

January 10, 2012

Mark Sableman
314-552-6103
FAX 314-552-7103
msableman@
thompsoncoburn.com

By PDF E-MAIL digitaldata@ostp.gov; publicaccess@ostp.gov

Mr. Ted Wackler
Deputy Chief of Staff
Office of Science and Technology Policy
725 17th Street, N.W.
Washington, D.C. 20502

Re: FR Doc 2011-28621: "Public Access to Digital Data Resulting from Federally Funded Scientific Research:
FR Doc 2011-28623: "Public Access to Peer-Reviewed Scholarly Publications Resulting from Federally Funded Research"
Comments of American Business Media

Dear Mr. Wackler:

These comments are submitted on behalf of American Business Media (ABM), an association representing more than 200 business-to-business information providers such as publishers, producers of print and other publications and websites, and organizers of trade shows and similar events. ABM's members produce more than 2,000 high quality, business-to-business publications. From *Oil and Gas Journal* to *Advertising Age* to *Insect & Disease Control Guide*, ABM publications form an essential role in assembling and disseminating the industry-specific news and information needed by businesses in thousands of different fields. Because the issues are quite similar, these comments are similar to those filed in January 2010 in response to OSTP's inquiry regarding "Public Access Policies for Science and Technology Funding Agencies Across the Federal Government."

Many American Business Media members publish journals and periodicals about government-funded activities or containing Scientific, Technical, and Medical (STM) research and reference

information created by or on behalf of government agencies. Indeed, the United States has a long tradition of encouraging the dissemination through various channels of information created by the government or about government activities, including through publishers that report on the results of government-funded activities.

ABM supports the objectives of disseminating scientific research and developments in academic thought, and indeed as publishers ABM members take a leading role in informing the public about technical and scientific developments and research. As discussed below, ABM believes that government objectives relating to public access to important useful information can best be achieved through partnerships and cooperation with publishers like ABM members.

ABM offers the following comments which apply generally to both of the captioned inquiries, and more specifically to Question (2) posed in both inquiries (concerning means to protect the intellectual property interests of publishers).

Distinction between research and value-added copyrighted content. In any discussion of this topic, one must distinguish between (a) government-funded research and (b) the value-added articles and other content for which the publishers have copyright and other rights.

a. **Research.** The federal government, through various agencies, funds various research enterprises which generate outputs such as experimental data, technical reports, grant reports, and conference papers. Thus, if the agencies or the researchers so choose, they already have full rights to make available to the public the outputs of taxpayer funded research, such as through electronic posting of technical reports. OSTP's request for information 2011-28621 specifically refers to this right, by describing the government's right to share "the primary data, samples physical collections and other supporting materials created or gathered in the course of work under NSF grants."

b. **Value-added content from the publishing process.** The publication of STM research (unlike the research itself) is not funded by the government. Accepted author manuscripts and published journal articles contain substantial added value through the actions of publishers, as explained in further detail below.

Crucial role of publishers. While STM research or information would often not be produced without the support of federal agencies, publication and wider dissemination of peer-reviewed journal articles about the research to the public would not occur without the millions of dollars publishers spend each year on gathering, peer reviewing, editing, publishing, disseminating, and archiving their copyrighted works. Among other things, publishers play a critical role in scientific and medical discovery and knowledge by establishing and promoting journals, editing the journals or managing the appointment of journal editors and the ongoing development of journal editorial boards, establishing and maintaining editorial standards and procedures, editing and preparing articles for publication, and publishing and distributing the publications.

Put simply, the initial funding and conducting of government-funded research is only part of the process; the value added by publishers is critical to identifying, classifying, refining, evaluating, and disseminating useful results of such research.

Adverse effects of mandated public access. Various government agencies have recently sought to override publishers' copyrights in instances where they deem the information contained in copyrighted works important to the public. Such government attempts to mandate public dissemination of copyrighted works of STM materials nature is a growing threat to all information content providers and the millions of readers and users who rely on their work and publications.

Publishers, not the government, bear the costs and risks involved in the value-added editorial process. Moreover, publishers have invested in new electronic technologies which allow them to make their publications and the STM and other information they contain more widely and timely available at reasonable expense to interested persons, including leaders and decision makers in the industries that will put that the research results to practical and productive use. Publishers must recoup their investments through traditional subscription, sponsorship, advertising, and 'pay-per-view' fees. Copyright protections have maintained the incentives for publishers to continue to invest in STM and other journals and periodicals and have permitted such publishers to realize a reasonable return on their investments. These incentives are necessary to encourage the continuing traditional value-added efforts of publishers, and to allow publishers to expand and improve their electronic dissemination options.

Some agencies appear to believe that they can balance publishers' needs for exclusive initial publication against the agency's perceived need for mandated public access by requiring that the mandated public access not occur until a certain time period after initial publication. ABM believes, however, that even with such a delay, a program of mandated public access for publishers' copyrighted works would significantly decrease publishers' incentives for creating value-added content and threaten the traditional balance between government activities in disseminating information and the important role that non-government organizations play in furthering knowledge about that information. For example, considering that the Copyright Act generally grants publishers exclusive rights to control their copyrighted material for a period of 95 years, it is obvious that restricting publishers to an exclusivity period of only six months or a year would represent a drastic curtailment of their normal incentives, and would present them with an unnaturally short period in which to recoup their investment.

Publishers' revenue sources will be imperiled if the value-added products of publishers' activities will be made freely available to the public by the government. Such mandated access would directly negate the exclusive publication rights which the publishers have under copyright law, and those exclusive publication rights are in turn essential to publishers' ability to earn subscription, sponsorship, and advertising revenue.

Conclusion

ABM believes that OSTP should not recommend that outputs of the publishing process, such as accepted author manuscripts and published journal articles, be made freely available. Any such policy that mandates free access to the outputs of the publishing process will likely remove the essential financial incentives for such publishing activities. It could also deprive citizens of a choice of sources from which to gain knowledge of government activities – an important aspect of our democracy since its inception. From either perspective, there is a good likelihood that mandating deposit of publishers' materials will destabilize the publishing system upon which researchers and the public have long depended.

Thank you for your consideration of these comments.

Very truly yours,
THOMPSON COBURN LLP

By 

Mark Sableman
MS/ss

cc: Mr. Clark Pettit