NIH Open Access Mandate:
A Careful Look at Two Options for Retaining Authors' Rights – "Do Nothing" and "Do it Early and Efficiently"

By
Georgia K. Harper
Scholarly Communications Advisor
University of Texas at Austin Libraries

> *"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."*

And with those 76 words, the former NIH suggestion, that researchers it funds should deposit copies of their published research articles in NIH's open access repository, PubMed Central, became a mandate early this year. Many people have worked tirelessly to make this happen and all believe fervently that the benefits from open access (OA) to the immense body of research funded by the NIH will be monumental. If you are new to the subject of OA, you can learn about it at a plethora of Websites devoted to the subject, such as Peter Suber's Open Access News and the Create Change Website. Open Access itself will not be the topic of this article; rather, here I would like to explore two institutional options for complying with the new mandate.

The mandate involves two related responsibilities. First is the responsibility to post articles that report NIH funded research. But, in order to post, the author of the article must possess a set of rights to give NIH to make the posted article publicly available. Because most authors are asked to assign all their rights to their publishers when their articles are accepted for publication, retaining sufficient rights to give to NIH can present a problem. It is this second responsibility, to retain adequate public access rights, that I want to address here. Institutions have many options for facilitating author retention of the set of rights needed to give NIH its "public access license." I won't invent a new name for one of the ones I want to explore -- it's the old "do nothing" option, and one that I think many institutions will find quite attractive. I'll contrast it with one I think is more effective and efficient -- the "do it early and efficiently" option, the one I would most recommend.

Michael Carroll published an article just last month for the Association of Research Libraries, "Complying with the National Institutes of Health Public Access Policy," in which he outlined six options he believes cover the possible strategies universities could employ to comply with the NIH mandate:

(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 (2008, p. ii).

I recommend that you read his entire article as it provides excellent background information and context.

Although he doesn't call it a "do nothing" option, I think his first option comes very close. I want to explore "doing nothing" because there are some facts about publishers, their author contracts, and their OA policies that might seem to support decision-makers who wish to take the "do nothing" option—at least on first blush. Most importantly, Carroll doesn't mention the fact that 67% of publishers listed at the SHERPA/RoMEO site (admittedly not all publishers, but a very large number of them) already permit some form of OA posting. These publishers' contracts with authors likely either directly reference their policies or implicitly permit OA, even if the contract might not explicitly frame the right as a reservation on the part of the author (reservation of the right to give NIH the right to make the author's article available publicly). Granted, this is not so secure as having an explicit contract provision permitting the author to post to PubMed Central for public access, because the authority to post could change in the future if the policy changes. But really, how likely is that? It does not appear at all that we are headed away from OA, but rather towards more uniform adoption of it. On the other hand, one never knows.

Of course, there are those 33% of publishers that haven't come around yet. And not every OA publisher's policy will correctly match the NIH requirement. For example, a publisher might permit OA posting on an institutional repository or personal Website, but not mention NIH's repository, PubMed Central. These gaps in OA coverage mean, ultimately, that relying on existing publisher OA policies as a basis to do nothing to comply with NIH requirements will save institutional time and energy now, but will require a case-by-case analysis of each potential publishing opportunity later

to determine whether or to what extent a contract clause or author addendum must be negotiated in order to comply with the requirement to provide NIH with a public access license. Carroll's option 1 and my “do nothing” option assume that faculty members will do these searches, evaluate their publishers’ OA policies and negotiate appropriate contract addenda as, and to the extent, needed. That has not been a successful approach in the past, and is, frankly, at least one reason for the failure of the NIH's earlier "suggestion" approach. Voluntary compliance rates remained in the low single digits for the three years of the suggestion policy’s existence. Carroll's option 2 assumes the institution will take on the necessary searching, evaluating and negotiating. My guess is that not many are going to want to get involved to this extent on a case-by-case basis.

So, “do nothing” may seem the easy way out and even be supportable with respect to the likelihood that publishers' policies may not require we do anything in many cases to be compliant with NIH requirements. But because there are cases where existing OA policies are inadequate or completely fail to meet the requirements of the mandate, I prefer the “early efficient” option that gives us perfect compliance with respect to retention of authors’ rights with only an additional signed paragraph in the researcher's paperwork that is already undoubtedly a part of NIH funding on the institution's campus.

So, how important is compliance? Are there consequences for failure to comply? Ah, now we get to the real core question. Future funding could be on the line; and if it has occurred to you that faculty might post without going to the trouble to secure needed rights (and what’s wrong with that?), the posting procedure requires a representation that the needed rights have been secured. No one should be cavalier about making false representations to the NIH regarding rights one doesn't really have. “Do nothing” may indeed be a viable option, but the downside is possibly unacceptable rates of noncompliance if we expect researchers to take on an evaluative and negotiation strategy they have been so far unwilling to assume, without support, and perform it effectively, to protect the institution from the consequences of noncompliance. Even though there are also consequences to the researcher for noncompliance, it would not appear that trying to determine down the road who failed to do what is really our best choice if there are reasonable, efficient actions we can take right now to comply in one easy motion: Carroll's option 3 can be implemented in as little as a one paragraph reservation of rights on behalf of the institution, that the researcher signs during the campus' routine processing of NIH funded grants. It does not matter who deposits an article, if the institution has a reservation of rights tailored to NIH requirements, the faculty researcher or whoever posts can make the required representation that the rights have been properly retained to give the NIH its required grant.

Following is a sample paragraph that can be included in the papers the investigator needs to sign anyway, upon receipt of NIH funds. This paragraph and the accompanying notice to his or her publisher about the rights retained should be all an institution needs to get investigator just about all the way there. All that remains is

for the investigator to follow through with the form of notice to the publisher, and posting the article (a task that might easily be centralized in departments, or assigned to support staff):

Investigator agrees:

1. that University retains the non-exclusive right to provide a copy of any final manuscript that reports research funded in part or in whole by this grant to the NIH upon acceptance of such manuscript for publication, to be made available to the public in PubMed Central as soon as possible but no later than 12 months after publication; and
2. to provide the following information to publisher upon acceptance of any article for publication that reports on research supported by this grant:

    > “The research reported in this manuscript was funded in whole or in part by NIH funding and is subject to the NIH public access policy, Division G, Title II, Section 218 of PL 110-161 (Consolidated Appropriations Act, 2008). The [name of institution] has retained non-exclusive rights in this manuscript that allow the final manuscript to be submitted to the NIH upon acceptance for publication, including all modifications from the publishing and peer review process, to be made available to the public in PubMed Central as soon as possible but no later than 12 months after publication.”