

COMPLYING WITH THE NATIONAL INSTITUTES OF HEALTH PUBLIC ACCESS POLICY:

Copyright considerations and options

A JOINT SPARC / SCIENCE COMMONS / ARL WHITE PAPER
By Michael W. Carroll

February 2008

SPARC[®]

 **science
commons**



ASSOCIATION OF RESEARCH LIBRARIES

Legal Disclaimer: This document is not legal advice, and this document does not create an attorney-client relationship. The author, SPARC, Science Commons, and ARL provide this information on an "as-is" basis. The author, SPARC, Science Commons, and ARL make no warranties regarding the information provided, and each disclaims liability for damages resulting from its use.

COMPLYING WITH THE NATIONAL INSTITUTES OF HEALTH ("NIH") PUBLIC ACCESS POLICY:
COPYRIGHT CONSIDERATIONS AND OPTIONS - A JOINT SPARC/SCIENCE COMMONS/ARL WHITE
PAPER

By Michael W. Carroll

February 2008

Copyright © 2008 by Michael W. Carroll. This White Paper is licensed to the public under a Creative Commons Attribution Non Commercial 3.0 Unported License (<http://creativecommons.org/licenses/by-nc/3.0>). Attribution under the license should be to Michael W. Carroll as author and to SPARC, Science Commons, and the Association of Research Libraries as co-sponsors.

Science Commons
c/o MIT CSAIL
Building 32-386D, Cambridge, MA 02139
<http://www.sciencecommons.org>

SPARC
21 Dupont Circle, Suite 800, Washington, DC 20036
<http://www.arl.org/sparc/>

Association of Research Libraries
21 Dupont Circle, Suite 800, Washington, DC 20036
<http://www.arl.org/sparc/>

Version 1.0, February 2008.

Available for free download at <http://www.arl.org/sparc>.

COMPLYING WITH THE NATIONAL INSTITUTES OF HEALTH
PUBLIC ACCESS POLICY: COPYRIGHT CONSIDERATIONS AND OPTIONS

TABLE OF CONTENTS

I. EXECUTIVE SUMMARY.....	i
II. BACKGROUND	2
A. Brief History of the NIH Public Access Policy.....	2
B. A Note on Copyright Law	3
C. Copyright and the Public Access Policy	4
III. ANALYSIS OF GRANTEES’ COPYRIGHT-RELATED OBLIGATIONS UNDER THE PUBLIC ACCESS POLICY.....	8
A. The Copyright Compliance Risk	8
B. Timing.....	9
IV. COMPLIANCE OPTIONS FOR GRANTEES AND PRINCIPAL INVESTIGATORS	10
Option 1. Rely on individual authors to satisfy grantee’s obligation under the award.....	10
Option 2. Assist Authors with Copyright Management.	11
Option 3. The Grantee License.....	11
Option 4. The Grantee License - Plus	12
Option 5. Negotiate Directly with Publishers.....	13
Option 6. Pre-clear Journals.....	14
V. ADDITIONAL SUGGESTION AND CONCLUSION.....	15
About the Author	16
About SPARC	16
About Science Commons.....	16
About the Association of Research Libraries	16
APPENDIX A - SUGGESTED COVER LETTER FOR AUTHOR JOURNAL SUBMISSION	17
APPENDIX B - ANALYSIS OF SELECTED BIOMEDICAL PUBLISHERS’ COPYRIGHT POLICIES.....	18

I. EXECUTIVE SUMMARY

On January 11, 2008, the National Institutes of Health (“NIH”) adopted a revised Public Access Policy¹ for peer-reviewed journal articles reporting research supported in whole or in part by NIH funds. Under the revised policy, the grantee shall ensure that a copy of the author’s final manuscript, including any revisions made during the peer review process, be electronically submitted to the National Library of Medicine’s PubMed Central (“PMC”) archive and that the person submitting the manuscript will designate a time not later than 12 months after publication at which NIH may make the full text of the manuscript publicly accessible in PMC.

NIH adopted this policy to implement a new statutory requirement under which:

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.²

This White Paper is written primarily for policymaking staff in universities and other institutional recipients of NIH support responsible for ensuring compliance with the Public Access Policy. The January 11, 2008, Public Access Policy imposes two new compliance mandates. First, the grantee must ensure proper manuscript submission. The version of the article to be submitted is the final version over which the author has control, which must include all revisions made after peer review. The statutory command directs that the manuscript be submitted to PMC “upon acceptance for publication.” That is, the author’s final manuscript should be submitted to PMC at the same time that it is sent to the publisher for final formatting and copy editing.

Proper submission is a two-stage process. The electronic manuscript must first be submitted through a process that requires input of additional information concerning the article, the author(s), and the nature of NIH support for the research reported. NIH then formats the manuscript into a uniform, XML-based format used for PMC versions of articles. In the second stage of the submission process, NIH sends a notice to the Principal Investigator requesting that the PMC-formatted version be reviewed and approved. Only after such approval has grantee’s manuscript submission obligation been satisfied.

Second, the grantee also has a distinct obligation to grant NIH copyright permission to make the manuscript publicly accessible through PMC not later than 12 months after the date of publication. This obligation is connected to manuscript submission because the author, or the person submitting the manuscript on the author’s behalf, must have the necessary rights under copyright at the time of submission to give NIH the copyright permission it requires. This White Paper explains and analyzes only the scope of the grantee’s³ copyright-related obligations under the revised Public Access Policy and suggests six options for compliance with that aspect of the grantee’s obligation.

¹ Revised Policy on Enhancing Public Access to Archived Publications Resulting from NIH-Funded Research, NOT-OD-08-033, <http://grants.nih.gov/grants/guide/notice-files/NOT-OD-08-033.html>.

² Consolidated Appropriations Act, 2008, Pub. L. No. 110-161 Div. G, Tit. II, § 218.

³ For the sake of convenience, recipients of NIH support are referred to as “grantees” hereafter regardless of the contractual form of NIH support.

Time is of the essence for NIH grantees. As a practical matter, the grantee should have a compliance process in place no later than April 7, 2008. More specifically, the new Public Access Policy applies to any article accepted for publication on or after April 7, 2008 if the article arose under (1) an NIH Grant or Cooperative Agreement active in Fiscal Year 2008, (2) direct funding from an NIH Contract signed after April 7, 2008, (3) direct funding from the NIH Intramural Program, or (4) from an NIH employee.

In addition, effective May 25, 2008, anyone submitting an application, proposal or progress report to the NIH must include the PMC reference number when citing articles arising from their NIH funded research. (This includes applications submitted to the NIH for the May 25, 2008 and subsequent due dates.)

Conceptually, the compliance challenge that the Public Access Policy poses for grantees is easily described. The grantee must depend to some extent upon the author(s) to take the necessary actions to ensure that the grantee is in compliance with the Public Access Policy because the electronic manuscripts and the copyrights in those manuscripts are initially under the control of the author(s). As a result, any compliance option will require an explicit understanding between the author(s) and the grantee about how the manuscript and the copyright in the manuscript are managed. It is useful to conceptually keep separate the grantee's manuscript submission obligation from its copyright permission obligation because the compliance personnel concerned with manuscript management may differ from those responsible for overseeing the author's copyright management.

