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May 24, 2013

The Honorable John A. Pérez
Speaker of the Assembly
State Capitol, Room 219
Sacramento, CA 95814

RE: AB 609

Dear Speaker Pérez,

I am writing in regards to AB 609. In particular I am writing to respond to a letter recently sent to you from the Association of American Publishers opposing this bill. Their letter contains a number of misleading statements and outright falsehoods that I feel compelled to address.

First, to introduce myself, I am an Associate Professor of Molecular and Cell Biology at UC Berkeley, where I have been since 2000. I have a long-standing interest in scholarly publishing, and am very familiar with the industry both as an author and a publisher.

In 2001 I co-founded the Public Library of Science (PLOS), a San Francisco based publisher of scientific and medical journals dedicated to making the research findings freely available to scholars and the public. PLOS pioneered “open access” publishing, which uses a service-based business model instead of the traditional subscription model. PLOS is now a thriving business, with over 120 employees in our San Francisco office and anticipated revenues of approximately \$50m in 2013. PLOS is incorporated as a non-profit, and thus I have no financial interest in its success.

The Association of American Publishers (AAP), who lobby on behalf of most for-profit and society scholarly publishers, have long opposed moves to make taxpayer-funded research available to the public, viewing them as a threat to the lucrative subscription journal publishing businesses of many of their members. For example, they strongly opposed the now highly successful NIH Public Access Policy and have subsequently worked to overturn it.

Their letter to this committee of May 14 argues that AB 609 would cost the state in excess of a million dollars in publication fees, would not save any money in subscriptions, would require the state to fund peer review and would cost the state jobs. Fortunately, none of

these things are true. As I will show below, the AAP's arguments are based on deeply flawed logic and a collection of misleading, inapplicable and outright false statistics.

Here are their points they raise in their letter with my comments following:

State Universities Could be Faced with Open Access Publishing Charges Estimated at More Than \$1 Million Annually

While AB 609 does not require authors to publish in author-funded open access journals, many journal publishers charge an article publishing fee to researchers to cover the cost to the publishers for making the journal articles freely available online. These costs could be substantial and are fundamentally unknowable, but the author of AB 609 has said that they may be similar to those in the implementation of the U.S. National Institutes of Health (NIH) policy, upon which AB 609 has been modeled. In a congressional hearing on open access in 2008, the director of NIH indicated that the agency spends \$100 million a year for page fees and open access charges. Therefore, one might estimate that California could spend \$1.1 million each year on these charges, as California's research budget is 1 % of that of NIH (\$332 million vs. \$30 billion). This rough estimate is likely an underestimate, as it only accounts for publishing charges and not for infrastructure, compliance, or the variation in open access charges.

As the AAP acknowledge, AB 609 does not in any way mandate that state-funded authors publish in open access journals. And yet they suggest that projected costs of in excess of \$1m in open access charges should be counted as a cost of this legislation. This is patently ridiculous. Not only does the bill not mandate open access publication, there is no reason to expect it would result in increased publication in open access journals. Indeed, by allowing for delays of up to 12 months before release of published articles, AB 609 was explicitly crafted to allow authors to continue publishing in subscription based journals.

But even if one buys the argument that AB 609 would result in increased publication in open access journals, the projections cited by the AAP are deeply flawed. To get to their estimate of \$1 million dollars in open access charges, the AAP relies on a quote from former NIH Director Elias Zerhouni who estimated, in 2008, that the NIH spent \$100 million on page fees and open access charges.

First, in 2008 the NIH Public Access Policy - which also does not mandate open access publication or favor it in any way - was just being introduced. Thus there is no reasonable way to argue that these costs arose as a result of the policy. Rather they clearly arose from authors choosing on their own how to publish their work.

Second, the \$100m Dr. Zerhouni quoted includes both open access charges and page fees – charges leveled by **subscription** publishers on authors in addition to the subscription fees they charge libraries for access to their content. In 2008, revenues for the entire open access publishing industry were less than \$20m. At most \$10m of this came from NIH authors (this is almost certainly an overestimate). Thus the vast majority of charges the publishers are attempting to attribute to open access were actually payments in page charges to subscription publishers.

Both the NIH policy and AB 609 include embargo periods of up to one year precisely because the drafters of the legislation chose not to force authors into open access publishing. Therefore the attempt by the AAP to consider open access charges a cost of this legislation is nonsensical. And their attempt to count \$90m in page charges they collected as costs of open access is a deeply misleading effort to convince the California Assembly that the costs of this legislation are much higher than they really are.

Savings to State Universities from Cancelled Journal Subscriptions Are Unlikely

There are no countervailing savings from the policies in AS 609 to offset the significant costs entailed. State universities would still need to maintain a large portion of their budgets for journal subscriptions, as students and researchers would continue to need to access research articles that are written by researchers from outside of California and not subject to the bill's provisions. Where some smaller journals may be cancelled or go out of business, and others may change to an author-pays open access business model, there will be many that continue as subscription journals. In fact, some analysts have suggested that costs for subscriptions may actually increase, as publishers will still need to recoup their investments in publication from a smaller subscription base.

