



NIH Public Access Staff  
National Institutes of Health  
Transmitted via <http://publicaccess.nih.gov/comments2/comments.htm>

RE: Request for Information: NIH Public Access Policy  
NOT-OD-08-060 (March 28, 2008)

May 30, 2008

To the National Institutes of Health:

The American Association of Anatomists (AAA)\* wrote to NIH Director Elias Zerhouni on October 27, 2004, to voice its strong objection to his proposal for “Enhanced Public Access to National Institutes of Health (NIH) Research Information” with its “optional” free access to our journal content after six-months. After several years of frustration, we now find ourselves responding to an NIH request for feedback on how to establish a similar process that has already been launched.

Our organization and our sister professional societies expend significant time and energy in support of NIH programs—in particular advocating for increased funding. Therefore, it troubles us to acknowledge that we are not convinced that all NIH “players” in the “public access” arena have negotiated and acted in good faith on this issue. We are very much concerned that the ultimate NIH goal is to shorten the compliance timeline leading to immediate access. Given our ongoing support of NIH, it dismays us to feel as if a long-time partner is letting us down.

The AAA Board of Directors recently affirmed its opposition to any legislative mandate related to open access of journal manuscripts. Nonetheless, we are realistic enough to recognize that the public access mandate is not likely to go away. Therefore, the first and most important point we must make is to urge NIH to maintain the 12-month upper limit on public release of manuscripts. Anything less could significantly reduce the resources available for most scientific journals – especially professional society journals – to provide quality peer review, editing, and publishing of NIH-funded research results.

Beyond that essential request, we would like to raise a number of other concerns and questions regarding NIH public access implementation. For reference, here is the law upon which this implementation has been based:

*SEC. 218. The Director of the National Institutes of Health shall require that all investigators funded by the NIH submit or have submitted for them to the National Library of Medicine’s PubMed Central an electronic version of their final peer-reviewed manuscripts upon acceptance for publication, to be made publicly available no later than 12 months after the official date of publication: Provided, That the NIH shall implement the public access policy in a manner consistent with copyright law.*

## **Why Doesn't Compliance = Compliant?**

AAA's scientific research journals—*The Anatomical Record* and *Developmental Dynamics*—are now fully compliant with the NIH's current public access policy, as mandated by Congress. Upon publication of each issue, our publisher will deposit the final *peer-reviewed* version of all NIH-funded articles to PubMed Central (PMC) and authorize public availability 12 months after publication. Although we object to the mandate, we are abiding by it.

However, this compliance apparently does not make us compliant enough for NIH. Only journals that make the final *published* version of NIH-funded articles available to PMC within 12 months will appear on the NIH list of compliant journals, the list that researchers are encouraged to check prior to submitting a manuscript for publication.

Why doesn't actual compliance with the law entitle a journal to appear on this list? Why is NIH misleading our prospective authors by not acknowledging that we are, indeed, compliant? Isn't it NIH that is out of compliance for seeking to go beyond the law and penalizing those who are actually fulfilling the terms of the congressional mandate?

## **"in a manner consistent with copyright law"**

While we are not experts on congressional intent, we find it difficult to believe that "in a manner consistent with copyright law" was meant to be the congressional equivalent of "make copyright someone else's problem." Nonetheless, that is precisely what NIH has done. Researchers are told by NIH that the first step in complying with the public access policy is to "Address Copyright. Before you sign a publication agreement or similar copyright transfer agreement, make sure that the agreement allows the paper to be submitted to NIH in accordance with the Public Access Policy."

With that brief instruction, NIH appears to think that the congressional intent has been followed. Copyright protection is intended to give the copyright holder the right to determine who can adapt the work to other forms. In reality, NIH has simply redefined the term "copyright" to suit its PMC model, forcing authors to comply because of their dependence on NIH grant support.

The copyright issues raised by implementation of this policy have been addressed in lengthy documents submitted to NIH by both commercial and non-profit publishers. We list just some of these issues here:

- a. PMC is reformatting and altering submitted author manuscripts. Why is this preferable to linking to the originally published document?
- b. NIH is exceeding its legal mandate by distributing copies of the PMC version to Web sites hosted outside the U.S., depositing manuscripts on an international mirror site with plans for additional such sites. How do these sites serve the needs of U.S. taxpayers?
- c. How will international copyright considerations be addressed to protect rights holders?

