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Elias A. Zerhouni, M.D., Director  
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Transmitted via email to [PublicAccess@nih.gov](mailto:PublicAccess@nih.gov)

RE: NIH Notice on Public Meeting: Seeking Comments on the Implementation of the  
NIH Public Access Policy  
NOT-OD-08-057 (March 7, 2008)

Dear Dr. Zerhouni:

We are writing on behalf of the Professional and Scholarly Publishing Division (PSP) of the Association of American Publishers (AAP) to relay important practical concerns that have been expressed by many of our members regarding implementation of the "NIH Revised Policy on Enhancing Public Access to Archived Publications Resulting From NIH-Funded Research." These members of the PSP publish the vast majority of materials produced and used by scholars and professionals in science, medicine, technology, business, law, and the humanities, and they employ tens of thousands across the United States.

While the PSP supports the principle of public access to science, we have significant concerns about aspects of the NIH public access policy's implementation that we believe may have unintended negative consequences for all stakeholders in the scientific research community, including the broader public.

We note that many of our concerns as scholarly publishers stem from the manner in which NIH and staff responsible for PubMed Central have implemented the public access policy, by taking liberties with copyrighted content in a fashion that competes with the activities of independent publishers and that undermines their rights in copyright. Specifically, by reprocessing and enriching manuscript submissions and expropriating publishers' value-added investments in peer-reviewed content, NIH is creating enhanced, derivative publications that go beyond the congressional mandate of posting researchers' documents that report on the results of federally funded research. Rather than just posting what it receives, be it an author's version (after peer review) or a publisher's submission (in a PDF or other fixed format), NIH has embarked upon XML-reformatting and tagging procedures to create alternative versions of published works that, when made freely available, substitute for the definitive articles in which publishers have already invested. In effect, NIH is entering the publishing business (and enabling other international mirror locations of its database to do so as well) by creating these enhanced derivative versions. As a result, the integrity of the scientific literature is compromised.

Below we have grouped our comments by topic and included relevant questions, focusing on the (A) importance of consultation with publishers as to the effective implementation of the new public access policy; (B) need for real safeguards to ensure meaningful protection of publisher copyright as Congress intends; and (C) development of best practices to ensure that the public access policy meets its stated objectives.

**A. Consultation with Publishers: NIH must ensure that there is a formal and ongoing consultative mechanism between NIH and publishers in which NIH and publishers commit to attaining a balanced implementation of the policy that achieves the public access objectives without negative impact on peer review publishing. The Senate committee report (110-107) to the FY08 LHHS Appropriations bill directed NIH to seek publisher input to ensure that publishers' copyright protections are maintained under the new policy.**

1. How has the policy that NIH announced on January 11, 2008, only weeks after the legislation was signed into law, incorporated publisher input, and how will NIH incorporate the concerns of publishers as it moves forward?

2. We would like to work with NIH toward an effective and fair implementation of this policy. We propose that a task force or advisory group, co-chaired by NIH and publisher-designated representatives, be vested with the requisite authority and responsibility to propose procedures for implementation of the policy mandate.

3. In the NIH Notice of Jan 11, NIH notes that “institutions and investigators are responsible for ensuring that any publishing or copyright agreements concerning submitted articles fully comply with this Policy.” Why would NIH place grantees in the position of negotiating with publishers in the complex world of copyright law? Why not reach agreements with publishers regarding payment for their journal articles, so as to remove from authors the administrative or financial burden of compliance with the policy?

4. The policy will have a negative impact on publishers, many of whom are small professional societies, because with their copyrighted material freely available on PubMed Central, subscription or other article-related revenues may well decline. What is NIH's plan to track possible harm to publishers, especially small societies? If harm is found, how does NIH plan to remedy it? Does NIH understand the basis for publishers' concern about such possible harm and its impact on publishers' willingness to invest in promoting the integrity and widespread availability of the scientific literature?

5. What are NIH expectations of its grantees with regard to ensuring that PMC postings of material will not diminish the rights that are acquired by publishers in that material, the value of the publishers' added contributions, and the interests of authors?

6. Will NIH provide publishers with detailed and robust PMC usage statistics that will enable them to assess the impact of PMC usage on their subscriptions? It is not clear from current NIH policies and procedures how publishers may obtain detailed and robust PMC usage statistics that will enable them to assess the impact of PMC usage on their own web traffic and subscription or other article-related income.

