

Revised Draft of Proposed Open Access Policy for the University of California; Version of 3/20/13 *with annotations and differences.*

Preamble¹

The Faculty of the University of California is committed to disseminating its research and scholarship as widely as possible. In particular, as part of a public university system, the Faculty is dedicated to making its scholarship available to the people of California. **Furthermore, the Faculty recognizes the benefits that accrue to themselves as individual scholars and to the scholarly enterprise from such wide dissemination, including greater recognition, more thorough review, consideration and critique, and a general increase in scientific, scholarly and critical knowledge. Faculty further recognize that by this policy, and with the assistance of the University, they can more easily and collectively reserve rights that might otherwise be signed away, often unnecessarily, in agreements with publishers.** In keeping with ~~this commitment to open dissemination and public access~~ **these facts, and for the primary purpose of making our scholarly articles widely and freely accessible,** the Faculty adopts the following policy:²

Grant of License and Limitations

Each Faculty member grants to the University of California a nonexclusive, irrevocable, worldwide license to exercise any and all rights under copyright relating to each of his or her scholarly articles, in any medium, and to authorize others to do the same.³ **Faculty members grant this license for the purpose**

¹ Section headings have been added to make the policy easier to navigate.

² The preamble has been expanded to include a clearer statement of the intended benefits of this policy: 1) to make our work more accessible; 2) to accrue the individual benefits, such as increased citation and re-use by other scholars; and 3) to collectively reserve broad rights by entrusting the University to hold them on our behalf. The preamble is also intended to communicate that the primary purpose of this action is to make our work freely available, and not for any commercial advantage or use that the University might want to consider, whether beneficial or not (see also notes 3-5 below).

³ This license grant has two functions: 1) to preserve the rights that faculty might want to use *in their own articles* by systematically granting those rights to the university, who may grant them back to us as needed (this is the purpose of the phrase “and to authorize others to do the same”); and 2) to enable the University to make our articles available to those who would use them (i.e. readers of our articles). Faculty have an incentive to make this grant as broad as possible so as to preserve as many rights as possible—any restriction on this grant simply means that those rights will go to the publisher instead. However, it is clear that faculty members do not intend UCOP to make unapproved and systematic use of the articles (especially commercial ones), and that restriction is stated after the license grant (see notes 4-5 below). By granting broad rights to the University, we also allow faculty to individually choose (at the point of

of making their articles widely and freely available in an open access repository and so that the University can grant these rights back to the author.⁴ Any other systematic uses of the licensed articles by the University of California must be approved by the Academic Senate.⁵ This policy does not transfer copyright ownership, which remains with Faculty authors under existing University of California policy.⁶

Scope and Waiver (Opt-Out)

The policy applies to all scholarly articles authored or co-authored while the person is a member of the Faculty except for any articles published before the adoption of this policy and any articles for which the Faculty member entered into an incompatible licensing or assignment agreement before the adoption of this policy. ~~This policy does not transfer copyright ownership, which remains with Faculty authors under existing University of California policy. Application of the license will be waived.~~ **Upon express direction by a Faculty member, the University of California will waive the license** for a particular article or ~~access~~ **delay access to the article** for a specified period of time.⁷

deposit) to direct UCOP which rights will be passed on to other users. Although it cannot be specified in the text of the policy itself, the **default** license used by eScholarship will be a non-commercial license (CC-by-NC). But by preserving this broad license grant, faculty may also choose to make other commercial uses of their own works—such as republishing them, excerpting them, or collecting them in an edited volume for sale.

⁴ This sentence clarifies the intention of the license grant by spelling out what uses the Senate authorizes CDL to make of the articles, namely, to make them freely available, and to grant back to the Author the rights granted to the University. However, the language cannot be so restrictive that it contradicts the license grant and invalidates the policy. Rather, the design of the policy is such that the Senate is expected to maintain oversight of what the license grant is used for, and in the case that faculty object, to review or ultimately rescind the policy.

⁵ This sentence clarifies that any other systematic uses (that is, uses made of all of the articles as a whole, not any particular article) is subject to restriction by the Senate. The intention is to disallow any other uses unless approved by the Senate.

⁶ The 1992 UC Copyright Policy clearly states that Faculty retain their copyrights in scholarly works, and this policy does not change that; further the license grant above, being nonexclusive, does not constitute a transfer of copyright to the University of California.