With respect to copyright management, the grantee has the following six options:

- (1) rely on authors to manage copyright but also to request or to require that these authors take responsibility for amending publication agreements that call for transfer of too many rights to enable the author to grant NIH permission to make the manuscript publicly accessible ("the Public Access License");
- (2) take a more active role in assisting authors in negotiating the scope of any copyright transfer to a publisher by (a) providing advice to authors concerning their negotiations or (b) by acting as the author's agent in such negotiations;
- (3) enter into a side agreement with NIH-funded authors that grants a non-exclusive copyright license to the grantee sufficient to grant NIH the Public Access License;
- (4) enter into a side agreement with NIH-funded authors that grants a non-exclusive copyright license to the grantee sufficient to grant NIH the Public Access License and also grants a license to the grantee to make certain uses of the article, including posting a copy in the grantee's publicly accessible digital archive or repository and authorizing the article to be used in connection with teaching by university faculty;
- (5) negotiate a more systematic and comprehensive agreement with the biomedical publishers to ensure either that the publisher has a binding obligation to submit the manuscript and to grant NIH permission to make the manuscript publicly accessible or that the author retains sufficient rights to do so; or
- (6) instruct NIH-funded authors to submit manuscripts only to journals with binding deposit agreements with NIH or to journals whose copyright agreements permit authors to retain sufficient rights to authorize NIH to make manuscripts publicly accessible.

II. BACKGROUND

As is well known, PubMed Central is central to a suite of interconnected databases that is perhaps the most valuable research archive in biomedicine.⁴ Administered by the National Institutes of Health (NIH) through the National Library of Medicine (NLM), PMC is a free, Internet-accessible archive of full text articles from peer-reviewed scholarly biomedical journals. The Public Access Policy is designed to increase the value of this resource to the biomedical research community and to the general public.

A. Brief History of the NIH Public Access Policy

On July 14, 2004, the Appropriations Committee of the U.S. House of Representatives instructed NIH to develop a policy requiring free online access to articles arising from NIH-sponsored research no later than six months after the articles' publication in peer-reviewed journals.

NIH responded in September 2004 with a notice of a draft policy⁵ followed by a public comment period during which thousands of comments were received and reviewed by NIH.⁶ NIH released the final version of the Policy on Enhancing Public Access to Archived Publications Resulting from NIH-Funded Research on February 3, 2005 with an effective date of May 2, 2005.⁷ The policy provided, in pertinent part:

Beginning May 2, 2005, NIH-funded investigators are requested to submit an electronic version of the author's final manuscript upon acceptance for publication, resulting from research supported, in whole or in part, with direct costs from NIH. The author's final manuscript is defined as the final version accepted for journal publication, and includes all modifications from the publishing peer review process.

...

At the time of submission, the author will specify the timing of the posting of his or her final manuscript for public accessibility through PMC. Posting for public accessibility through PMC is requested and strongly encouraged as soon as possible (and within twelve months of the publisher's official date of final publication).

The three key features of the final policy were: (1) it was voluntary instead of mandatory; (2) NIH decided as a matter of policy that it would require the person submitting a manuscript to grant NIH copyright permission to make the full text article publicly accessible; and (3) the duration of the optional embargo period for public access was extended from six to 12 months after publication.

⁴ See PMC Frequently Asked Questions, <http://www.pubmedcentral.nih.gov/about/faq.html>.

⁵ Enhanced Public Access to NIH Research Information, NOT-OD-04-064, Sept. 3, 2004, <http://grants.nih.gov/grants/guide/notice-files/NOT-OD-04-064.html>.

⁶ NIH first released its draft policy on its web site on September 3, 2004, commencing a 60-day comment period. NIH then published the same text in the *Federal Register* on September 17, 2004, 69 Fed. Reg. 56074, also commencing a 60-day comment period. The comment periods were merged and the comment period closed on November 16, 2004.

⁷ Policy on Enhancing Public Access to Archived Publications Resulting from NIH-Funded Research, NOT-OD-05-022, Feb. 3, 2005 at <http://grants.nih.gov/grants/guide/notice-files/NOT-OD-05-022.html>.

In early February 2006, the NIH sent a progress report to Congress (dated January 2006). Among other things, NIH reported that the rate of compliance with its request for public access was below 4%. Responding to the data demonstrating a low compliance rate under the voluntary policy, Congress enacted as part of the Consolidated Appropriations Act, 2008 a provision requiring NIH to make its voluntary policy mandatory.⁸ NIH released its revised policy on January 11, 2008 with an effective date of April 7, 2008.⁹

B. A Note on Copyright Law

The peer-reviewed journal articles subject to NIH's Public Access Policy are copyrighted works of authorship, and NIH has been directed by statute to make these articles publicly available in a manner consistent with copyright law. The remainder of this Section addresses the copyright issues that NIH must address with respect to its policy. The Public Access Policy requires grantees and investigators to take an active role in ensuring that public access to NIH funded research is consistent with copyright law. The following section identifies the copyright issues that grantees and Principal Investigators must address to comply with NIH's implementation of this statutory requirement.

1. Authorship and Transfers of Copyright Ownership

The author is automatically the initial owner of the copyright in an original work of authorship as soon as the work has been fixed in a tangible medium of expression. Originality requires independent creation by the author and a modicum of creativity. Facts and ideas are not copyrightable. Consequently, the results and underlying data reported in an article are facts that are not subject to copyright. Similarly, the insight or idea leading to an experiment is also not subject to copyright. In the case of journal articles, the copyright applies to the author's creative expression, such as the choice of text to describe materials and methods, an experiment or its result. Tables, figures, charts or other accompanying material are copyrightable only if some minimally creative decisions were required in their design.

Once the copyright vests in the author, s/he can authorize others to use the work in one of four ways: (1) assign the entire copyright; (2) grant an exclusive license; (3) grant a non-exclusive license; or (4) dedicate the copyright to the public domain. An author must sign a written document to effectively assign the copyright or grant an exclusive license. In contrast, a non-exclusive license or permission can be granted quite casually. A verbal okay or even conduct, such as posting a work on a publicly accessible web server, is deemed to be the grant of a non-exclusive license. The remainder of this White Paper uses the terms "permission" and "non-exclusive license" interchangeably.

In some quarters, confusion has arisen about whether the copyright in the first draft of an article (a.k.a. "pre-print") is distinct from the copyright in the final published version. It is important to note that the scope of the exclusive rights encompasses the exact text or any text that is "substantially similar." Although in some cases there may be a distinct copyright in the authors' revisions to the article, the substantial similarity standard usually means that the owner of the copyright in an article has the exclusive rights to control the dissemination of any version of the article. Thus, a transfer of copyright to a publisher does not leave the author with the rights to grant a license with respect to the author's final manuscript or any other earlier drafts of the article. It is, however, possible for the copyright owner to use licensing to allocate different rights with respect to different versions of an article. Some journal publishing agreements that transfer the copyright to the publisher do just this.

⁸ Consolidated Appropriations Act, 2008, Pub. L No. 110-161, Div. G, Tit. II, § 218.

⁹ Revised Policy on Enhancing Public Access to Archived Publications Resulting from NIH-Funded Research, NOT-OD-08-033, <http://grants.nih.gov/grants/guide/notice-files/NOT-OD-08-033.html>.