CA AB 609 Will Undermine Investments in the Peer Review Process that Ensures the Quality and Integrity of Scientific Research, Potentially Requiring California to Make Those Investments Itself

The peer review process ensures that research articles are rigorously reviewed by experts in specialized fields before they are published – in effect, the “checks and balances” of good science. Publishers invest in supporting the peer review process that vets the validity and significance of authors' research findings by identifying appropriate reviewers, maintaining content management systems, providing enhanced digital coding and graphic design, disseminating the articles, enhancing the discoverability of article content and preserving the scholarly record. AB 609 would reduce publishers' ability to continue those investments, and potentially transfer those costs to the California research budget.

I put these two sections together so as to point out their logical inconsistency. The AAP are arguing on the one hand that AB 609 will not save California any money because libraries will not cancel any subscriptions. On the other hand, they are arguing that the bill will undermine publishers' ability to carry out peer review because they will lose revenue from canceled subscriptions. Obviously, these can not both be true. If libraries do not cancel subscriptions, then publishers will not lose money. If publishers do lose revenue as a result of the bill, it will be because California is saving money. The AAP's willingness to juxtapose these logically incompatible statements demonstrates that they are only interested in scoring debating points - not in an honest assessment of the costs of this legislation.

CA AS 609 Will Negatively Impact California Jobs

California ranks second in the country for periodical and journal publishing jobs, employing approximately 17,000 people with a payroll of more than \$250 million. By requiring surrender of their value-added, peer reviewed scientific journal articles within 12 months of publication, AS 609 will erode the financial sustainability of not-for-profit and commercial publishers, ultimately putting jobs at risk. Government mandates that make journal articles available free will likely have the same effect on the publishing industry as experienced by many newspapers when they chose to give their content away for free. Newspapers facing bankruptcy had to start charging for online access, as it is unlikely that someone will subscribe to a newspaper (or journal) when they can obtain the articles for free online.

Again, the AAP are using misleading statistics in an attempt to make it seem like this bill would threaten California jobs. First, the publishers lump scholarly journal publishing together with periodicals (magazines and newspaper) publishing. I am sure that virtually all of the 17,000 jobs they cite are in the periodicals industry, and have absolutely nothing to do with scholarly publishing. Surely the AAP know how these jobs break down - this is their industry after all. Yet they chose to cite jobs in industries unaffected by AB 609 to inflate the numbers.

The reality is that there has traditionally been relatively little activity in scholarly publishing in California. The biggest publishers are based in Europe, and most American journals are based in Boston, NY or Washington. I suspect the biggest employer in the scholarly publishing industry is PLOS – who have and 100 people working full time in their San Francisco office, as well as a larger pool of California-based freelancers and other contractors. Plus California is a hotbed for growth in open access publishing – including hot new startups like PeerJ. Given this, and the leading role California always plays in innovative new technologies, it is likely that a real push for open access publication would net thousands of new jobs in California.

It is also equally cynical to use the analogy of newspapers for the effect this bill would have on scholarly publishers. The AAP knows full well that unlike magazines and newspapers, whose businesses are struggling, there is a perfectly viable alternative business model for scholarly publishing. PLOS, BMC (a UK based open access publisher recently acquired by Springer) and others have proven is both viable and profitable. They know that if subscriptions go away, neither scholarly publishing nor the people it employs will not go away. The only thing that will change is that the public will have access to the results of research they paid for - something the members of the AAP do not currently provide.

AB 609 Is Unnecessary Because Publishers Are Devoted to Providing Access to Research and Invest in the Dissemination of Research in a Variety of Ways

Publishers provide access to published research articles through a variety of methods, including subscriptions, article rental and free-to-reader “open access” articles that are subsidized by author fees or sponsorships. Publishers have also voluntarily created programs that provide access to research literature for communities that have been previously underserved through outreach programs, such as patientINFORM, the Emergency Access Initiative and Research4Life, as well as programs for public libraries, journalists and high schools. Publishers have also worked with research funders, including government agencies and private foundations, for collaborative solutions to advance access to articles that report or analyze funded research. These collaborative, flexible partnerships are the right way to advance access while ensuring the sustainability of a well-functioning scholarly system. AB 609 takes us in an opposite direction and would contribute to fragmentation, duplication and dilution of efforts to build an infrastructure that is interoperable and efficient.

One can not help but laugh at this statement. The AAP’s members are so devoted to providing access to research that they spent the first two pages of this letter arguing that providing access to the public would destroy their industry and take thousands of California jobs with them.

In closing, I hope that you will see the letter from the AAP for what it is - an effort to mislead the California Assembly by making a simple bill that would have modest costs in

implementation and minimal, if any, effects on the publishing industry seem costly and destructive.

I expect that when you analyze the true costs of AB 609, you will find that they are limited to the costs of implementing a system for storing and disseminating the results of state funded research. I believe these costs could be mitigated, if not completely eliminated, by leveraging already existing digital archiving systems in place at UC's California Digital Library.

Thank you for your consideration of this important issue.

Sincerely,

A handwritten signature in black ink that reads "Michael Eisen". The signature is written in a cursive, slightly slanted style.

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