⁷ This sentence has been rewritten to more clearly express that it is the Faculty member who will direct the University to waive the license (not the University or the publisher). The waiver itself (also known as the “opt-out” clause) has not been revised here and applies only to the license, not to the policy as a whole. To obtain a waiver requires only that faculty communicate their intention to do so; no one must grant permission or otherwise negotiate to waive the license. This waiver is separate from the deposit

Deposit of Articles

To assist the University in disseminating and archiving the articles, **Faculty commit to helping the University obtain copies of the articles.**⁸ **Specifically,** each Faculty member **who does not permanently waive the license above** will provide an electronic copy of his or her final version of the article to the University of California by the date of its publication,⁹ **for inclusion in an open access repository.**¹⁰ ~~The University of California will make the article available in an open access repository.~~ When appropriate, a Faculty member may instead notify the University of California if the article will be freely available in another repository or as an open-access publication.¹¹ **Faculty members who have permanently waived the license reserve the right to deposit a copy with the University of California or elsewhere for archival purposes.**¹²

obligation, but as should be clear from the following paragraph, the deposit obligation in this version clearly applies only to those people who DO NOT opt out of the license.

⁸ This added line states generally that faculty will hereby commit to helping the University of California make their work more available, and to indicate that it is the responsibility of both parties to do so.

⁹ Faculty members are expected to deposit the final version at the time of publication of the official version, to the extent practicable. If they have opted to delay access (e.g. for 6 months, 12 months or even longer), they may deposit the article either at the time of publication (with the understood requirement that CDL will only make it available when the embargo period is over), or at the time at which the embargo period expires.

¹⁰ This sentence states the obligation by Faculty to deposit a copy of their final version of the article by the date of its publication. This obligation applies to all faculty **who DO NOT** opt out of the license in the preceding paragraph. If a faculty member prefers not to deposit for any reason, he or she can do so by waiving the above license, which can be done by simply visiting the eScholarship site and communicating the title of the article and name of the journal. The sentence also declares again that the purpose of this deposit is to make the work available in an open access repository, and not for any other purpose.

¹¹ Publication in an open access journal, or deposition in another open access repository satisfies the deposit obligation under this policy. If research is covered by another mandate, or a faculty member chooses to publish in open access journals, it is not necessary to also deposit an article in eScholarship, though eScholarship may still display the meta-data and permanent location of the article.

¹² This sentence clarifies that even if a faculty member opts out of the license, he or she may still deposit a copy in eScholarship or elsewhere, even though no longer obligated to. This line is important in indicating to publishers that the faculty member is not hereby relinquishing the right to keep an archival copy of his or her articles.

Notwithstanding the above, this policy does not in any way prescribe or limit the venue of publication. This policy neither requires nor prohibits the payment of fees or publication costs by authors.¹³

Oversight of Policy

The Academic Senate and the University of California will be **jointly** responsible for implementing this policy, resolving disputes concerning its interpretation and application, and recommending any changes to the Faculty. **Any changes to the text of this policy will require approval by both the Academic Senate and the University of California.**¹⁴ The Academic Senate and the University of California will review the policy within three years, and present a report to the Faculty **and the University of California.**

The Faculty calls upon the Academic Senate and the University of California to develop and monitor mechanisms that would render implementation and compliance with the policy as convenient for the Faculty as possible.

¹³ This sentence clarifies that the choice of where to publish is not in any way limited by this policy, and remains the responsibility of the author and his or her co-authors. Furthermore, the policy only requires that an *additional copy* of an article be deposited, and does not in any way require or even encourage a faculty member to pay to publish the original article in an open access journal.

¹⁴ This sentence further asserts the intention of the Academic Senate to oversee the policy jointly with the University of California, and to ensure that changes cannot be made unilaterally by either party.

Definitions and Notes:

“University of California”: Throughout the policy “University of California” refers to the University of California Office of the President, the system wide administrative body responsible for the operation of the University. Practically speaking, the primary entity responsible for implementing this policy is the California Digital Library. CDL is co-funded by UCOP and the ten campus libraries.

“Academic Senate”: Through the policy “Academic Senate” refers to the system-wide faculty Senate, which is composed of senate representatives from all of the campus divisions. Practically speaking, the relevant committees that would oversee this policy include the Academic Council, the University Committee on Library and Scholarly Communication, and the University Committee on Research Policy, and other system-wide committees as necessary.

“scholarly articles”: the term is intended to mean published, peer-reviewed research articles. However, the least restrictive term available is preferred. Any greater precision of the term tends to exclude one discipline or practice; for example, to say “scholarly journal articles” might exclude those who publish in edited volumes; to say “peer-reviewed scholarly articles” might exclude law reviews (reviewed by students) or those reviewed by editorial collectives; etc.