Since the author is initially in a position to manage the copyright in a biomedical journal article, it is important to identify the author or authors for purposes of complying with the Public Access Policy. Although it may seem obvious that those authors listed on a journal article jointly own the copyright in the article, this may not be so. First, there is a fundamental legal uncertainty about who the copyright law recognizes as the author of scholarly articles written by university faculty. Familiarity with this uncertainty is assumed, and this White Paper proceeds on the assumption that either by law or by university policy, faculty authors have the right to transfer exclusive rights under copyright to journal publishers.¹⁰ There is also a factual uncertainty that arises with every co-written article that affects the proper legal characterization of the authors' relationship and their respective rights to grant licenses or to transfer rights under copyright with respect to the article. This issue is discussed in Section III below.

2. Liability for Copyright Infringement

Distributing copies of full text journal articles over the Internet implicates copyright. The copyright owner has the exclusive rights to (1) reproduce the work in copies, (2) publicly distribute copies, (3) publicly perform the work, (4) publicly display the work, and (5) prepare derivative works. The courts have been imprecise in their analysis of how these exclusive rights apply on the Internet, but under the current interpretation of copyright law when a user downloads a copy of a work from an Internet server and views the work on the screen, the copyright owner's rights of reproduction, public distribution and public display have been exercised.

The liability analysis has two steps. First, one asks whether there is a valid copyright in the work and whether the use includes the exercise of one or more of the copyright owner's exclusive rights. Second, if the answers to those questions are yes, one asks whether such use is permitted under the fair use doctrine, under other limitations or exceptions to copyright or under a license or permission from the copyright owner.

In the case of public access to full text articles on PMC, NIH would be exercising the rights of reproduction or distribution and public display by sending copies of copyrighted manuscripts to members of the public who request them. Systematically distributing copies of another's copyrighted work over the Internet generally will not qualify as a fair use or under any of the other statutory limitations and exceptions to copyright. In this author's view, NIH would infringe copyright by systematically distributing copies of peer-reviewed journal articles from its PubMed Central archive without permission to do so.

C. Copyright and the Public Access Policy

Under the Public Access Policy, NIH receives two copyright licenses in connection with the journal articles written with NIH support. One is a license that NIH receives at the time the grant, cooperative agreement or contract comes into force. The second is permission granted during the process of submitting the manuscript to PMC. Under the terms of the Public Access Policy, NIH is relying only on the permission granted during manuscript submission as the basis for providing public access to full text articles. For this reason, it is essential that grantees and Principal Investigators ensure that copyright in NIH-funded articles is managed so that the author's final manuscript is submitted by one with authority to grant NIH permission to make it

¹⁰ University and other institutional copyright policies reflect this uncertainty about authorship under the law, with some asserting ownership by the university and a license back to the faculty and others purporting to recognize the faculty's customary or traditional rights under copyright. For the record, this author is of the view that most university policies that purport to treat faculty as the legal authors of their own work risk being ineffective if it is determined that scholarly articles are works made for hire. A transfer of exclusive rights requires a written instrument signed by the author. See 17 U.S.C. § 204. It is uncertain which, if any, general university policies satisfy this writing requirement.

publicly accessible within 12 months of publication. Although the first license is not directly relevant to compliance with the Public Access Policy, the mechanics of how that license is granted suggest a means for compliance with the Public Access Policy.

1. Federal Purpose License

Under applicable Health and Human Services regulations, those funded by the government may keep the copyright in works created with support from federal funds. However, NIH, as a part of its funding agreements, “reserves a royalty-free, nonexclusive and irrevocable right to reproduce, publish, or otherwise use the work for Federal purposes, and to authorize others to do so.”¹¹ This license is granted prior to the creation of the copyrighted work, and it comes into effect as soon as the work is created. Thus, subject to issues discussed in Section III below, any subsequent transfer of copyright by the author or grantee is subject to NIH’s Federal Purpose license.

One might ask whether this license suffices as the legal basis for the Public Access Policy. On its face, NIH’s license “to reproduce, publish or otherwise use” copyrighted manuscripts written with federal support would appear to cover public access to these works through NIH’s PMC server. During the comment period on the February 3, 2005 version of the policy, the American Physiological Society and the American Association of Immunologists filed a “legal analysis” that looked very much like a legal brief arguing that NIH had misinterpreted the scope of its own license and would infringe copyright if this license were relied upon as the basis for posting final manuscripts in PMC.¹² In its response to the comments accompanying the February 3, 2005 version of the policy, NIH explained:

Although the NIH, at this time, is not relying on the government purpose license, it is an available means for NIH to reproduce, publish or otherwise use copyrighted works resulting from NIH funding for Federal purposes, as well as to authorize others to do so. Arguments put forth and cases cited by the commenter as support for the premise that the government purpose license could not be used as a basis for PMC to post the manuscripts are not persuasive. None of the cases address circumstances where a government agency is acting to fulfill its own statutory purposes with regard to publications resulting from its own research funding. Creation of a publicly accessible, permanent archive of NIH-funded research publications is squarely within the statutory authorities of the NIH and the NLM and clearly constitutes a Federal purpose.¹³

In this author’s opinion, NIH is clearly correct about the scope of the Federal Purpose license, but it is also the case that based on the content, style and tenor of the APS/AAI analysis, NIH faced a non-trivial risk that it would have to litigate the issue had it chosen to rely on this license. Consequently, NIH chose as part of the February 3, 2005 version of the policy to require the person submitting the manuscript to set the embargo period and to specifically grant NIH permission to make the manuscript publicly accessible after that period.

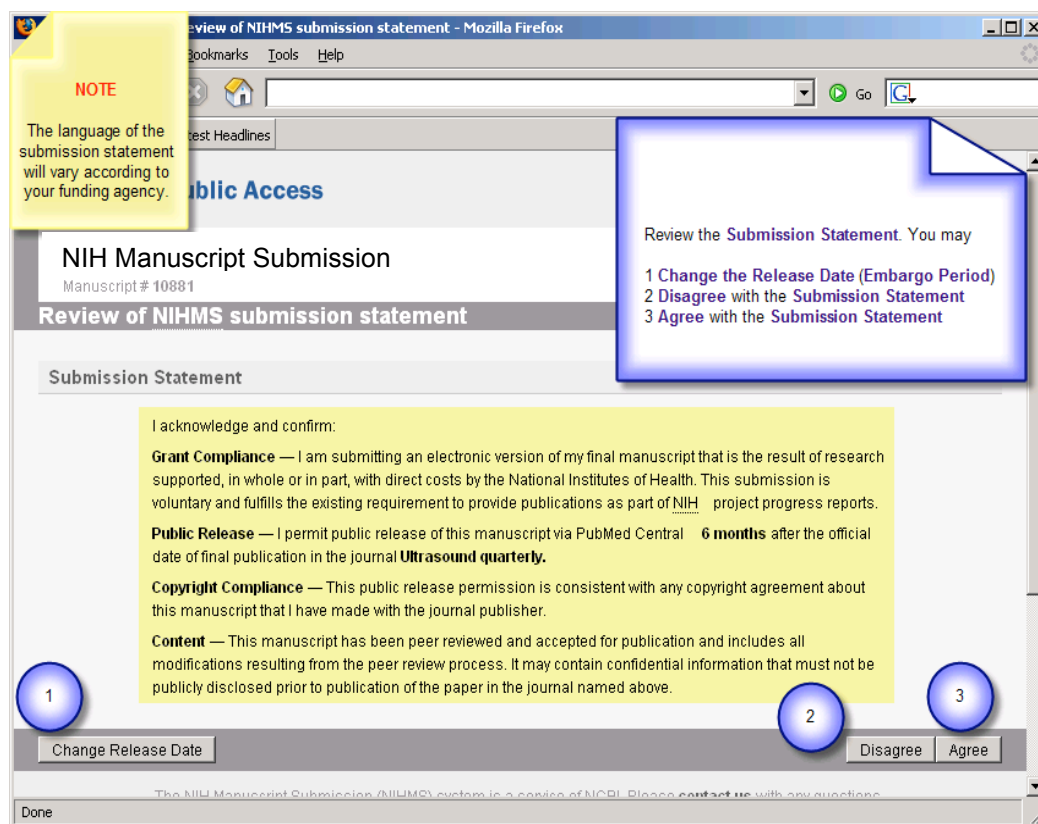
¹¹ 45 C.F.R. § 74.36 (2007).

