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Committee on Oversight and Government Reform
U.S. House of Representatives
2157 Rayburn House Office Building
Washington, DC 20515

Re: The Research Works Act (H.R.3699)

On behalf of the 18,000 faculty, students, and staff at Carnegie Mellon University, we are writing to express our strong opposition to H.R. 3699, the Research Works Act (RWA). The RWA would prohibit federal agencies from requiring public dissemination of articles reporting on federally funded research and from requiring authors or their employers to assent to public dissemination of such articles. In its wake, the RWA would terminate the successful National Institutes of Health (NIH) public access policy.

Contrary to the claims of supporters, most notably the Association of American Publishers (AAP), the RWA is not needed to save peer review, the publishing industry, or jobs because none of these are endangered by federal public access policies. **What is endangered – by the RWA – is author copyrights and the substantial investment in open access repositories.** This letter addresses each of these claims.

The AAP argues that federal public access policies threaten peer review and therefore the high standards of scientific research. This makes no sense because federal public access policies (e.g., the NIH mandate) apply to peer-reviewed manuscripts.[1]

The AAP argues that to preserve economic incentives for publishers to continue to invest in peer review and innovation, federal agencies must be prohibited from developing public access policies.[2] Yet there is no evidence that public access policies reduce incentives to invest in publishing, result in canceled subscriptions, or eliminate jobs.[3] The study that publishers reference as evidence of *potential* harm from public access policies eliminates from consideration the primary drivers of journal cancelations[4]: escalating subscription prices and changing faculty needs and journal usage.[5] Despite open access mandates, the publishing industry is thriving. In 2011, Elsevier and Wiley reported profit margins of 30-35%,[6] and the combined markets for science, technical and medical publishing (STM) grew 3.4%.[7]

Careful examination of the AAP's claims reveals their flaws[8]:

- *Claim: the NIH policy will harm the U.S. publishing industry*. Not true. Industry representatives could provide no examples of harm at the hearing before the House Judiciary Committee in September 2008 or the hearing before the House Committee on Oversight and Government Reform in July 2010. **Many publishers not only meet but exceed the NIH policy requirements** – allowing deposits in PubMed Central in less than twelve months, allowing deposit of the published version of the article, or allowing deposits under open licenses that

remove copyright restrictions on re-use. Furthermore, many publishers directly deposit articles into PubMed Central as a service to authors.

- *Claim: the NIH public access policy limits researchers to publishing in a few compliant journals and deprives them of the freedom to choose the dissemination model that best serves their interests.* Not true. According to the Open Access Directory, 100% of publishers surveyed will accommodate the NIH policy, i.e., authors are not limited to publishing in just a few journals.[9] **It is the RWA that would deprive researchers of the freedom to choose the dissemination model that best serves their interests by prohibiting them from entering into agreements to disseminate their work open access.**

- *Claim: federal public access policies deprive publishers of their free choice of business models.* Not true. Federal public access policies regulate grantees, not publishers. Publishers are free to accept whatever manuscripts and copyright transfer agreements they want. **Public access is a business proposition.**[10] If publishers believe the cost of publishing publicly-funded research exceeds the benefits, they can refuse to publish the work of publicly-funded authors.

- *Claim: the NIH public access policy imposed severe restrictions on the scope of copyright protection for journal articles. The RWA will remove these restrictions.* Not true. The NIH public access policy complies with U.S. copyright law, neither extending nor shrinking the scope of protection for journal articles. **The RWA will not recover the scope of copyright protection for journal articles, but extend the scope of publisher reach into author rights.**

Much of the publishers' strategic rhetoric hinges on their notion of journal articles as "private-sector research work." The notion is reductive and misleading at best, and its evolution pernicious.

