical that these services continue to be made available.”

surprising, given that distributing content in the marketplace—and thereby providing access to countless readers around the world—is the core mission of the publishing industry. Collectively, our members provide access to millions of articles through billions of downloads every year. And when access isn't available immediately for free, it is still available immediately through the marketplace for anyone who subscribes to or otherwise licenses the content, just as anyone can go online to purchase a book, movie, song, or other work.

Importantly, the same cannot be said for data. There are many instances where researchers and practitioners are not able to access specific research datasets in any way. Simply put, the data is not made accessible for public consumption, which can affect the quality of scientific research, particularly in instances where the data is necessary to replicate or otherwise test the rigor of scientific discoveries.

The problem exists even for data resulting directly from federally funded research, despite the OSTP Memo's requirement that "[t]o the extent feasible . . . digitally formatted scientific data resulting from unclassified research supported wholly or in part by Federal funding should be stored and publicly accessible to search, retrieve, and analyze." In fact, in its November 2019 report on "Additional Actions Needed to Improve Public Access to Research Results,"² the Government Accountability Office found that while all of the nineteen agencies it reviewed had identified repositories to support public access to *publications* discussing federally funded research, several agencies had not yet taken important steps to facilitate public access to *data* resulting from federally funded research.

Publishers are taking major steps to facilitate access to research data—including by working with specific research communities to develop standards for data sharing—and the publishing industry is eager to pursue new opportunities for incentives, education, and collaboration with partners to make research data more openly available where appropriate. In this context, it is also important to recognize that not all data is alike, and not every researcher is in the same position with regard to their ability to share data (for example, privacy concerns may limit data sharing in certain instances).

In summary, the lack of access to data represents both the most significant barrier and the most significant opportunity for change in the research space, and the publishing industry stands ready to work together with OSTP to identify and implement appropriate solutions.

Question 2: What more can Federal agencies do to make tax-payer funded research results, including peer-reviewed author manuscripts, data, and code funded by the Federal Government, freely and publicly accessible in a way that minimizes delay, maximizes access, and enhances usability? How can the Federal Government engage with other sectors to achieve these goals?

When examining options to make taxpayer-funded research results freely available to the public, it is essential to distinguish between research results that are obtained through funding by taxpayers—e.g. data collected through studies financed by federal grants—and downstream products that discuss or build upon taxpayer-funded research, but that are not themselves funded by taxpayers. This second category includes peer-reviewed articles reporting on and analyzing grant-funded research results, newspaper articles or other publications discussing such results, as well as hundreds of thousands of other downstream consumer products like automobiles, electronics, and healthcare products that benefit from and incorporate upstream federally funded research and data. Any policy proposals targeted at privately produced downstream products should carefully consider the private sector markets, investments, and incentives that enable the production and distribution of these products in the first place.

With respect to peer-reviewed journal articles, currently the vast majority of investment in the production, distribution, and long-term stewardship of these articles is supported by private marketplace transactions—chiefly copyright licenses—in the United States and hundreds of foreign countries. These transactions cover a wide range of open access, subscription, and blended agreements. Importantly, the marketplace is working very well—hundreds of American publishers vigorously compete with each other,

² United States Government Accountability Office Report to Congressional Requesters, *FEDERAL RESEARCH Additional Actions Needed to Improve Public Access to Research Results*, GAO-20-81 (November 2019), available at: <https://www.gao.gov/assets/710/702847.pdf>.

both on price and non-price terms, as they seek to innovate and improve their products and services in order to meet the evolving and diverse needs of their authors and readers. Collectively, publishers offer authors and readers a tremendous amount of choice—open access and otherwise—in how to publish and consume journal articles.

We must emphasize that publishing is not a broken marketplace in need of government intervention. On the contrary, the current publishing marketplace is a highly successful one for the United States, highlighted by innovative, competitive transactions and investments that produce the highest quality, largest quantity, and widest dissemination of peer-reviewed journal articles, including through open access agreements. OSTP should support this marketplace, avoiding intrusions such as government-mandated free distribution of articles earlier than twelve months after publication. Such regulatory intrusions would significantly disrupt scholarly communication by rendering irrelevant the copyright protection that lies at the heart of marketplace incentives, investments, and transactions that drive the economy. As a result, they would make private sector investment very difficult and would effectively amount to a decision to replace private sector investment with government funding, requiring billions of dollars in additional appropriations simply to maintain the current quantity and quality of research article output.

In this regard, AAP was deeply troubled by a recent suggestion that the government could replace the private sector and fund the peer review and publication of articles discussing federally funded research for approximately \$100 million dollars in additional government spending per year. Setting aside the significant concerns that arise from placing the government in the position of deciding how much money will be invested in peer review and publication of journal articles, \$100 million is not close to the sum that would actually be required. By way of comparison, private sector publishers currently invest many hundreds of millions—if not billions—of dollars per year in producing and disseminating these articles.³ Such a massive reduction in investment would substantially decrease the quality and quantity of peer-reviewed articles produced in the United States. It would also have serious negative implications for academic freedom, as the lack of investment would leave thousands of authors unable to publish their works unless they can find funding to underwrite the costs.

