

TESTIMONY OF

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Mr. Chairman and members of the Subcommittee. It is a great honor to appear before this distinguished panel.

Thank you for the opportunity to testify on this matter of importance to copyright generally, and to the public, to the research community, to the authors of scientific, technical, and medical (STM) articles, and to the publishers of scientific, technical, and medical journals. I would like to focus on the larger policy issues that undergird the American copyright system, with a special focus on how our copyright laws encourage the broadest possible dissemination of high quality, peer-reviewed articles without running roughshod over the rights of authors and copyright owners.

I applaud your decision, Mr. Chairman, to give a full airing of these issues before your Subcommittee. They bear directly on the copyright policies of our government and the incentives to authorship and publication under U.S. copyright law. For reasons I will discuss, any proposal to weaken copyright protection for works based on research done with government money -- on the theory that the taxpayers paid for it so they should own it -- could be contrary to our national interest in encouraging access to pioneering research and broad public dissemination of scholarly articles.

In this debate, three key questions must be answered. First, what public access policy will result in the broadest dissemination of high quality, peer-reviewed articles? Second, is it fair for the U.S. government to appropriate the value-added contributions of our private sector publishers? And, third, is it correct to assume that the STM publishers will continue to publish their journals even if they lose a large percentage of their paid subscriptions?

Many of my colleagues in academia recognize that the STM publishers perform many vital functions in bringing these articles into the public forum. For one thing, they make substantial investments in the peer-review process. While they do not as a general rule pay the reviewers, the publishers hire in-house teams of experts to support outside specialists. These teams handle the mechanics of distribution of the articles to the public, stay close to the academic experts in the discipline, both personally and professionally, follow the literature, and engage in on-going communications with the authors about the reviewers' comments and the incorporation of those comments into the manuscript.

In addition to the peer-review process, the publishers make judgments about which of the manuscripts to publish, depending on their quality and the importance of the research itself. They also correct errors, edit the manuscripts, and make them presentable for publication.

My basic concern about government proposals to limit the copyright will, sooner rather than later, weaken the commercial market for these journals. If this prophesy comes to pass, who, I wonder, will handle all of these costly and ethically sensitive administrative details? Some of my academic colleagues are confident that this change in the mechanics of scientific publishing will have little or no impact on the private sector publishers, and that they will remain as robust as ever, even if the government publishes all of their

manuscripts shortly after publication. Some claim that they have “evidence” that STM publishing will continue to flourish. I have not seen that evidence. To me, it represents wishful thinking. In my experience, Congress is normally reluctant to hang major change in information policy on the thin reed of wishful thinking. With the prospect of free copies available in the near term, isn’t it reasonable to expect that many corporate and academic librarians will cancel their subscriptions? They all face budget cuts and staff cutbacks, and some estimate a cancellation rate approaching 50 percent. With plummeting sales, how could the STM publishers continue to publish? This is a critical point, and one that this committee has a special sensitivity to. It really goes to the heart of the matter, in terms of public policy.

It is a basic premise of copyright that the law is designed to benefit the public, not reward authors or publishers. But, as James Madison wrote in the Federalist Papers, “the public good fully coincides” with the rights of authors and copyright owners. It seems clear that Congress would not want a free access policy to cause many or all of the private STM publishers to shut down. Of course, if fair market competition, or a change in the culture of academic publishing, or costly overhead were eventually to drive the private publishers out of business, so be it. It is one thing that they should suffer demise because of changes in the marketplace, and it is another to be brought down by governmental fiat. Does the government intend to perform all of the vetting, selection, and editing functions now performed by the learned societies, by the professional organizations, and by the STM publishers? I doubt that Congress wants to hire a thousand new workers to take on these additional responsibilities. So the question occurs: who is going to do it? I do not see replacements for the publishers raising their hands to volunteer. For this reason alone, Congress will think carefully before implementing an information policy that mandates free dissemination of articles that report on federally financed research. And there are larger issues as well. Experience teaches that as a general rule Congress prefers to keep government officials out of the academic peer-review and manuscript selection process. We live in an open society. With a weather eye on the First Amendment, we try to keep the government at arms length from these delicate publication decisions, so as not to skew the integrity of the process.

That being said, the new public access policy brings back vivid memories of the debate we had in 1980 with the Small Business and University Patent Procedure Act. In that debate, Senator Russell Long, Chairman of the Senate Finance Committee, following the script written by Admiral Rickover, the father of the nuclear submarine, argued in favor of existing government policy—that patents developed with government research money belong to the taxpayers who subsidize the research. Senator Bayh and Senator Dole reasoned that the taxpayers would get a far greater return on their investment if we instead facilitated private sector ownership and commercialization of the patents, putting these inventions to work for the people.