Initially used to oppose passage of the NIH mandate and the Federal Research Public Access Act (FRPAA), publishers argued that journal articles are private-sector works produced by the publisher's investment of time and expertise.[11] The claim masks the scope of activities and costs incurred in producing a journal article. Roughly 55% of the cost is conducting the research and expressing the findings in writing. Fifteen percent of the cost is the performance of peer review. Publisher related activities, including coordinating peer review, constitute 30% of the total cost.[12] Journal articles are not private-sector works, but the final step in a collaborative process that yields intellectual property – initially authors' copyrighted manuscripts.

Publishers have a legitimate claim to the formatted, copyedited, published version of a work. They might have a claim to the peer-reviewed author's manuscript version, though given that publishers coordinate peer review (for which they expect remuneration) and academics perform peer review (funded gratis by their institution), the academy also has a claim to the peer-reviewed manuscript.[13] **What publishers cannot rightfully claim is that federal mandates result in the government's taking of private-sector products.** If initial copyright owners choose not to transfer their copyrights to certain publishers, for whatever reason, that is their prerogative as copyright owners. If publishers choose not to support the rights authors need to comply with federal mandates, for whatever reason, that is their prerogative as publishers. Federal mandates do not take private-sector products, but rather encourage authors to steward their copyrights wisely in their own and the public's interest.

The RWA takes the argument a step farther by defining a private-sector research work as any version of an article intended to be published and to which a publisher has entered into an arrangement to make a value-added contribution.[14] The definition extends the publisher's reach and presumption of ownership to the pre-refereed version of the work submitted to a publisher. But the RWA reaches even further, constraining what authors can do before submitting their work to a publisher. By prohibiting

authors (or their employers) from entering into an agreement that requires public dissemination of their work, **the RWA renders author copyrights meaningless.**

After centuries of receiving article manuscripts at no cost and without constraints, publishers apparently feel entitled to these free gifts and to have no respect for authors, their copyrights, or those who fund them. According to the AAP, no industry can survive when it financially invests in a product that must be disseminated for free. The statement seems reasonable on the surface, but it misrepresents what open access advocates want and overlooks the fact that publishers leverage the very situation their statement decries. No one is arguing that publishers should not recover their costs or make a profit. What open access advocates want is a business model that (compared to toll access) more effectively contains costs and disseminates research for the public good. Universities and federal agencies have and will continue to invest in researchers who give their intellectual property away for free. **To whom they choose to give their free gifts is and must remain their prerogative.**

Open access is critical to growing the economy and accelerating science. In support of open access, substantial investments have been made in institutional and disciplinary repositories. These repositories rely on authors to exercise their copyrights and grant permission to archive, disseminate, and preserve their work. In usurping author copyrights, publishers extend their reach into the cyber-infrastructure of open access repositories and open standards development that holds the promise of interoperability, redundancy, and longevity needed to achieve the economic and public benefits of open access. **The infrastructure will falter under publisher grasp, starved for the content that warrants the investment.**

Researcher outrage is a clear indication that the RWA does not champion their interests. Thousands have signed a petition to boycott Elsevier, outspoken supporter of the RWA.[15] Hundreds have signed a pledge to assist only with peer review of works that will be available open access.[16] Some have called for researchers to publish exclusively in peer-reviewed open access journals.[17] Researchers have referred to the AAP's support of the RWA as "unethical, immoral and unworthy of any organisation committed to the dissemination of knowledge."[18] Others have referred to the RWA as "audacious in the extreme,"[19] and "a classic example of 'regulatory capture' by an industry that is feeding off of government largesse."[20] Some have called for progressive publishers and scholarly societies to withdraw from the AAP.[21] Even some AAP members oppose the RWA.[22]

Carnegie Mellon urges the House of Representatives not to confuse covering the costs of publishing with maximizing the margins of profit. What the RWA will incentivize is the continuation of toll-access business models that limit access, stifle innovation, and feed the spiral of escalating prices and journal cancelations. **The government should reject the RWA and pass the Federal Research Public Access Act (FRPAA), to incentivize open-access business models that provide increased opportunity for innovation, commercialization, and job creation.**

In closing, contrary to what its supporters contend, the RWA will not serve the nation's interest in growing the economy or accelerating science. **If passed into law, the RWA will hold federal agencies and authors hostage to prior consent from publishers.** What is at stake in federal public access policies is not peer review, publishing, or jobs, but toll-access business models and runaway profits. We strongly urge you to oppose the RWA.