¹² See Comment of the American Physiological Society (Nov. 16, 2004) (Attachment A), <http://www.dcprinciples.org/responses/aps.pdf>.

¹³ Policy on Enhancing Public Access to Archived Publications Resulting from NIH-Funded Research, NOT-OD-05-022, Supplementary Information, § II.P.3 (Feb. 3, 2005), <http://grants.nih.gov/grants/guide/notice-files/NOT-OD-05-022.html>.

2. The Public Access License

Under the January 11, 2008 revision of the Public Access Policy, NIH has not changed the preexisting steps in the manuscript submission process. The only material change is that use of this process is now mandatory. The compliance issue discussed in this White Paper for grantees and Principal Investigators arises out of the required step in the submission process in which the person submitting the manuscript sets the time after publication (not to exceed 12 months) at which the manuscript should be made publicly accessible, and the submitter grants NIH copyright permission to make the manuscript publicly accessible. A screen shot of this step from NIH's submission guide is set forth below.¹⁴



Under copyright law grant of permission is the same as the grant of a non-exclusive license. For purposes of clarity, this White Paper refers to the “Public Release” permission granted to NIH in the above-referenced step in the manuscript submission process as the “Public Access License.” This is not a term that NIH uses in its explanation of the Public Access Policy, but it is useful to have a name for this permission or license because it is the legal basis for NIH’s compliance with the statutory command that the Public Access Policy be implemented “consistent with copyright law.”

In its response to comments accompanying the release of the February 3, 2005 policy, NIH directly explained why it had chosen to rely on the Public Access License as its policy choice for complying with copyright law:

Copyright: NIH received comments that the proposal infringes on copyright interests of Federal grantees. These commenters argued that copyright interests

¹⁴ The Guide can be found at <http://www.nihms.nih.gov/web-help/PI-NPMC/PI-NPMC-22.html>.

are well-established under Federal law, that NIH has no authority to alter them, and that the proposal is not consistent with controlling Department of Health and Human Services (HHS) regulations. They believe the proposal fails to recognize the need for copyright permission from authors and/or publishers. They argue that neither the principle of fair use, nor the Federal purpose license, can be used by NIH to implement the proposal. Finally, they argue that the PMC “open access” submission agreement constitutes a forced license and undermines copyright.

The Policy explicitly recognizes and upholds the principles of copyright. First, submission of final manuscripts is voluntary rather than mandatory; the voluntary submission to NIH by authors and institutions under the Policy constitutes permission to post the manuscripts on PMC and release to the public after the submitter's specified post-publication delay time. The fair use exemption to copyright infringement does not apply to the government's request for the manuscripts. It applies to the public use of the manuscripts as posted on PMC and provides a limitation on such use consistent with the terms of that exemption.

NIH does not need to seek permission from journals who may acquire copyrights from authors or institutions because any copyright transfer or assignment is currently subject to the government purpose license pursuant to 45 C.F.R. 74.36. Although the NIH is relying on permission, rather than the government purpose license, as the basis for its Policy, the government purpose license is fully available as a legal authority under which manuscripts could be reproduced, published, or otherwise used for Federal purposes. The comment that the proposal is not consistent with controlling HHS regulations granting copyright is not persuasive, since those same regulations grant the agency its government purpose license.

Finally, authors can indicate what copyright restrictions, if any, apply to their manuscripts when submitting them to PMC and can choose an appropriate PMC submission agreement that recognizes those rights.¹⁵

Although NIH stressed the voluntary nature of manuscript submission in its explanation, the change from voluntary to mandatory submission under the January 11, 2008 policy has no effect on NIH's compliance with copyright law. So long as the person submitting the manuscript has the authority to grant NIH the Public Access License, NIH's subsequent distribution of copies of manuscripts to the public will comply with copyright law.

¹⁵ Policy on Enhancing Public Access to Archived Publications Resulting from NIH-Funded Research, NOT-OD-05-022, Supplementary Information, § II.P.2 (Feb. 3, 2005), <http://grants.nih.gov/grants/guide/notice-files/NOT-OD-05-022.html>. This author has one quibble with NIH's understanding of the copyright consequences of the reader's downloading a manuscript. NIH asserted that the reader must rely solely on fair use for the copy made during download. However, since the purpose of the Public Access License is to enable members of the public to display a copy of the manuscript on their computer screens and to download a copy to the reader's hard drive, the Public Access License granted during manuscript submission also covers the display copy or download copy made by the reader. Any further copies made by the reader would be subject to the normal restrictions imposed by copyright subject to the normal limitations and exceptions, including fair use.

III. ANALYSIS OF GRANTEES' COPYRIGHT-RELATED OBLIGATIONS UNDER THE PUBLIC ACCESS POLICY

Congress has mandated that NIH make peer-reviewed, copyrighted manuscripts publicly accessible through PubMed Central provided NIH does so consistent with copyright law. Copyright law requires that NIH have a license to publicly distribute copies of these manuscripts from one with the rights to grant it. NIH relies on the person submitting the manuscript to have the rights under copyright to grant NIH the Public Access License. Under the Public Access Policy, the *grantee* must ensure that the author's final manuscript is submitted to PMC by one with authority to grant NIH the Public Access License.

A. The Copyright Compliance Risk

Unless grantees intervene with their authors prior to April 2008, the risk of non-compliance with the Public Access Policy arising from these authors' business-as-usual copyright management practices is substantial. Since copyright in articles written with NIH support starts out in the hands of the author, the grantee must monitor how the author manages copyright in the manuscript or the grantee must take more direct action in order to ensure compliance. In particular, the focus of risk management should be on how investigators handle copyright agreements sent to them by journal publishers.

Copyright is an author's right. At the time the article is written, the author is in a position to grant NIH the Public Access License required by the January 11, 2008 revised policy. The risk arises with respect to publication agreements because under copyright law, for an author to transfer exclusive rights under copyright, he or she must do so in writing. Once an NIH-funded *author* signs an agreement that transfers all or most rights under copyright to the publisher, the *grantee* will be non-compliant with the terms and conditions of the grant award unless a publisher submits the manuscript. Even if the author or a member of grantee's staff subsequently submits a manuscript to PMC, the person submitting the manuscript will not have the legal authority to grant NIH the Public Access License and therefore such a submission will still be non-compliant.