**B. Proper Protection of Copyright: NIH must develop specific safeguards to ensure that day-to-day implementation of the public access policy respects the basic principles embodied in copyright and not undermine these rights that provide incentives for publishers to invest in the peer-reviewing, publishing, distribution, and archiving of scientific articles.**

1. How will NIH ensure that any revisions to copyrighted materials such as reformatting, enhancing, linking, or otherwise changing the articles do not undermine the rights, added value and interests referred to above?
2. How will the policy protect against distribution of copyrighted materials to other sites around the world besides PubMed Central?
3. How will NIH address possible objections or concerns from copyright owners who do not assent to the public posting of their material on PubMed Central and its related international sites, or who have concerns about the enforcement of copyright located on and delivered from those sites?
4. Publishers recoup the expense of peer review, production, and distribution by several means, including commercial sales. When copyrighted articles are freely available online, their commercial value can be eroded. How will NIH ensure that the policy will protect publishers' intellectual property assets, retaining the commercial value of the copyrighted articles?
5. Recognizing publishers' copyright and investments in peer review and publishing, does NIH plan to supplement its grant funds to sponsor public access to the manuscripts? If yes, how will such funds be identified in the grant, and what has NIH budgeted per year for such incremental costs?
6. How will NIH ensure that the articles on PubMed Central meet with publisher requirements, such as the access-control period, and that the policy actually applies to the articles that NIH is posting?
7. How will NIH prevent piracy of the articles from PubMed? Will NIH monitor for mass downloading of posted articles by single users? How will NIH work with publishers in the event that copyrighted articles are pirated from PubMed Central? If NIH finds that articles have been subject to piracy, how will NIH notify the publisher and provide any information NIH may have about the infringer? Will NIH provide for review and revision of the public access policy if piracy occurs from PubMed Central or the other international repositories connected with PMC?
8. How will NIH ensure that the articles on PMC maintain the publisher's branding, and if applicable, the corresponding disclaimers and notices so that publishers can preserve their brand assets and manage their liability appropriately?

**C. Good Faith Implementation: NIH must agree to adopt and develop certain best practices to ensure that the public access policy meets and adheres to its stated objectives.**

1. Since PMC will compete with publishers' own websites as more PMC content overlaps with content on publishers' sites, how will NIH maintain the primacy of the publishers' websites and ensure that the manuscript on PMC does not displace or act as a substitute for the final published journal article, i.e., the authoritative version of record, which resides on a publisher's site? Will NIH work with publishers to ensure that readers know and are directed to where the final published versions can be obtained?
2. Many publishers provide free access to authors' manuscripts or final published articles twelve months after publication or even sooner. NIH does not consider this access compliant with the NIH

policy. Would NIH consider including author manuscripts only in its administrative database and archive, while providing public access via display only through publisher sites? If not, what is the rationale for maintaining an unedited manuscript for public consumption if the final, authoritative version has been made available for free access on the publisher's site?

3. What will NIH do in cases of noncompliance with its policy guidelines? What action will be taken when a grantee's article is published, but NIH is not provided with the peer-reviewed manuscript? What actions will be taken against noncompliant grantees when they apply for future NIH grants?

4. How does NIH anticipate securing and sustaining a source of funding to maintain the database of articles that will accumulate over time, including costs to migrate to new platforms? Under the new policy, US taxpayers will be funding public access to science to any person anywhere in the world with Internet access. Has the NIH considered the ramifications of providing such international access, and how this might affect national security or other US government trade regulations?

We look forward to the public meeting at NIH on March 20 and the upcoming RFI proceedings, but considering the far-reaching implications of the substantial change in the NIH public access policy, we urge HHS and NIH to do a full Notice and Comment Rulemaking. We believe that the public and the publishing community should be given an opportunity to comment on the content of the new policy before it goes into effect. We urge HHS and NIH to hold off on implementing the policy until after the Notice and Comment proceedings have been completed.

We also look forward to a more formal process for working closely with NIH to implement the new public access policy.

Thank you for the opportunity to communicate our views.

Sincerely yours,

Michael Hays, Chair



F. Hill Slowinski, Vice-Chair



Executive Council, Professional and Scholarly Publishing Division  
Association of American Publishers (AAP/PSP)