Instead of government mandates that risk significant market disruption, we urge OSTP to encourage increased free access to articles by supporting voluntary initiatives—coupled with dedicated appropriated funds—to enable more authors to participate in the many open access publishing options offered in the marketplace. In addition to avoiding marketplace disruption and allowing for continued private sector investment, this approach would also ensure that authors can publish their works regardless of whether they have access to funds to cover the costs.

Question 3: How would American science leadership and American competitiveness benefit from immediate access to these resources? What are potential challenges and effective approaches for overcoming them? Analyses that weigh the trade-offs of different approaches and models, especially those that provide data, will be particularly helpful.

Researchers, practitioners, and the public already enjoy immediate access to peer-reviewed articles, whether via marketplace transactions, free access through libraries, or in some instances free access on publisher websites and through public repositories. This immediate access is supported by marketplace mechanisms and intellectual property rights that enable ongoing private sector investments and that advance American science leadership and competitiveness.

Government-mandated immediate free online access, however, risks causing significant harm to American science leadership and competitiveness. There are many reasons for this, but due to the RFI's page limitations, we will only note three issues that warrant significant further consultation with concerned stakeholders both in government and in the private sector.

³ Estimates range from \$600 million to \$1.35 billion per year.

Hundreds of non-profit research organizations, along with Members of Congress, private companies, and trade associations across a range of industries and interests have expressed concerns that a policy of government-mandated immediate free access would: (1) directly and negatively impact American researchers, scientists, and medical professionals, as well as the quality of scientific and medical research publications produced in the U.S.; (2) undermine American intellectual property rights that are fundamental to promoting investment and innovation in science and medicine; and (3) directly and negatively impact the American economy, jobs, and thriving U.S. intellectual property exports.

Evidence of these concerns is plentiful. Senator Thom Tillis (R-NC, and Chairman of the Senate Judiciary Intellectual Property Subcommittee) recently explained that “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.”⁴ The Senator additionally expressed concern that OSTP’s proposed policy “would risk negative consequences [for] hundreds of thousands of American jobs.”⁵ Furthermore, the Senator noted that this policy “could diminish the high quality of scientific and other scholarly research in the United States,” and would “have a detrimental impact on the millions of American researchers, scientists, and medical professionals informed by these journals.”⁶

Eight Republican Members of Congress with a background in medicine noted that “such a policy would undermine American jobs, exports, innovation, and intellectual property resulting in scientific societies ceasing operations or no longer disseminating U.S.-sponsored science that is key to maintaining U.S. leadership in science and technology on the global stage.”⁷ Ten other Republican Members of Congress explained that “this overreach into an effective private marketplace within the American economy” would eliminate “billions of dollars of U.S. exports currently attributable to publishers” and would “threaten to upend the most trusted form of scientific communication . . . limiting the quality and quantity of peer-reviewed articles that are available to the very scientists they are intended to inspire, and threaten[ing] an untold number of great medical and scientific breakthroughs.”⁸

The Copyright Alliance stated that such a policy “would eviscerate the copyrights of journal publishers throughout the country,” further noting that “today the government eviscerates copyright protection for peer-reviewed journal articles. What’s next tomorrow? Works of art, iconic photographs, documentaries?”⁹ Furthermore, hundreds of medical and scientific societies, together with the U.S. Chamber of Commerce, the Software and Information Industry Association, and several other companies and associations have warned that such a policy “would significantly harm the system of peer-reviewed scholarly communication that fuels America’s leadership in research and innovation.”¹⁰

We thank OSTP for taking these concerns seriously as it moves forward in this process.

Respectfully submitted,



Matthew Barblan
Vice President, Public Policy
Association of American Publishers

⁴ April 17, 2020 letter from Senator Thom Tillis to Dr. Kelvin Droegemeier.

⁵ *Id.*

⁶ December 12, 2019 letter from Senator Thom Tillis to Secretary Wilbur Ross and Director Mick Mulvaney.

⁷ February 18, 2020 letter from eight United States Representatives to President Trump.

⁸ April 9, 2020 letter from ten United States Representatives to Acting Director Russell T. Vought.

⁹ February 18, 2020 letter from the Copyright Alliance to President Trump, *available at*: <https://copyrightalliance.org/wp-content/uploads/2020/03/CA-Letter-Opposing-Journal-EO-Feb-2020.pdf>.

¹⁰ December 18, 2019 letter from 140+ organizations to President Trump, *available at*: <https://presspage-production-content.s3.amazonaws.com/uploads/1508/lettertothe-president-from-140-research-and-publishing-org-2.pdf?10000>.