

**University of California  
Open Access Policy  
Draft: For Comment Only**

## **1. Introduction**

This policy proposal and related materials were prepared by an ad hoc working group appointed by Provost Hume in response to a proposal unanimously approved by the Academic Assembly and forwarded to President Dynes in May 2006 to adopt a policy – titled then as the “UC Faculty Scholarly Work Copyright Rights Policy” – which confirms UC faculty ownership of copyright of their scholarly work, but through which faculty would grant a limited and non-exclusive permission to the Regents to make work published in a scholarly journal or conference proceedings publicly accessible by posting it in an open, on-line repository of scholarly publications. The full text of the proposal is attached as Appendix II and also available from <http://www.universityofcalifornia.edu/senate/assembly/may2006/copyright0506.pdf>.

When faculty authors sign away copyright, as they usually are asked to do through publication contracts with publishers, they themselves no longer necessarily have the right to use or permit the use of their work in ways that advance their own goals and the research and education goals of the University and the academy. Faculty may be unduly restricted in the dissemination and use of their work, e.g. their ability to post their work on the web, deposit it in long term preservation archives, or create follow up or derivative works. These restrictions decrease the utility and impact of scholarship and may delay, diminish, or hide the scholar’s contributions to the progress of knowledge.

Copyright ownership, however, comprises a bundle of rights, and copyright law allows authors to transfer some rights and retain others. Retention of all copyright rights allows an author full autonomy in the author’s use of his or her materials, but an author may transfer some rights to a publisher and retain others, which achieves a balance between the publisher’s goals and the author’s goals of sharing the material to further scholarship. In seeking this balance, the UC Open Access policy:

- Asserts and confirms the UC faculty author as the copyright holder;
- Supports authors’ retention of rights in order to use and develop their works without restrictions;
- Ensures the UC faculty author routinely grants the University a non-commercial and non-exclusive right to make the material available in an open access repository, where it will be permanently and openly accessible;
- Suggests a mechanism for the UC faculty author to transfer limited rights to the publisher so that it can publish a work, receive a financial return, and receive proper attribution and citation as the source of first publication.

## **2. The Open Access Policy Proposal**

### **Preamble**

As affirmed by the Academic Personnel Manual (APM 010), the University’s fundamental mission is to discover knowledge and to disseminate it to its students and to

society at large. Appropriate management of copyright rights is a key factor in maximizing the dissemination and the resulting impact of the scholarship of the UC faculty.

## Policy

A faculty member's ownership of copyright is delineated by the University of California Policy on Ownership of Copyright.<sup>1</sup> This open access policy seeks to increase authors' influence in scholarly publishing by establishing a collective practice of retaining a right to open access dissemination of certain scholarly works. University of California faculty shall routinely grant to The Regents of the University of California a license to place in a non-commercial open-access online repository the faculty member's scholarly work published in a scholarly journal or conference proceedings.<sup>2</sup> In the event a faculty member is required to assign all or a part of his or her copyright rights in such scholarly work to a publisher as part of a publication agreement, the faculty member shall retain in the publication agreement the right to grant the foregoing license to the Regents. Faculty may opt out of this policy for any specific work or invoke a specified delay before such work appears in an open-access repository in accordance with the opt-out mechanism set forth below.

### **3. Policy Implementation**

- **University support for copyright management**

In support of the collective practice established by the policy, the Academic Senate, in collaboration with the University's Office of the President, will initiate direct communication with scholarly publishers and establish support mechanisms for the policy and the use of scholarly work which it covers. The University, including assistance, as appropriate, from the Office of the President and the campuses will support faculty in their efforts to retain open access dissemination rights, and to foster a broad spectrum of publication venues. No income will accrue to the Regents, the University, or the Academic Senate by this non-exclusive copyright license.

- **Opt-Out Mechanism (*n.b.* policy implementation would include *one* of the options below)**

Option A – permission-based: A faculty member may seek permission from a "UC open access agent" (UC-OA)<sup>3</sup> to opt out of this policy for a specific work that has been accepted for publication in a journal or conference proceeding that refuses to allow open access placement of the work within six months of publication. Within five working days of receiving an author's request, the UC-OA must grant permission

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<sup>1</sup> <http://www.universityofcalifornia.edu/copyright/>

<sup>2</sup> A license means that the copyright owner gives to another the right to use a copyrighted work in specified ways. This license shall be limited, irrevocable, perpetual, worldwide, royalty-free, fully paid-up, and non-exclusive. Such a license does not transfer any right to The Regents other than the specific license to place the work in the non-commercial, open-access online repository. Accordingly, the faculty member retains copyright ownership in his or her work.

<sup>3</sup> An open access agent is an appropriate university or campus agent to be developed jointly by the administration and the Academic Senate.

or assist the faculty member in negotiating with the publisher. Ten working days after the faculty member seeks permission, if the publisher has not agreed to allow open access placement of the work within six months of publication, the faculty member may opt out of this policy. The faculty member must notify the UC-OA of such an opt out.

Option B – consultation and notification-based: After consulting with a “UC open access agent” (UC-OA), a faculty member may opt out of this policy for a specific work that has been accepted for publication in a journal or conference proceeding that refuses to allow open-access placement of the work within six months of publication. As part of the process of consultation, the UC-OA may assist the faculty member in negotiating with the publisher. The faculty member must notify the UC-OA of such an opt-out.

Option C- notification based: A faculty member may opt out of this policy for a specific work that has been accepted for publication in a journal or conference proceeding that refuses to allow open access placement of the work within six months of publication. Before opting out, a faculty member may consult with a “UC open access agent” (UC-OA) and request assistance in negotiating with the publisher. The faculty member must notify the UC-OA of such an opt-out.