No formal study of publication agreements was conducted in preparation of this White Paper, but this author has reviewed the copyright policies of selected large or prominent biomedical publishers as detailed in Appendix A. That review suggests that for a number of journals the author(s) must assign copyright or grant an exclusive license of sufficient breadth that neither the author nor the grantee retains sufficient rights to grant NIH the Public Access License after signing the publication agreement. In February 2008, only a small percentage of publishers had a binding agreement with NIH to submit manuscripts and to grant NIH the Public Access License.¹⁶

Thus, if the author(s) of an NIH-sponsored article subject to the Public Access Policy follow standard practice and sign some of the journal publishers' copyright agreements reviewed without altering the terms, the grantee will be non-compliant with the Public Access Policy unless the publisher, as a matter of grace, chooses to submit the manuscript to PMC. Some publishers have adopted a policy to voluntarily submit manuscripts to PMC. The largest of these is Elsevier.¹⁷ Grantees that rely on such policies for compliance run the risk that this policy may change or that such publishers will fail to execute and not deposit a manuscript.

¹⁶ See NIH, Journals that Submit Articles to PubMed Central, http://publicaccess.nih.gov/submit_process_journals.htm.

¹⁷ See Elsevier, Funding Body FAQ, http://www.elsevier.com/wps/find/authorsview.authors/author_sponsorship_information.

Many NIH-sponsored articles are co-written. The legal implications for compliance with the Public Access Policy are as follows. When many authors are listed on an article they may be (1) joint authors; (2) authors only of their expressive contributions (text, graphics, etc.); or (3) not authors at all for copyright purposes. Joint authors are those who contribute original expression to a work with an intent that their contributions will be merged into an inseparable whole. Joint authors share all rights in the copyright in an article as tenants in common. Each joint author may grant non-exclusive licenses, and the joint author may transfer his or her interest in the copyright to third parties. All joint authors must agree for a transfer of all rights under copyright to be effective. Under these principles, any of the co-authors individually has the legal power to ensure compliance with the Public Access Policy by granting NIH the Public Access License.

For the sake of completeness, there is a case-specific risk to flag. With respect to a small portion of co-written articles, the grantee may not have a relationship with the owners of all the rights under copyright and therefore may not be in a position to ensure compliance with the Public Access Policy. It is probably the case that most co-written articles are jointly authored, which means that the grantee's employees have the legal rights to ensure compliance with the Public Access Policy unless they sign away too many rights in a publication agreement.

In some cases, however, it may be that an author contributes only separately created material – such as a copyrightable figure or table – produced in relation to prior research. In these cases, there is some risk that each author has only the rights to grant a license with respect to his or her contribution to the article. It is still the case that those other authors and their institutions also are obliged to comply with the Public Access Policy, and it may also be the case that the other authors agreed to let such an author act as their agent. Consequently, although the risk has been flagged, in this author's view, this risk is insubstantial enough that it would not be worth investing resources to identify precisely what copyrightable expression a grantee's employee contributed to a co-authored article and under what terms.

A related risk is that not all persons listed as co-authors on an article are necessarily authors at all in the eyes of copyright law. Only those persons who contribute original expression to the text of the article or the associated materials are authors for copyright purposes, even though scientific norms require attribution for others who contributed to the underlying research. Where a grantee's employee is listed as a co-author but does not own any share of the copyright in an article, the grantee will have to rely on the employing institutions of those authors with rights under copyright to ensure that the manuscript is submitted to PMC and that NIH receives the Public Access License.

B. Timing

April 7, 2008 is the key date for compliance, but the precise contours of the obligation are defined by the date of funding and the date of acceptance for publication. From the risk management perspective, grantees should have a plan in place to address author(s)' copyright management practices with respect to NIH funded articles accepted for publication on or after April 7, 2008. However, not all of these articles are necessarily subject to the Public Access Policy. Such articles are subject to the policy if the article arose under (1) an NIH Grant or Cooperative Agreement active in Fiscal Year 2008, (2) direct funding from an NIH Contract signed after April 7, 2008, (3) direct funding from the NIH Intramural Program, or (4) from an NIH employee.

In addition, effective May 25, 2008, any person submitting an application, proposal or progress report to the NIH must include the PMC reference number when citing articles arising from their NIH funded research. (This includes applications submitted to the NIH for the May 25, 2008 and subsequent due dates.)

IV. COMPLIANCE OPTIONS FOR GRANTEES AND PRINCIPAL INVESTIGATORS

Grantees effectively have six options for complying with their copyright-related obligations under Public Access Policy.

Option 1. Rely on individual authors to satisfy grantee's obligation under the award.

From a grantee's perspective, relying on authors to ensure compliance with the Public Access Policy is attractive insofar as it avoids adding copyright-related overhead to the office responsible for grants compliance. But this option also poses a foreseeable risk of non-compliance with the attendant consequences for future funding. Many NIH funded authors are likely to submit their manuscripts to publishers whose respective copyright agreements would, if signed without alteration, leave the author with insufficient rights to grant NIH the Public Access License as required in the mandatory manuscript submission process.

As a result, this option would require substantial time and effort by authors in the short term to understand the scope of their obligation to retain sufficient rights by amending the publisher's offered agreement or to find a new publisher in some cases. It is foreseeable that some authors would not successfully amend the publisher's copyright agreement and would still sign such an agreement to get their work published. Even if the author submits the final manuscript to PMC and purports to grant NIH the Public Access License in the process, the author would lack the authority to do so. In such a situation, a publisher would be within its rights to demand that NIH disable public access to the manuscript, thus frustrating the purpose of the Public Access Policy.

To reduce the burden on authors, grantees interested in pursuing this option or related versions may be interested to know that there are a number of standardized author's addenda, including a joint SPARC and Science Commons addendum, each of which would leave the author with more than sufficient rights to grant NIH the Public Access License if accepted by a journal publisher. These addenda can be generated through the Scholar's Copyright Addendum Engine, which is freely available for local hosting.¹⁸

There are two types of risk associated with Option 1. First, many articles are co-authored, and the grantee's faculty member may not be the corresponding author who has been designated to negotiate copyright issues with the publisher by the co-authors. In such a situation, the grantee would be reliant upon a researcher in another institution to reserve sufficient rights under copyright to enable the grantee to comply with the Public Access Policy.¹⁹

Second, even when the corresponding author is employed by the grantee, the level of risk associated with Option 1 depends upon whether the author's interest in ensuring that the grantee remains in compliance is sufficiently strong to motivate the author to negotiate with a journal publisher or, in the worst case, to refuse an offer of publication if the publisher is unwilling to cooperate with the requirements of the Public Access Policy.

¹⁸ Scholar's Copyright Addendum Engine at <http://sciencecommons.org/projects/publishing/scae>.

¹⁹ The legal effect of the corresponding author's signature on a copyright transfer agreement is subject to some uncertainty. Under copyright law, joint authors may grant non-exclusive licenses to third parties without their co-author's permission, and a joint author may transfer his or her share in the copyright without a co-author's approval. However, all co-authors must agree for there to be a complete transfer of exclusive rights. If the corresponding author in fact has agreement from the co-authors to transfer rights to the publisher on behalf of all co-authors, the transfer will be legally effective. If, however, one or more co-authors has not agreed, then the publisher only receives a share of the exclusive rights, and the remaining co-author retains sufficient rights to comply with the Public Access Policy.