Sincerely,

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[1] Ironically, given their concern about peer review, publishers propose public dissemination of final research reports and summaries as an acceptable alternative to federal public access policies. Public dissemination of these materials is not an acceptable alternative because these materials are not peer reviewed and do not contain the detailed analyses provided in journal articles.
[2] See http://www.publishers.org/press/56/.
[3] See http://www.michaeleisen.org/blog/?p=846. According to Mike Rossner, Executive Director of the Rockefeller University Press, no data are available indicating loss of subscription revenue as a result of the NIH mandate.
[4] C. Beckett and S. Inger (2007). *Self-Archiving and Journal Subscriptions: Co-existence or Competition?* London: Publishing Research Consortium, p. 3. Available at: http://www.publishingresearch.org.uk/documents/Self-archiving_summary2.pdf.
[5] M. Ware (2006). *ALPSP Survey of Librarians on Factors in Journal Cancellation*. Association of Learned and Professional Society Publishers, pp. 2-3.
[6] See http://www.library.yale.edu/~llicense/ListArchives/1109/msg00069.html.
[7] "Combined STM Markets Grew 3.4% in 2011." *Simba Information*. Available at http://www.simbainformation.com/about/release.asp?id=2503.
[8] See http://www.publishers.org/issues/5/9/ and http://www.publishers.org/issues/56/.
[9] See http://oad.simmons.edu/oadwiki/Publisher_policies_on_NIH-funded_authors.
[10] Peter Suber. See https://plus.google.com/u/0/109377556796183035206/posts/QYAH1jSJG6L.
[11] See http://www.publishers.org/press/56.
[12] J. Houghton, C. Oppenheim, et al (January 2009), *Economic Implications of Alternative Scholarly Publishing Models: Exploring the Costs and Benefits*, A report to the Joint Information Systems Committee (JISC). Available at: http://ie-repository.jisc.ac.uk/278/3/EI-ASPM_Report.pdf.
[13] Roughly 80% of the cost of peer review is covered by universities and federal agencies that pay the salaries of those who perform peer review. The remaining 20% is covered by publishers that coordinate peer review. J. Houghton, C. Oppenheim, et al (January 2009).
[14] See http://www.gpo.gov/fdsys/pkg/BILLS-112hr3699ih/pdf/BILLS-112hr3699ih.pdf.
[15] See http://thecostofknowledge.com/.
[16] See http://www.researchwithoutwalls.org/.
[17] See Michael B. Eisen, http://www.nytimes.com/2012/01/11/opinion/research-bought-then-paid-for.html.
[18] See Richard Poynder, http://poynder.blogspot.com/2012/01/research-works-act-cambridge-university.html.
[19] See David Prosser, http://lj.libraryjournal.com/2012/01/publishing/ala-midwinter-2012-head-of-rluk-calls-research-works-act-audacious-in-the-extreme/.
[20] See Tim O'Reilly's letter to Congress at https://www.popvox.com/bills/us/112/hr3699/comment/263013.
[21] See, for example, http://cameronneylon.net/blog/update-on-publishers-and-sopa-time-for-scholarly-publishers-to-disavow-the-aap/, http://scienceblogs.com/confessions/2012/01/scholarly_societies_its_time_t.php, and http://blogs.berkeley.edu/2012/01/05/why-does-the-university-of-california-press-support-reactionary-legislation-opposing-public-access-to-scientific-research/.
[22] For example, MIT University Press, Pennsylvania State University Press, University of California Press, and the American Association for the Advancement of Science.