The Fair Copyright in Research Works Act: A Brief Explanation of Its Purpose and Effect

Summary

The legislation seeks to ensure fairness in copyright protection for private sector research publications, referred to as "research works." For nearly a century, copyright protection has provided the incentive for publishers to invest in the peer-review of research prior to publication and in the infrastructure necessary to publish and distribute scientific journal articles about the latest government-funded research. Publishers have depended on copyright to protect these works that have aided in the advancement and integrity of science and contributed to substantial gains in biomedical research and other knowledge.

The legislation will prevent the Federal government from diminishing copyright protections for works that are based on research funded by the Federal government, where a non-governmental entity has provided substantial funding or contributed a meaningful added value. While the government may have funded the research, or some of it, it should not claim fundamental rights in the research works that reflect meaningful value-added by publishers who have funded the essential peer review process.

Explanation of the *Fair Copyright in Research Works Act*

This prohibition would not change or interfere with general principles of U.S. government assistance or procurement policies, because it would apply only to certain kinds of funding agreements and only to a related "extrinsic work" as defined by the following criteria:

- First, in order to be considered an "extrinsic work" under the legislation, the work product must be related to an agreement with a Federal agency under which funds are provided by the agency to a non-government entity "for the performance of experimental, developmental, or research activities."
- Second, "a work of the United States Government," *i.e.*, a work prepared by a Federal officer or employee as part of that person's official duties, would not be affected because the prohibitions in the legislation would only address Federal agency funding agreements with, and related works created by, non-government persons.
- Third, in order to qualify as an "extrinsic work," the non-U.S. Government work based upon, derived from, or related to a covered "funding agreement" with a Federal agency must either be:
  - supported in substantial part by funding from an entity that is not a Federal agency and is not a party to the funding agreement or acting on behalf of such a party; or,
  - a work that represents, reflects or results from a "meaningful added value or process" contributed by one or more other entities that is not a Federal agency and is not a party to the funding agreement or acting on behalf of such a party.

The only kind of copyrighted work that would be subject to the legislation's prohibitions would be one that is: (1) produced by a non-government person who has created the work in connection with the receipt of financial assistance for conducting research under a funding agreement with a Federal agency; and (2) where the work is either supported in substantial part by funding from an entity that is not a Federal agency and is not a party to the funding agreement or acting on behalf of such a party, or represents, reflects or results from a "meaningful added value or process" contributed by one or more

other entities that is not a Federal agency and is not a party to the funding agreement or acting on behalf of such a party.

The Legislation Would Correct the NIH Public Access Policy

An example of the kind of "funding agreement" that this legislation is intended to prevent is illustrated by the implementation of the National Institutes of Health (NIH) Public Access Policy regarding the manuscripts for copyrighted articles that NIH-funded researchers write for publication in private-sector, peer-reviewed science journals.

The NIH requires submission of such researchers' final, peer-reviewed manuscripts to NIH immediately upon acceptance for journal publication, so that NIH can make the articles freely available online no later than 12 months after the date of publication. NIH specifically requires submission of the final manuscript only after the manuscript has passed through the publisher's "quality assurance" processes of peer-review and determination of acceptability for publication, even though the journal publisher is not a party to the funding agreement for the research and does not receive any funding from NIH for its processing and publication of the manuscript in final article form.

Moreover, NIH relies upon its funding agreement with the author of the article to impose the obligation to allow NIH to make the final, peer-reviewed manuscript freely available online within 12 months of publication in the journal, despite the fact that this distribution competes directly with the publisher's business model of subscription-based distribution and substantially diminishes the value of this critical class of copyrighted works. Of course, the legislation does not mandate or preclude any conventional, open access, or other business model the affected parties may choose voluntarily to employ.

Such an arrangement is fundamentally unfair to the journal publisher – in light of the publisher's investment and acquired copyright in the published version of the article, and its status as a non-party to the NIH funding agreement – because it allows NIH to deliberately, and without providing just compensation, take the value of the publisher's "quality assurance" processes and usurp the publisher's right to control distribution of the article. This legislation would address this inherent unfairness and will help ensure that there continue to be incentives for journal publishers to invest in the peer review, editing, publishing, dissemination and archiving of scientific journal articles.