Option 2. Assist Authors with Copyright Management.

Instead of relying entirely on the author to satisfy the grantee's obligation, a grantee might engage more directly with the Principal Investigator and authors under his or her supervision to manage the copyrights in articles arising from NIH-sponsored research. Option 2 comes in two varieties and the administrative resources necessary to implement each vary accordingly.

(a) Author Education.

The first variation is to provide authors with dedicated resources to educate them about their rights under copyright and with some standardized forms, such as author's addenda, that could be used to amend a publisher's copyright agreement to ensure that the author has rights sufficient to comply with the Public Access Policy. These resources might also include tips for negotiating with publishers about copyright, lists of publishers or journals that have agreements with NIH, and lists of journals known to be cooperative with the Public Access Policy and those known to refuse to publish articles subject to the Public Access Policy. Depending on the number of faculty and associated researchers who receive NIH funding, this option is likely to require additional staff resources.

This variation provides the grantee with greater assurance than Option 1 that the author understands the nature of the copyright-related obligation under the Public Access Policy. Like Option 1, this variation relies on the author's incentive to keep the grantee in compliance to ensure that the author manages copyright appropriately.

(b) Author representation.

Alternatively, the grantee might ask or require NIH-funded authors to authorize the grantee to act as the author's agent in negotiating copyright issues with journals. Under this variation, the grantee would be responsible for reviewing and signing publication agreements on the author's behalf. The grantee's licensing agent would also be responsible for using a contractual addendum to alter those agreements that would otherwise render the author unable to grant NIH the Public Access License.

Implementing this option would likely require greater expenditure than Option 1 because the grantee would hire one or more licensing agents. The benefit of centralizing this function, however, is that such agents would be more familiar than authors with the range of publication agreements and would have experience with negotiating amendments to these as is necessary. Option 2 could be an interim step toward Option 5, under which the grantee would negotiate a standard copyright agreement with at least the major biomedical publishers to ensure that the author retains sufficient rights to grant the Public Access License.

Option 3. The Grantee License.

Options 1 and 2 focus on ensuring that the author retains sufficient rights to enable the grantee to comply with the Public Access Policy. As an alternative, the grantee may seek to directly acquire sufficient rights from the author to ensure its own compliance with the Public Access Policy.

The surest method for acquiring such a non-exclusive license is to require the Principal Investigator and any other researchers working on an NIH-sponsored project to grant to the grantee a non-exclusive copyright license at the time they commence work on the project. The potential authors of copyrightable journal articles make a legal commitment at the time they accept NIH support for their work. At the moment when the article is first drafted (and when subsequent revisions are made), the actual copyright license is granted automatically under the terms of the commitment to the grantee. The best way to implement Option 3 is to have each

researcher working on the NIH-sponsored project sign a standard form granting the license to the grantee at the time the researcher commences work on the project.

The scope of this license would include the right to grant the Public Access License to NIH, and thus the grantee ensures that it is in a legal position to comply with its contractual commitments to NIH. In concept, Option 3 is exactly like NIH's Federal Purpose license except that the licensee is the NIH grantee rather than NIH. As a legal matter, if the mechanics of the license are executed properly, this license would survive any subsequent action by the author that may seem in conflict with the grant of this license – such as the author's signing a publisher's copyright agreement that purports to transfer all rights under copyright to the publisher.

There is still a risk that, without proper education, the author may sign a form that requires the author to make a representation that is arguably false. But even if that occurs, the grantee is protected because the grantee still has the legal rights necessary to comply with the terms and conditions of its agreement with NIH.²⁰ To close the loop, because the grantee would still have the rights to grant NIH the Public Access License, NIH would be implementing the Public Access Policy consistent with copyright law even as to these articles. The publisher's only legal recourse would be against the author for representing that s/he could transfer all rights under copyright without any prior licenses when, in fact, a prior license had been granted. While it is unlikely, in this author's opinion, that a journal publisher would assert such a claim against an author, it would be advisable to invest institutional resources in making clear to authors the need to amend publication agreements that are inconsistent with the grantee's license.

Finally, even though the article may have authors from other institutions, each co-author (in the copyright sense of the word) is empowered to grant non-exclusive licenses to the copyrighted work. In general, a license from the grantee's own faculty member or employee in a co-authored journal article would be sufficient so long as all authors contributing copyrightable expression to the article and accompanying materials did so with an intention that these be merged into an inseparable whole.

Option 4. The Grantee License - Plus

Option 3 contemplates a strategy aimed only at compliance with the Public Access Policy. However, if the grantee chooses to negotiate the terms of copyright with the Principal Investigator and other researchers, the question arises why the grantee should not also secure permission to post a copy of the author's final manuscript, or perhaps even the final published version of the article, in the grantee's own digital repository.

No matter which option the grantee chooses, the unavoidable fact is that the Public Access Policy requires grantees to arrive at a more explicit understanding about copyright with the NIH-funded authors they employ than heretofore has been the case. Under the policy, the point of that conversation is to ensure public access to the NIH funded research. Since that conversation is now necessary, and since the grantee must assume a greater administrative role in copyright matters as a result, it seems sensible to think that the grantee might use this changed circumstance as a means for furthering its own institutional goals by also providing public access through the grantee's institution itself.

Some evidence suggests that some faculty would be receptive to granting the university a license as well. For years, faculty and librarians on campuses across the country have drawn

²⁰ See 17 U.S.C. § 205(e) (“A nonexclusive license, whether recorded or not, prevails over a conflicting transfer of copyright ownership if the license is evidenced by a written instrument signed by the owner of the rights licensed or such owner's duly authorized agent, and if (1) the license was taken before execution of the transfer; or (2) the license was taken in good faith before recordation of the transfer and without notice of it.”).

attention to the need for author education and better copyright management to improve scholarly communication. As mentioned in the discussion of Option 1 above, a number of standardized author addenda have been produced for use by authors to amend publication agreements so that authors retain the rights to make their work publicly accessible on the Internet, including through PMC.

Recent developments suggest that some faculty are interested in more explicit community commitments to manage copyright in a manner that facilitates public access to their work. For example, as of February 2008, the Faculty in the University of California system had under consideration a proposed policy by which faculty members would commit to routinely granting to the Regents of the University of California a non-exclusive license to place a copy of their scholarly work in a non-commercial, open access repository.²¹ In February 2008, the University of Oregon Faculty Senate passed a resolution calling on authors to retain rights to provide open access.²²

In addition, on February 12, 2008, the Faculty of Arts and Sciences at Harvard University became the first faculty in the United States to adopt a policy under which each author would grant to the university a license sufficient to permit posting of faculty-authored articles in the Harvard repository and to permit Harvard to permit reposting of such articles so long as access is available without a charge for profit. This license is waivable by the faculty member on an article-per-article basis.²³

As with Option 3, by entering into a separate agreement with the NIH-supported researcher-authors, the grantee can ensure its own compliance by taking a license prior to the signing of any publication agreements. Although Option 4 protects the grantee's interest, prudence dictates that the grantee should also educate authors to alert them to the risks of signing a publisher-drafted copyright form that calls for representations that the author cannot legally make. The measure suggested in Part V below also would mitigate this risk for the authors.

