AN OPEN LETTER
Re: Request for Information on the NIH Plan to Enhance Public Access to the Results of NIH-Supported Research, Notice Number: NOT-OD-23-091

Few organizations have done as much to increase public access to research as the National Institutes of Health. Recognizing the digital-era potential for much wider access to biomedical research – as well as the scientific and public benefits of such access – the NIH has set the standard globally for research funding agencies. The agency has strengthened its policies to overcome the inertia of researchers on matters of public access. It has stood up to large corporate publishers that have actively lobbied against its public access measures. The NIH has led the way in achieving what is now a consensus among scholarly communication stakeholders on the value of public access for research and its benefits to humankind.

That the NIH is now reaching out for public input on "the NIH plan to enhance public access to the results of NIH-supported research" is another admirable demonstration, at least in principle, of its commitment to promoting the progress of science through greater access. For it may, in fact, be time to consider whether *enhancing* the NIH's pioneering methods of the last two decades is the best possible path forward for this Year of Open Science, as federal agencies have designated it.

One indication of the changes afoot has recently been made clear by Dr. Alondra Nelson in her role as Director of the White House Office of Science and Technology Policy (OSTP) and Assistant to the President for Science and Technology. In the August 25, 2022 OSTP policy directive, now known as the Nelson Memo, she sets the tone by stating that "when research is widely available to other researchers and the public, it can save lives, provide policymakers with the tools to make critical decisions, and drive more equitable outcomes across every sector of society." There are three ways in which this consequential statement suggests that the NIH should consider a substantial change in direction, one that goes well beyond the policy document's position on introducing zero embargoes for NIH-sponsored research:

1. First, Dr. Nelson's statement reminds readers of the public access benefits, rather than stating the government's policy. It reflects what is now a consensus, reinforced by the pandemic, among researchers, societies, librarians, publishers, and funding agencies on the value of public access. To arrive, then at a time "when research is widely available" will require a leveraging of that consensus. Consider, for example, the Nelson Memo's elimination of embargoes on public access to federally financed research. The NIH first introduced an embargo period (before public access is provided to federally funded research) in the 2000s, it seems fair to say, as a concession to the publishers' subscription model in exercising their copyright. To eliminate embargoes may further *enhance* NIH's public access policy but it places a further check on publishers' intellectual property rights. The consensus alternative is to find a way to align stakeholders' interests with sustainable public access through copyright reform.

2. Secondly, Dr. Nelson's statement recognizes the benefits of public access to the whole

of research without qualification. In introducing a public access policy in the early 2000s, the NIH understandably based it on the public's research investment. Yet as Dr. Nelson makes clear, the reason for public access is not that the public paid for it, but that public access promotes the progress of science to the benefit of humankind. That progress is not being well served today nor are policymakers and physicians by the fragmented, partial, and unpredictable nature of public access to research publications. To paraphrase John Donne, no study is an island entire of itself; every study is a piece of the continent, a part of the main body of the literature. Having done so much to establish the benefits within its sponsored research, the NIH needs to now look at supporting the far broader goal implicit in Dr. Nelson's vision.

3. Thirdly, Dr. Nelson brings home the vital urgency of public access. It can help to save lives, make critical policy decisions, and "drive more equitable outcomes across every sector of society." This stands in contrast to public access' current rate of progress. In 2021, 88% of the global scholarly journal revenues were from exclusive subscriptions, according to the market research company Simba. The current scholarly publishing market, despite a great deal of experimentation, is not delivering this commonly agreed upon good of public access in a timely manner or, many would argue, at a fair market price. Rather than reducing embargoes, the NIH needs to join with other stakeholders in considering how copyright, which so aptly facilitates subscription revenues, can provide comparable incentives to speed the move to public access.

Now, some are bound to object that the NIH should stay in its lane. Yet, it can readily be argued that the NIH has made public access its lane over the last two decades, just as the effective pursuit of its mission calls for improving access to the whole of the research literature. Rather than steer clear of copyright, the NIH could be said to have a responsibility to bring its accumulated expertise to bear on a digital-era copyright update for science. This is all well in advance of any subsequent initiatives by the Copyright Office or Congress

Almost every other cultural enterprise, from video games to music streaming, has instigated copyright reforms, since the onset of the internet. The current law served scholarly publishing's Age of Print. It does not, however, offer an equivalent means of recouping publisher investments in public access. Article processing charges have had limited success, while "read and publish" agreements still depend on subscriptions. As the largest biomedical research funder, who better to initiate a national conversation among stakeholders sharing this common goal of promoting the progress of science through public access than the NIH.

Nor need such deliberations start from scratch, as considerable work on science and copyright has been undertaken, whether on strengthening limitations and exceptions,[1] offering secondary publishing rights to authors,[2] introducing statutory licensing for research publications,[3] or

[1] Flynn, S., et al. (2020). Implementing user rights for research in the field of artificial intelligence: A call for international action. *Joint PIJIP/TLS Research Paper Series*, (48).
[2] A position statement from Knowledge Rights 21 on secondary publishing rights (2022). Knowledge Rights 21.
[3] Willinsky, J. (2023). Copyright's broken promise: How to restore the law's ability to promote the progress of science. MIT Press.

removing research from copyright's domain.[4] There is also precedent for the necessarily international scope of this endeavor, with the WIPO Copyright Treaties and the TRIPPS Agreement, while the Marrakesh Treaty (2013) provides a particularly encouraging example of bringing human rights to bear on access to knowledge on a global scale.

Since the NIH began on this public access path, the alignment around public access makes possible a reform of copyright to facilitate public access. Such a change will not only enable the benefits Dr. Nelson has set out, it could free up the inordinate amount of energy spent on pursuing public access by working around copyright with limited success. Our hope is that the NIH will consider expressing a willingness to join with others to consider how a digital-era copyright law can serve this common goal of an open science.

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[4] Shavell, S. (2010). Should copyright of academic works be abolished? *Journal of Legal Analysis* 2, no. 1.