

Intellectual Property Scholars' Response to OSTP Request for Information FR Doc. 2020-06622, Regarding "Public Access to Peer-Reviewed Scholarly Publications, Data, and Code Resulting from Federally Funded Research"

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The Office of Science and Technology Policy (OSTP) issued a Request for Information: Public Access to Peer-Reviewed Scholarly Publications, Data and Code Resulting From Federally Funded Research on February 12, 2020 (RFI).¹ The undersigned intellectual property (IP) scholars submit these Comments under the extended deadline.² We appreciate this opportunity to share our views on this important topic.

The RFI directs comments along four vectors: (i) current limitations on effective communication of research outputs and potential responsive changes; (ii) possible actions by Federal agencies to increase free and public access to federally funded research results; (iii) benefits to American science leadership and competitiveness from "immediate" access to outputs of research funded in part by Federal agencies; and (iv) other "information that might be considered for Federal policies related to public access to peer-reviewed author manuscripts, data, and code resulting from federally supported research."

OSTP has a long and storied history across the twentieth century and down to the present. The Office played key roles in developing both the federal agency research funding system and the technology transfer system that are central policy components in America's success as the science and technology global leader. While many comments will likely be directed to copyright in the context of scientific journals as commercial market publishers, our contribution prompts OSTP to align any new publication policies with the longstanding science and technology research and development (R&D) policies enshrined in the Bayh Dole Act of 1980 and related regulations for different types of federal research funding.

Federal extramural³ research funding is divided into four categories: procurement contracts, governed by the Federal Acquisition Regulation (FAR);⁴ grants, governed by

¹ 85 F.R. 9488 (Feb. 19, 2020).

² 85 F.R. 17907 (Mar. 31, 2020).

³ "Extramural" refers to research outside government owned and operated facilities. "Intramural" would instead signify research done within government owned and operated facilities.

⁴ A procurement contract is used when "... the principal purpose of the instrument is to acquire (by purchase, lease, or barter) property or services for the direct benefit or use of the ... Government;" 31 U.S.C. § 6303.

Bayh-Dole;⁵ cooperative agreements, also governed by Bayh-Dole;⁶ and “other transactions,” limited to the Department of Defense and arguably governed by neither FAR nor Bayh-Dole.⁷

The purpose behind the distinctions is central to our Comments on the RFI. Whereas procurement contracts are used for the Federal government to acquire goods or services for its own use as any other market purchaser, grants and cooperative agreements are used for private contractors to engage in R&D leading to knowledge and materials that will be used primarily *outside* of the government. Thus, while title, ownership, or control of procured goods and services can properly vest in the Government, as for any market purchaser, title, ownership, and control of research results funded by grants or cooperative agreements vests in the contractor under the fundamental allocation rule and purpose of Bayh-Dole.⁸

Accordingly, any sense that research results—including inventions, data, or materials (biological or otherwise)—are produced by, or on behalf of, the government is false. To the contrary, the fundamental premise of Bayh-Dole (originating in earlier patent and extramural research funding policies of both the Kennedy and Nixon Administrations) is that title to government funded extramural research results are best left to recipient organizations such as universities (“contractors” in Bayh-Dole parlance) to license to the private sector for commercialization.⁹ This is because the Federal government had proven woefully unable to secure the “practical application” of basic and applied sciences research. This meant that the benefits of such research were not realized by the public.

⁵ A grant agreement is used when “. . . the principal purpose of the relationship is to transfer a thing of value to the . . . recipient to carry out a public purpose of support or stimulation authorized by a law of the United States instead of acquiring . . . property or services for the direct benefit or use of the . . . Government; and . . . substantial involvement is not expected between the executive agency and the . . . recipient”
31 U.S.C. § 6304.

⁶ A cooperative agreement is used when “. . . the principal purpose of the relationship is to transfer a thing of value to the . . . recipient to carry out a public purpose of support or stimulation authorized by a law of the United States instead of acquiring . . . property or services for the direct benefit or use of the . . . Government; and . . . substantial involvement is expected between the executive agency and the . . . recipient”
31 U.S.C. § 6305.

⁷ See GAO, *Intellectual Property: Information on the Federal Framework and DoD’s Other Transaction Authority* (GAO-01-980T, Jul. 17, 2001) (Statement of Jack L. Brock, Managing Director, Acquisition and Sourcing Management and John B. Stephenson, Director, Natural Resources and Environment, before the Subcommittee on Technology and Procurement Policy, Committee on Government Reform, House of Representatives).

⁸ Federal agencies can modify the standard clauses of funding agreements (grants or cooperative agreements) to vest title, ownership, or control of research results in exceptional circumstances, but those have to be justified and documented.

⁹ See Sean M. O’Connor, *The Real Issue Behind Stanford v. Roche: Faulty Conceptions of University Assignment Policies Stemming from the 1947 Biddle Report*, 19 MICH. TELECOMM. & TECH. L. REV. 379, 387-412 (2013), available at <http://www.mttlr.org/volnineteen/oconnor.pdf>.