Option 5. Negotiate Directly with Publishers.

Options 1 and 2 rely on authors to ensure that the grantee is compliant. Options 3 and 4 ensure that the grantee is in a position to comply with the Public Access Policy but leave to the author the responsibility of alerting the journal of the prior license granted to the NIH grantee. These options pose the risk for unwary authors that they will sign forms that call for representations they cannot legally make. Options 5 and 6 focus on publishers' willingness to act as a partner to facilitate compliance with the Public Access Policy.

Under Option 5, grantees may seek to mitigate the risk of non-compliance by negotiating some more general form of copyright understanding with biomedical publishers. This solution might take the form of a binding agreement between the grantee (or a group of grantees) and the

²¹ University of California, Proposed Open Access Policy, <http://osc.universityofcalifornia.edu/openaccesspolicy/OpenAccess-Policy-DRAFT1-29-2007.pdf>; see also UC Open Access Policy Proposal, http://www.lib.berkeley.edu/scholarlycommunication/uc_open_access_policy.html (Feb. 2007).

²² Motion US 07/08 - 17 Initiative to protect the rights of faculty authors of scholarly publications (passed Feb. 13, 2008) at <http://www.uoregon.edu/~uosenate/dirsen078/US078-17.html>.

²³ Harvard is then in a different compliance position with respect to articles arising from NIH-funded research written by its Arts & Sciences faculty. On the one hand, the university is automatically in a position to comply with the Public Access Policy unless the faculty member has waived the Harvard license. On the other hand, if the faculty member waives the Harvard license, Harvard must then choose one of the options listed here to ensure compliance with the Public Access Policy. Of course, not all NIH-funded authors at Harvard are members of the Faculty of Arts & Sciences, so Harvard is in the same position as all other grantees with respect to these authors.

publisher(s) by which either (1) the author of any NIH-funded articles accepted by any of the publisher's journals retains sufficient rights to grant the Public Access License or (2) the publisher contractually commits to the grantee to deposit final manuscripts (or published versions) in PMC within 12 months of publication.

With respect to initial deposit of the manuscript and copyright licensing, some publishers already have binding agreements with NIH such that publication can be business-as-usual for the author and grantee with respect to articles they publish because NIH treats articles published in these journals as per se compliant.²⁴ There are other publishers who have made only voluntary commitments to post to PMC. Relying on these voluntary commitments is risky because NIH does not treat publication in these journals as per se compliant with Public Access Policy. In addition, it should be noted that Option 5 can fully address the copyright obligation under the Public Access Policy but not the deposit obligation. A publisher can make a binding agreement to deposit the final manuscript into PMC and to grant NIH the Public Access License, but the grantee must still ensure that the author receives the review copy of the manuscript in PMC's XML format and must approve that formatting for the deposit requirement to be met.

Chances are slim that Option 5 is a realistic possibility prior to April 7, 2008 because of the number of publishers who would have to agree to this solution. Consequently, Option 5 should be considered as a longer term solution that might follow short-term adoption of one of Options 1-4.

Option 6. Pre-clear Journals.

Finally, the grantee can manage its compliance risk perhaps most fully by limiting the field of journals to which the author(s) may submit the manuscript. The grantee would require researchers to agree as a condition of working on an NIH-sponsored project that any articles arising from the project would be submitted only to journals that have been pre-cleared by the grantee. These journals are likely to fall into one of four categories. First, the journal could be an open access journal that, for example, uses Creative Commons licenses. Any version of these public licenses automatically gives NIH the rights equivalent to those called for by the Public Access License. Second, journals may be pre-cleared because they have binding deposit agreements with NIH. Third, journals may be pre-cleared because they have binding deposit agreements with the grantee. Fourth, journals may be pre-cleared if their copyright agreements already give the author sufficient rights to comply with the Public Access Policy without need for amendment.

The risk management benefits to the grantee of Option 6 are self-evident, but researchers may resist this level of control over research dissemination. The feasibility of this option depends in part upon the quantity and quality of journals that would meet one of the four above-mentioned criteria for pre-clearance.

²⁴ See Journals That Submit Articles to PubMed Central, http://publicaccess.nih.gov/submit_process_journals.htm.

V. ADDITIONAL SUGGESTION AND CONCLUSION

The compliance options discussed in Section IV comprise the six possible ways in which a grantee could ensure that one with legal authority to do so submitted the author's final manuscript to PMC and granted NIH its Public Access License during the process of manuscript submission.

None of these options is foolproof. Options 1 and 2 carry the risk that the author may fail to retain sufficient rights to grant NIH its license. Options 3 and 4 ensure that the grantee is capable of complying but pose the risk that the author may make a misrepresentation to a publisher about the rights s/he has. Option 5 requires publisher agreement, and Option 6 would likely meet resistance from faculty and would require enforcement.

One additional measure to consider is to require that NIH-funded authors include with any article submission notice to the publisher that the article arises under an NIH-funded project and an agreement that, if accepted, the article will be published in a manner consistent with the Public Access Policy. This measure is not a substitute for the options discussed in Section IV, but it may serve to further mitigate risk in some cases.

Placing the publisher on early notice of NIH support for the research reported in an article provides a legal basis for arguing that the boilerplate terms of the publisher's copyright agreement must be read in light of the additional knowledge the publisher had upon receipt of the article. A variety of legal and equitable theories could be called upon to support the position that by accepting the article for consideration while knowing that the author's final manuscript must be submitted to PMC and be made publicly accessible within 12 months of the date of publication, the publisher cannot be heard to complain later when the article is made publicly accessible, even if the author happened to sign the publisher's form copyright agreement whose terms are arguable inconsistent with the grant of the Public Access License.

In at least some cases, this language alone may be legally ineffective to retain rights for the author. It is therefore recommended that this submission notice be used in conjunction with an addendum to the publisher's copyright agreement when necessary.

Please see Appendix A for suggested language that authors may use in a cover letter accompanying a manuscript submitted for publication in a peer-reviewed journal.

* * * * *

The National Institutes of Health Public Access Policy promises to improve knowledge dissemination in the biomedical sciences by making federally funded research publicly accessible to a range of audiences. While researchers at grantee institutions are among the likely beneficiaries of this policy, grantees must shoulder a new responsibility for ensuring that researchers properly manage their manuscripts and copyrights to comply with the Public Access Policy. Whichever option(s) for ensuring compliance with manuscript deposit and copyright permission to NIH seem most attractive, grantees and NIH-funded researchers will need to share an explicit understanding about the proper management of the approximately 80,000 manuscripts produced annually with NIH support and the 80,000 copyrights in those manuscripts.²⁵

²⁵ See NIH, Public Access Frequently Asked Questions, <http://publicaccess.nih.gov/FAQ.htm#f4>.