These issues raise important questions and concerns regarding copyright protections that would prevail both within and outside U.S. borders. By appropriating and redefining copyright in this manner, NIH has clearly gone beyond congressional intent in regard to making manuscripts publicly available and has disregarded congressional intent related to consistency with copyright law.

## **Compensation for value added**

The research published in our journals is rarely obsolete within a year; it generally has a shelf life well beyond the 12-month public access window. When copyrighted articles are freely available online, their commercial value is significantly eroded. While NIH may pay for the actual research, it is the journal publisher who bears the expense of creating the publication—from peer review to copyediting, layout, production, distribution, and archiving both digitally and in print.

When publishers are no longer able to recoup these costs through subscription revenues (*i.e.*, from the readers), they will have to recoup them at the front end from the authors. We note that the NIH policy allows reimbursement of publication costs if they are “actual, allowable, and reasonable to advance the objectives of the award.” We ask that NIH be more explicit about what is considered “allowable” and “reasonable” and make it very clear to grantees that funds may be used to cover open access fees. In addition, we would like to know how such funds will be identified in a grant and how much NIH has budgeted per year for publication costs.

## **If a tree falls, but we have no data...**

NIH appears more intent on drawing users to PMC than to connecting users with the final published article. Why else would NIH (1) refuse to link from PMC directly to the original journal and (2) use its own system of article identification (PubMed Identifiers) rather than adopt the widely-accepted Digital Object Identifier (DOI) as a means of identifying authoritative material and associating it with the rights holder of record? This extra identifier can only contribute to reader confusion and adds no apparent value.

Libraries make their journal purchasing decisions based on usage data. As journal usage moves from paper to electronic, the provision of detailed online usage data becomes more and more important. It is inevitable that the public access policy will cut into journal subscription revenue. NIH is drawing usage away from our online journals, then compounding this situation by not providing publishers with the comprehensive usage statistics that would enable us to assess the impact of this policy.

## **Reversing gears on review articles**

NIH previously encouraged publishers to add review articles to journals as a way to sustain our subscription base under the voluntary policy. The revised mandatory public access policy now calls for the submission of review articles to PMC. Journal editors commission review articles based on the scientific expertise of scientists; they are not based on specific research projects supported by NIH research grants.

We request that NIH modify its guidelines to state that its deposit requirement only applies to peer-reviewed manuscripts that report findings of empirical research and does not apply to literature reviews. NIH might consider review articles as “low-hanging fruit” in regard to possible changes in the public access policy. It is a simple change that the scientific publishing community would appreciate.

## **Our taxpayer dollars at work**

- How much will it cost NIH to effectively implement the public access policy?
- How does this cost translate into lost opportunities for research?
- Why does NIH continue to believe that building a duplicative resource via PubMed Central is preferable to simply linking to publishers' Web sites where the research is already available at no additional cost to taxpayers?

As NIH is the steward of medical research for the nation, AAA is the steward of research for our discipline. We believe that the "public access" process, as presently implemented by NIH, threatens our ability to fulfill this mission over the long term.

Our hope is that NIH will take our concerns and those of other journal publishers seriously. We do not believe that the NIH intent is to bring about the demise of scholarly biomedical journals. It is therefore imperative that NIH consider the potential unintended consequences of its actions as the public access mandate is put into practice. Scientific journal publishers have an important role to play in the preservation and dissemination of research literature. We would much prefer to do this as NIH's partner than as an adversary.

Sincerely,



David Burr, Ph.D.  
President, American Association of Anatomists

\*The American Association of Anatomists, based in Bethesda, MD, was founded in 1888 for the "advancement of anatomical science." Today, AAA is the professional home for biomedical researchers and educators focusing on anatomical form and function. In addition to being the primary educators of medical students in their first year of medical school, AAA members worldwide work in imaging, cell biology, genetics, molecular development, endocrinology, histology, neuroscience, forensics, microscopy, physical anthropology, and numerous other exciting and developing areas. AAA publishes two scientific research journals—*The Anatomical Record* and *Developmental Dynamics*—plus an education journal—*Anatomical Sciences Education*—and a quarterly newsletter. Among its other programs and services, the organization sponsors an Annual Meeting (part of Experimental Biology) and maintains a Web site that offers members and others a variety of tools to enhance their teaching and research.