The same logic applies to written materials produced by grant or cooperative agreement funded investigators discussing their research results. Scientific publishing ventures are subject to the same dynamics as are commercialization ventures for technology produced under federally funded research. As scholars have documented, reputable scientific publishing requires costly private investment to sustain the international gold standard of peer review and the level of quality production, graphics, and searchable databases that promote the progress of credible science.¹⁰ While copyrightable works are not covered by Bayh-Dole, neither are they “government works” when produced by grant or cooperative agreement funding recipients. This remains true even after the Supreme Court’s recent decision in *Georgia v. Public Resource Organization, Inc.*¹¹ Works commissioned under a procurement contract may be government works, and perhaps even statutory work made for hire, provided there was an express writing to that effect and the subject matter fit within one of the nine enumerated statutory types of works.¹² But again, that is not what is going on in federally funded extramural research occurring under grants and cooperative agreements.

At most, Federal agencies hold a non-exclusive license to use research results arising under grants or cooperative agreements for *government* purposes.¹³ This generally does not include providing these things to the general public as a government service. It is possible that the Government could do so if it was willing and able to pre-empt the entire private market for this product and deliver copies of the patent or copyright protected item to the market that are commensurate with the quality of market participants. But this would require appropriation of massive amounts of taxpayer dollars to recreate what the private sector already provides efficiently.

Further, the fully commercialized versions of goods, services, and peer-reviewed articles that derived in part from federally funded research results are nearly always downstream products produced without government funding. Thus, any government license to research results does not necessarily apply to these finished products. For example, if federal funding led to a patentable invention that could be used in a smartphone, the government license would apply only to that patent and not the entire phone. Likewise, for peer-reviewed publications: to the extent a government use license exists just by virtue of standard agency funding agreements, it only applies to the research results, perhaps in the form of written lab notes.

Accordingly, even OSTP’s 2013 Memorandum directing agencies to require federal funding recipients to allow free public access to the final version of peer-reviewed publications may have been overreach that undercuts Congress’ extramural research policy goals set out in Bayh-Dole. If the Federal government wants to provide peer-reviewed private market produced publications to the public for free, it can procure them through the normal FAR contract system. This will of course cost a lot of money. But the Federal government should not be trying to get for free through the grant and cooperative

¹⁰ See, e.g., Adam Mossoff, *How Copyright Drives Innovation: A Case Study of Scholarly Publishing in the Digital World*, 2015 MICH. ST. L. REV. 955 (2015).

¹¹ No. 18-1150, 590 U.S. __ slip op. (2020).

¹² 17 U.S.C. 101, 201(b).

¹³ See, e.g., 35 U.S.C. 202(c)(4)

agreement channels what it would otherwise have to buy in the open market. This principle should apply equally to peer-reviewed scientific publications as it does to other commercial market goods that embody Bayh-Dole subject inventions. The government does not get these goods for free, nor can it direct how contractors make them available to the market.¹⁴

Romantic notions of “open science” often used to justify open access policies are often based on idealistic myths not supported by the history of science. To the contrary, many of the greatest scientists in the Western tradition were highly protective and secretive with their research. Their processes and data were, after all, their competitive edge in the race for scientific priority and a long and fruitful research agenda. The *results* of their scientific inquiry, couched as “discoveries” or new laws or principles of nature, needed to be open and replicable, but that did not mean the underlying data or processes did.

While some bemoan “duplicative efforts” as wasteful, many of the most famous scientific races in history were replete with secretive independent traversing of the same ground. In fact, the British Royal Society allowed presentations of even research results to be done in private for awarding scientific priority and credit. This meant that such results were not made public. Ultimately, science seems to work best as a competitive market—at least as far as spurring rapid and pioneering advances. Open access works against this in the vain hope that a non-competitive collective will be equally motivated to long hours and expensive research.

No matter how you look at it, government-mandated immediate open access for copyrighted peer-reviewed manuscripts ignores and destroys the resource-intensive review, translation, and commercialization processes required to produce and disseminate these manuscripts. It confuses the so-called public domain with the public sphere or market. The most important is the latter—are innovative, creative, and valuable new writings being made available to the public in vetted commercially viable forms, perhaps for a fee, or are we simply mandating that inferior versions are made available for free? What is better? History and the market have already given us the answer.

We strongly urge OSTP to refrain from reducing further the already market-disruptive regulation that allows a mere 12-month embargo to recoup major investments in producing and disseminating peer-reviewed publications. Pushing access sooner will destroy the scientific publishing sector—with nothing to replace it in scale or quality—as well as dampen the successful competitive marketplace of scientific research. It will also unbalance the successful premise and system of R&D based off technology transfer under Bayh Dole.

¹⁴ While Bayh-Dole does provide “march-in rights” under 35 U.S.C. 203 that allow the funding agency to grant licenses to the subject invention to third parties, this is only in the case where a contractor fails to achieve “practical application,” in the sense of getting a product embodying the subject invention to the market.

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