“co-authored”: Current copyright law gives all co-authors equal rights in a publication; even if one author objects to making a work openly available (or not), the co-authors still retain the right to do so. There is no conflict if two different universities (or funders) require one or another author to make a work open access.

“access delayed”: Also known as an “embargo” – this term refers to the length of time after publication that an article will remain inaccessible. Most publishers who demand waivers in order to publish are actually satisfied with a temporary delay of access (usually 6-12 months).

“final version”: In this policy, final version is taken to mean (at minimum) the post-peer review, revised and copy-edited version of a paper, but not necessarily the typeset publisher's copy (unless allowed by the publisher, which CDL will help to determine). Faculty members are expected to deposit the final version at the time of publication of the official version, to the extent practicable. If they have opted to delay access (e.g. for 6 months, 12 months or even longer), they may deposit the article either at the time of publication (with the understood requirement that CDL will only make it available when the embargo period is over), or at the time at which the embargo period expires.

A note on the scope of this policy

This is an Academic Senate Policy; should it be approved, it will apply to all Senate Faculty (also known as “ladder” faculty) throughout the UC system. If it is subsequently adopted by the Office of the President as a presidential policy, it will presumably apply to all academic personnel as defined in the APM; however, that designation of scope is the prerogative of the Office of the president, not the Faculty Senate.

What are creative commons licenses and how are they used?

To make our articles available for any use other than reading on a screen (copying, printing, use in a classroom, inclusion in a course reserve or course reader, and so on), eScholarship must indicate what license rights are given to the end-user of the article. The standard licenses for this purpose are the Creative Commons licenses (creativecommons.org), which very clearly indicate what can be legally done with an article. All Creative Commons licenses that eScholarship uses require attribution. The default license restricts end-users from making “commercial” use of an article. Faculty may remove this restriction if they wish and choose a CC-by license (“attribution only”).

Differences of this policy from existing and proposed federal and state legislation

The proposed policy reserves a non-exclusive right for authors by granting it to our employer on the understanding that they will use those rights to make our articles available (*immediately*, or after a delay designated by the author) and also enable authors to make other uses of these works, by granting those rights back to the authors.

Existing federal legislation (the NIH Public Access Act) does not preserve such rights, but only requires that NIH-funded research articles are made publicly accessible 12 months after the date of publication, via the PubMed repository.

Proposed legislation in Congress (the FASTR Act), and a directive from the White House Office of Science and Technology Policy mirror the NIH Public Access legislation. FASTR would extend the requirement to all federal funders with budgets over \$100 million, and would require deposit 6 months after publication. The OSTP directive applies to the same agencies and recommends 12 months, but leaves it in the hands of the agencies to develop the ultimate policy.

The proposed state legislation (AB 609) is nearly identical to the Federal FASTR act, but is intended to cover only state-funded research (and is not intended to apply to all state employees in the University systems)

The proposed UC policy would cover all faculty, but allow individuals to opt out; federal and state legislation only covers those who receive federal or state funds, and does not allow opt-out.

The proposed UC policy clearly defines what legal rights authors will retain, and the implementation would clearly communicate those rights; the federal and state legislation use the term “public access” but do not define what rights are included when a work is made publicly accessible. The CA legislation may include a specification that the works be made available for commercial use, but as of 3/20/2013, it has not been amended.

If both the UC policy and the federal or state legislation were passed, compliance with the federal legislation would also satisfy the UC policy (authors would not have to deposit twice—but would retain greater rights than under the federal legislation alone).

Although the systems are compatible, the UC policy is preferable for faculty on several counts: it allows opt out, it clearly specifies the rights reserved, and it covers all research, not just federally funded research.

Differences of this policy from the UCSF policy adopted May 21, 2012.

The UCSF policy does not grant as broad a set of rights, because it restricts the use of the articles by the phrase “provided they are not sold” to the license grant. The intention of this language is that it prevent UC from selling the articles; the actual effect is that it restricts all subsequent uses of the articles (for instance, the subsequent inclusion of an article in an edited volume). The proposed policy would preserve broader rights, but attempts to limit any systematic use of the articles by UC other than making them freely available; furthermore it leaves the choice of such restrictions (commercial/non-commercial uses) in the hands of the authors rather than dictating acceptable uses in the policy.

The UCSF policy requires deposit even in the case of opting out from the license. The revised policy proposed here only obligates deposit by those who do not opt out of the license.