



August 12, 2009

The Honorable John Cornyn
United States Senate
517 Hart Senate Office Building
Washington, D.C. 20510-4305

The Honorable Joseph L. Lieberman
United States Senate
706 Hart Senate Office Building
Washington, D.C. 20510-0703

Re: S. 1373, The Federal Research Public Access Act of 2009

Dear Senators Cornyn and Lieberman:

On behalf of NetCoalition,¹ I am writing to express appreciation for your introduction of S. 1373, The Federal Research Public Access Act of 2009 (FRPAA). NetCoalition hopes this importation legislation is enacted this Congress.

FRPAA would require researchers funded by 11 federal agencies to deposit copies of the resulting articles into an open online archive no later than twelve months after publication in a peer reviewed journal. FRPAA expands the existing public access policy of the National Institutes of Health to other federal agencies.

It is the mission of NetCoalition companies to help their users locate and access the information they need. FRPAA furthers this mission by placing valuable publicly funded research in an online location where search engines operated by NetCoalition members can index and link to it. FRPAA thus simultaneously assists the broad dissemination of important scientific information and promotes the growth of the Internet.

Some have argued that a public access policy such as FRPAA is inconsistent with copyright law because it requires the involuntary transfer of copyright. This argument threatens to disrupt the fundamental relationship between authors and the entities that pay them for the creation of content. A wide variety of entities, including Internet companies, book and magazine publishers, and marketing departments, pay authors in advance to create works such as articles, novels, and photographs. In exchange for the advance, the author agrees to transfer the copyright to the entity, or to grant the entity a license to use the work.

This system is beneficial to both the author and the entity. The entity receives the content it needs, and the author receives payment while she is creating the content. Because creation of

¹ NetCoalition's members include Amazon.com, Ask.com, Bloomberg, eBay, Google, Yahoo!, and Wikipedia, as well as state and local ISPs.



high quality content can take months or even years, this system is particularly important to individual artists or small production companies.

Once the author receives the advance, she must live up to her end of the bargain. She must create the content, and she must transfer the rights she agreed to transfer. FRPAA is no different from this system of advances. In exchange for a large grant, an investigator agrees to give the funding agency a nonexclusive license to post the peer-reviewed manuscript created with that grant to an open online archive a year after publication. If FRPAA constitutes an unlawful involuntary transfer, so does the system of advances relied upon by authors and businesses. Treating the advance system as an unlawful involuntary transfer would have dire consequences. Entities would stop making advances to authors because they would not be able to enforce the terms of the agreements. Authors would suffer since they would receive no payment until after they created the content.

In short, the argument that FRPAA constitutes an involuntary transfer of copyright calls into question the legality of many copyright agreements entered into every day by thousands of authors and businesses.

Finally, it bears emphasis that the value of the federally-funded articles lies not in their expression, but in facts and ideas they contain. As the Supreme Court unanimously ruled in *Feist Publications, Inc., v. Rural Telephone Service Co., Inc.*, 499 U.S. 340 (1991), the Constitution forbids copyright protection of these facts and ideas so as to encourage their broad dissemination and use. By ensuring public access to these facts and ideas a year after their publication, FRPAA promotes copyright's fundamental objectives.

Again, thank you for your leadership on this issue. We look forward to working with you and your staff towards the goal of enactment of FRPAA this Congress.

Sincerely,

/s/

Markham C. Erickson
Executive Director and General Counsel