

TESTIMONY OF

RALPH OMAN

PRAVEL PROFESSORIAL LECTURER IN INTELLECTUAL PROPERTY LAW

AND

FELLOW OF THE CREATIVE AND INNOVATIVE ECONOMY CENTER

THE GEORGE WASHINGTON UNIVERSITY LAW SCHOOL

Hearing on

The Fair Copyright in Research Works Act

THE U.S. HOUSE OF REPRESENTATIVES

COMMITTEE ON THE JUDICIARY

SEPTEMBER 11, 2008

Mr. Chairman and members of the Subcommittee. It is a great honor to appear again before this distinguished panel. It has been a few years since my last appearance.

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 articles, and to the publishers of STM journals. I would like to focus on the larger policy issues that undergird the American copyright system and discuss the proposal of the National Institutes of Health that requires recipients of NIH research grants to effectively renounce copyright in their peer-reviewed article manuscripts just 12 months after publication. I will also briefly mention the bill introduced by Chairman Conyers that seeks to moderate the impact of the NIH proposal in a way that will encourage the broadest possible dissemination of high quality, peer-reviewed articles without running roughshod over the rights of authors and copyright owners.

This hearing is important on another level. The language in the appropriations bill that has given rise to this controversy was never vetted by the Judiciary Committee—the committee with intellectual property expertise. With your scrutiny today, the Subcommittee puts this narrow dispute in the larger context of the constitutional mandate—to promote the progress of science for the public interest. Other than celebrating the Judiciary Committee’s involvement, I will not comment on the wisdom of legislating on appropriations bills. Into that Serbonian Bog I will not wade.

Instead, I simply applaud your decision, Mr. Chairman, to give a full airing of these issues before your expert 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, the NIH proposal seems short-sighted, counterproductive, damaging to U.S. creativity, which this subcommittee fosters and safeguards, and contrary to the NIH’s own interests in encouraging broad public dissemination of peer-reviewed learned articles. The Appropriations Committee, to its credit, sensed that the NIH proposal ventured into sensitive territory and added a very important proviso. That proviso directed the NIH to “implement the public access policy in a manner consistent with copyright law.” In my opinion, the NIH has fallen short of that dictate in several respects, and, with this committee’s expert guidance, they should refine their proposal in ways that are true to both the letter and spirit of the copyright law, and the essential policies behind it.

In this debate, three key questions must be answered. First, what policy will result in the broadest dissemination of high quality, peer-reviewed scholarly articles? Second, is it fair for the U.S. government to appropriate the value-added contributions of the private STM publishers? And, third, is the NIH correct in its assumption that the STM publishers will continue to publish their journals even if they lose 50 percent 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 to support outside specialists. These teams arrange and coordinate effective distribution, stay close to the academic experts in the discipline 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 level of interest in the research itself. They also edit the manuscripts and make them presentable for publication.

My basic concern about the NIH proposal is that it will, sooner rather than later, destroy the commercial market for these scientific, technical, and medical journals. If this dark prophesy comes to pass, who, I wonder, will handle all of these expensive and 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, and that it will remain as robust as ever, even if the NIH freely publishes all of the NIH peer-reviewed article manuscripts shortly after private publication. Some claim that they have "evidence" that STM publishing will continue to flourish. I have not seen that evidence. To me, it suggests an element of wishful thinking. In my experience, Congress is normally reluctant to hang major legislative change in copyright policy on the thin reed of wishful thinking. With the prospect of free copies available in the near term, who in the face of experience and reality can reasonably expect that subscribers to STM journals, faced with their own budgetary constraints and needs, will not look with real favor on alternative free sources? I can't. It is belied by common sense. Certainly, many university and industry librarians will cancel their subscriptions to these learned journals, with some estimates of a cancellation rate approaching 50 percent. With plummeting sales, how could the STM publishers stay in business? 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. With that admonition, we consider the NIH proposal. It seems clear that Congress would not want the NIH free access policy to cause many or all of the private STM publishers to fade

away. 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 an ill-considered governmental fiat. The NIH does not intend to perform any of the vetting, selection, and editing functions now performed by the learned societies, by the professional organizations, and by the STM publishers, and I doubt if Congress wants to increase their budget so they can 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, I question the wisdom of the NIH provision. And there are larger issues as well. Experience teaches that as a general rule Congress prefers to keep the hairy snout of the federal government out of the peer-review and manuscript selection process. We live in an open society, and, 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 process.

That being said, the NIH provision 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 inventions, putting these inventions to work for the people. We are about to celebrate the 30th anniversary of Bayh/Dole, and no one is arguing for its repeal.

The same policy arguments apply in the NIH case. If the NIH succeeds in putting all of the NIH-related peer-reviewed articles on its online database for free within one year of publication, 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 government fisc. If the NIH provision is fully implemented, it will almost certainly end this self-policing and self-financing 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 manuscript articles that the NIH will publish contain preexisting materials that the NIH researcher did not create and therefore does not own. Here, I am thinking of charts, diagrams, photographs, and illustrations. Will the NIH commandeer the rights of

those creators as well, or will it require the NIH researcher to clear all of those ancillary rights as part of the “contract”. Today, of course, the publishers often help the author clear these rights, including electronic distribution rights. Will the NIH 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 at least co-authors) are foreign nationals, and would fall under the protection of the Berne Convention. And I assume some of the impacted publisher/copyright owners are foreign as well. As I will note in a moment, the NIH policy will seriously threaten the protection of American authored and published works in foreign countries. This government edict from the NIH, not promulgated “in a manner consistent with copyright law”, has a crippling effect on the value of the copyright in these works. Some of my academic colleagues argue that the Berne Convention has no relevance to the NIH policy. They see it as a simple contract matter, and they note that the researchers get very valuable consideration for their assignment of copyright to the NIH under the 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, an NIH grant is a matter of life and death professionally. To claim that the assignment of the reproduction right is “voluntary”--the product of a free market negotiation--strikes me as disingenuous.

In fact, the government involvement puts the NIH “contract” in a suspect category in the Berne and TRIPs 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 this unwaivering government action that diminishes copyright, disguised as a “contract”. In any case, the NIH free access policy is an unfortunate international precedent for a country like the United States, whose great strength is intellectual property.

The NIH should reconsider the long term consequences of its proposal. 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. The NIH itself recognizes that “publication in peer-reviewed journals is a major factor in determining the professional standing of scientists;

institutions use publication in peer-reviewed journals in making hiring, promotion, and tenure decisions.”

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. Congress should require the NIH to demonstrate convincingly that their 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. Absent that proof, the NIH should rethink their current policy of involuntary assignment. Current law gives the NIH some discretion in implementing their open access policy in a manner consistent with copyright. If the NIH do not amend their policy, Congress should direct them to do so. The Chairman’s bill will allow the publishers to continue publishing. It will preserve the STM journals as valuable professional tools for scientific research, thereby promoting the progress of science. By restoring the status quo ante, the Chairman’s bill will 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. I would urge its enactment.

I would be pleased to answer any questions.