About the Author

Michael W. Carroll is a Professor at the Villanova University School of Law, and he serves on the Board of Directors of Creative Commons, Inc. His research and teaching interests are in the areas of intellectual property law and cyberlaw. As an extension of his scholarly and professional interests, Professor Carroll is an active advocate for open access to the scholarly literature. Prior to joining the Villanova faculty, Professor Carroll practiced law at Wilmer, Cutler & Pickering in Washington, D.C., specializing in intellectual property and e-commerce matters. He also served as a law clerk to Judge Judith W. Rogers, U.S. Court of Appeals for the D.C. Circuit and Judge Joyce Hens Green, U.S. District Court for the District of Columbia. Professor Carroll received his A.B., with general honors, from the University of Chicago and his J.D. magna cum laude from the Georgetown University Law Center.

About SPARC

SPARC, the Scholarly Publishing and Academic Resources Coalition, is an international alliance of academic and research libraries working to correct imbalances in the scholarly publishing system. Developed by the Association of Research Libraries, SPARC has become a catalyst for change. Its pragmatic focus is to stimulate the emergence of new scholarly communication models that expand the dissemination of scholarly research and reduce financial pressures on libraries. Action by SPARC in collaboration with stakeholders – including authors, publishers, and libraries – builds on the unprecedented opportunities created by the networked digital environment to advance the conduct of scholarship.

About Science Commons

Science Commons designs strategies and tools for faster, more efficient web-enabled scientific research. Science Commons identifies unnecessary barriers to research, crafts policy guidelines and legal agreements to lower those barriers, and develops technology to make research data and materials easier to find and use. The goal of Science Commons is to speed the translation of data into discovery and to unlock the value of research so more people can benefit from the work scientists are doing.

About the Association of Research Libraries

The Association of Research Libraries (ARL) is a nonprofit organization of 123 research libraries in North America. Its mission is to influence the changing environment of scholarly communication and the public policies that affect research libraries and the diverse communities they serve. ARL pursues this mission by advancing the goals of its member research libraries, providing leadership in public and information policy to the scholarly and higher education communities, fostering the exchange of ideas and expertise, and shaping a future environment that leverages its interests with those of allied organizations.

APPENDIX A

SUGGESTED COVER LETTER FOR AUTHOR JOURNAL SUBMISSION

Dear [Publisher or Editor name],

Enclosed is a manuscript to be considered for publication in _____ [Journal name]. The research reported in this manuscript has been funded through the National Institutes of Health and therefore its publication must comply with the NIH Public Access Policy (<http://grants.nih.gov/grants/guide/notice-files/NOT-OD-08-033.html>).

In order to ensure compliance with the NIH policy I, as corresponding author on behalf of all the authors, am retaining the rights to:

- Provide a copy of the authors' final manuscript, including all modifications from the publishing and peer review process, to the NLM's PubMed Central (PMC) database at the time the manuscript is accepted for publication; and
- To authorize NIH to make such copy of the manuscript available in digital form for public access in PMC no later than ____ months (indicate 0 to 12 months) after publication.

[Universities may insert any additional terms pertaining to author and institutional rights for reproduction, distribution for academic activities, deposition in institutional archive, etc. Suggested language for this option is:

- To prepare derivative works from the manuscript;
- To authorize others to make any use of the manuscript provided that it is not sold for a profit and that the author receives credit as author and the journal in which the manuscript has been published is cited as the source of first publication; and
- To distribute copies of the manuscript in connection with teaching and research by the author and by the author's employer.]

By accepting this manuscript for review, [publisher name] accepts these terms and agrees that the terms of this agreement are paramount and supersede any provisions in any publication agreement for this article, already signed or to be signed at a later date, that may conflict.

(Signature of corresponding author on behalf of all authors)

APPENDIX B

ANALYSIS OF SELECTED BIOMEDICAL PUBLISHERS'
COPYRIGHT POLICIES

American Academy for the Advancement of Science

Permits author to post final manuscript in PMC with six-month embargo.

<http://www.sciencemag.org/about/authors/prep/license.dtl>.

American Chemical Society

Does not permit author to post final manuscript in PMC.

<http://pubs.acs.org/copyright/forms/copyright.pdf>.

American Medical Association

Does not permit author to post final manuscript in PMC.

<http://jama.ama-assn.org/cgi/data/293/14/1788/DC1/1>

Elsevier

Does not permit author to post final manuscript in PMC).

http://www.elsevier.com/wps/find/supportfaq.cws_home/rightsasanauthor.

Elsevier has voluntarily committed to submit the author's accepted manuscript to PMC with a 12-month embargo.

http://www.elsevier.com/wps/find/authorsview.authors/author_sponsorship_information

Nature Publishing Group

Permits authors to post final manuscript in PMC with six-month embargo.

http://www.nature.com/authors/editorial_policies/license.html

Springer

General copyright agreement does not permit authors to post final manuscript in PMC.

<http://www.springer.com/?SGWID=3-102-45-69724-0>

However, authors may pay \$3,000 US publishing fee to select Springer Open Choice, under which author keeps copyright and grants the public the Open Choice License (which is the same as the Creative Commons Attribution Non Commercial 2.5 License). This scope of this public license necessarily gives NIH the rights it needs under the Public Access Policy.

<http://www.springer.com/open+choice?SGWID=0-40359-0-0-0>

Taylor & Francis

Unclear. The relevant language in its policy is:

[Author retains] the right to post your revised text version of the 'postprint' of the Article (i.e., the Article in the form accepted for publication in a Taylor & Francis journal following the process of peer review), after an embargo period commencing 12 months (STM) or 18 months (SSH) after first publication (either in print or online), as an electronic file on an Author's own website for personal or professional use, or on an Author's internal university, college, or corporate network or intranet, or within an Institutional or Subject Repository, but not for commercial sale or for any systematic external distribution by a third party (for example a listserv or database connected to a public access server)

<http://www.tandf.co.uk/journals/authorrighs.pdf>

Taylor & Francis also permits authors to opt for iOpenAccess, under which the author pays \$3,250 US and transfers copyright to Taylor & Francis, which then grants a public license in the published version of the article. (The license is the Creative Commons Attribution Non Commercial No Derivatives 3.0 License). This option gives NIH the rights necessary under the Public Access Policy.

Wiley-Blackwell

Although Wiley has acquired Blackwell, the company appears to have maintained separate copyright policies for each unit's journals. The Blackwell agreement appears to permit posting in PMC although the embargo period is not specified.

http://www.blackwellpublishing.com/bauthor/faqs_copyright.asp#1.3

For Wiley Interscience journals, the publisher has said with respect to the Public Access Policy that “[w]e will clarify our policy regarding the deposit of articles arising from research funded by the NIH when the NIH provides more details of the mandate that becomes effective on 7 April 2008.”

<http://www3.interscience.wiley.com/authorresources/journal-man-sub.html#afteracc>

A more complete list of publisher copyright policies has been collected by the SHERPA/RoMEO project in the United Kingdom. The list is a valuable resource that provides links to a range of biomedical and other scholarly publisher's copyright policies. The list also provides summary information, including SHERPA/RoMEO's opinion about the degree to which that author may make some version of an article available on the Internet and whether the publisher's policy is compliant with the NIH Public Access Policy. In this author's opinion, the SHERPA/RoMEO assertion that a publisher's copyright policy gives the author the rights necessary to grant NIH the Public Access License is not always legally accurate and should be used with caution. For the list of all scholarly publishers, see

<http://www.sherpa.ac.uk/romeo.php?all=yes>.