The same policy arguments apply on the copyright side. If the government puts the government financed peer-reviewed articles in an online database for free shortly after publication, many of the private publishers will be hard-pressed to survive. To me, it seems far more likely that the U.S. taxpayer will achieve the desired objective—the

broadest possible dissemination of the peer-reviewed article manuscripts—under the current system. With the private STM publishers running the peer-review process, selecting the articles, and aggressively marketing their journals to libraries and other research institutions, both foreign and domestic, the current system lets the publishers bring their professional judgment and expertise into the process and ensures high quality scholarship. Paid subscriptions keep the current system perking along, without intrusive government involvement, and without an infusion of funds from the federal treasury. A free access policy, if broadly implemented, it will almost certainly end this self-policing and self-financing private system and get the federal government deeply into the STM publishing business.

Finally, Mr. Chairman, I would like to mention a few related issues. First, I wonder if any of the articles that the government will post online will contain preexisting materials that the government financed researcher did not create and therefore does not own. Here, I am thinking of charts, diagrams, photographs, and illustrations. Will the government commandeer the rights of those creators as well, or will it require the researcher to clear all of those ancillary rights as part of the “package”. Today, of course, the publishers often help the author clear these rights, including electronic distribution rights. Will the government undertake this task if the publishers drop out of the picture?

Second, I wonder if the NIH proposal really serves our international interests. Our trade negotiators are constantly fighting for strong intellectual property protection, which is under siege in many countries around the world. I assume that some of the authors or co-authors are foreign nationals, and they would get protection under the Berne Copyright Convention. The free access policy could violate their rights, and expose the United States to retaliation at the World Trade Organization. And I assume some of the impacted publisher/copyright owners are foreign as well. As I will note in a moment, the new public access policy will seriously threaten the protection of American authored and published works in foreign countries. This government policy reduces the value of the copyright in these works. Some of my academic colleagues argue that the Berne Convention has no relevance to government information policy. They see it as a simple contract matter, and they note that the researchers get very valuable consideration for their assignment of copyright under the government contract. Granted, the researchers do receive a generous stipend, averaging \$400,000, but that fact also makes the whole arrangement suspect. To a serious researcher, a governmental grant is a matter of life and death professionally. To claim that the abandonment of copyright is “voluntary”—the product of a free market negotiation—strikes me as a bit disingenuous.

In fact, the government involvement puts a “coerced contract” in a suspect category in the Berne and WTO context. It is not a private contract between commercial interests. Let me draw a hypothetical. The U.S. motion picture industry is now permitted to exhibit theatrically only 10 or so films per year in China. Suppose the government of China were to offer the American film producers a deal: “If you sign a contract waiving your reproduction right, we will allow you to exhibit 100 films a year.” The producers would crunch the numbers and calculate the bottom line, even while complaining bitterly that the deal is outrageous and clearly a violation of the spirit of copyright and the Berne

Convention. Nonetheless, they might conclude that on balance they would make more money with the proffered deal than they now make with limited access to the huge Chinese market. So, in the end, they might sign on the dotted line. Could the United States take that “contract” to the WTO and press a claim under TRIPs that China is not complying with its treaty obligations? I think so. The ensuing mass piracy of American films in China would be a direct result of government action that diminishes copyright, disguised as a “contract”. In any case, the free access policy is an unfortunate international precedent for a country like the United States, whose great strength in foreign markets is intellectual property.

I find it a little strange, after spending more than eight years as the U.S. Register of Copyrights trying to protect American authors and publishers from foreign pirates, that Congress may now decide to give away that valuable intellectual property free of charge. The pirates must feel vindicated.

There is also a huge foreign commercial market for these publications, and a free access policy would cost the United States millions of dollars that we now get from rich foreign governments and large foreign corporations. As my old boss, Senator Mathias once said, “Talk about Uncle Sap. It’s like standing on the coastline and shoveling buckets of greenbacks into the waves.”

To its great credit, this subcommittee is looking at the long term consequences of a free access policy. The dedicated researchers who benefit from the NIH grants take great professional pride in being published in prestigious learned journals, all of which constitute a valuable and reliable resource for future research.

Despite some grumbling about high subscription prices, very few researchers, academics, or librarians are suggesting that the journals have outlived their usefulness. The STM publishers should be given the right to compete fairly in a changing marketplace, in which they will innovate and have the opportunity to flourish on their own merits, as long as their copyrights are protected. Proponents of change must convince Congress that a free access policy will not jeopardize the existence of the STM publishers and the indispensable role they play in vetting and selecting peer-reviewed articles. Strong copyright protection will preserve the STM journals as valuable professional tools for scientific research, and thereby promote the progress of science. Congress should give the evolving free market a chance to come to grips with the new online technologies without undercutting the incentives that publishers have relied on for two hundred years.

We can solve the problem of patient access to these valuable STM articles without doing damage to the incentives provided by copyright. Let’s all sit down and reason together and figure out how to do it.