- **Tracking publishers’ open access practice**

The UC Office of Scholarly Communication (OSC) shall make available a list, updated regularly, of publishers that do not allow open-access placement of their material. Notifications provided by faculty members under the opt-out mechanism shall be used by the OSC, in order to make a list of publishers that regularly fail to allow open-access. This information may be made public and serve as the basis for initiating further discussion with these publishers.

- **Use of open access repositories**

The University of California eScholarship Repository (<http://repositories.cdlib.org>) is an open access repository in which UC faculty-authored materials can be placed to meet the goals of the policy. Placement of UC faculty-authored material in other trusted, publicly-accessible repositories, such as the National Library of Medicine’s PubMedCentral (<http://www.pubmedcentral.nih.gov/>), or the physics arXiv (<http://www.arXiv.org>) will also meet the goals of the policy. Trusted, publicly accessible repositories are those which provide reliable, long-term access to managed digital resources; are internet-accessible at no fee for the reader; have explicit preservation and governance policies; and use data formats and technology management that conform to industry standards.

- **Recording access characteristics of faculty publications**

Files submitted to Academic Personnel Committees for merit or promotion review of a faculty member should contain a list of articles published in scholarly journals or conference proceedings, indicating, for each, whether it has been included in an open access repository(ies) and, if so, providing the identity of that repository(ies).

## **Appendix I. Supporting Materials**

As noted above in *Policy Implementation*, it is proposed that the University provide mechanisms to support the policy and the use of materials which it covers. Examples of two such types of support are provided here:

- A. a description of the extant UC eScholarship Repository;
- B. a sample publication agreement addendum whose use by authors and publishers confirms the intent of the policy.

### **A. UC's eScholarship Repository**

The eScholarship Repository, sponsored by the California Digital Library, provides persistent and easily discoverable access to scholarly output from the University of California. It is a project of the eScholarship initiative of the California Digital Library within the University of California Office of the President. As of early 2007 the eScholarship Repository provides support for working papers, pre-prints, post-prints, seminar series, and UC-sponsored online journals with more than 200 participating academic and research units. The repository is on the web at <http://repositories.cdlib.org/escholarship/>.

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## B. Sample Publication Agreement Addendum<sup>4</sup>

An amendment such as this, when attached by an author to a publication agreement or contract, is a mechanism through which crucial copyright rights can be retained by the author, including those necessary to follow the proposed UC open access policy.

Following this sample publication amendment is an explanation of its terms in non-legal language.

### AMENDMENT TO PUBLICATION AGREEMENT FOR UNIVERSITY OF CALIFORNIA AUTHORS

1. In accordance with the University of California Open Access Policy, this Amendment hereby modifies the attached Publication Agreement concerning the following Article:
 

\_\_\_\_\_ (manuscript title) \_\_\_\_\_ (journal name)
2. The parties to the Publication Agreement and to this Amendment are:
 

\_\_\_\_\_ (corresponding author), and \_\_\_\_\_ (the Publisher).
3. The parties agree that in the event of a conflict between this Amendment and the Publication Agreement, the provisions of this Amendment shall prevail and the Publication Agreement shall be construed accordingly.
4. Notwithstanding any terms in the Publication Agreement to the contrary and in addition to the rights retained by Author and/or licensed by Publisher to Author in the Publication Agreement and any fair use rights of Author, Author and Publisher agree that the Author has the following rights:
  - a. The Author, without limitation, has the non-exclusive right to use, reproduce, distribute, perform, *and* display publicly the Article and create derivative works, including, but not limited to, updates, of the Article in electronic, digital or print form in connection with the Author's teaching, conference presentations, lectures, other scholarly works, and for all of Author's academic and professional activities, provided the journal in which the Article has been published is cited as the source of first publication of the Article.
  - b. The Author has all the non-exclusive rights necessary to make, or to authorize others to make, the Article available in online digital form, including but not limited to, a non-commercial website under the control of the Author or the Author's employer or through any non-commercial digital repository, such as the University of California's eScholarship Repository or the National Library of Medicine's PubMed Central database, provided, however, that such rights shall not be exercised before publication of the Article. If Publisher delays publication of the Article unduly, Author has the option of terminating this Agreement.
  - c. The Author further retains all non-exclusive rights necessary to grant to the Author's employing institution the non-exclusive right to use, reproduce, distribute, display, publicly perform, and make copies of the Article in electronic, digital or in print form in connection with teaching, digital repositories, conference presentations, lectures, other scholarly works, and all academic and professional activities conducted at or by the Author's employing institution at the time of publication of the Article.
5. Acknowledgment of Prior License Grants. Publisher acknowledges that Author's assignment of copyright or Author's grant of exclusive rights to Publisher in the Publication Agreement is subject to Author's prior grant of a non-exclusive copyright license to Author's employing institution and/or to a funding entity that financially supported the research reflected in the Article as part of an agreement between Author or Author's

<sup>4</sup> This sample was adapted from existing addendums in use or proposed for use by MIT (see <http://libraries.mit.edu/about/scholarly/copyright-form.html>), the Scholarly Publishing and Academic Resources Coalition (SPARC; see <http://www.arl.org/sparc/author/index.html>) and the Science Commons and Creative Commons Scholar's Copyright Project (see <http://www.sciencecommons.org/projects/publishing/>).

employing institution and such funding entity, such as an agency of the United States government. Publisher acknowledges that it has determined prior to execution of this Agreement whether any such grant exists.

6. Entire Agreement. This Amendment and the Publication Agreement, taken together, constitute the final agreement between the Author and the Publisher with respect to the publication of the Article and allocation of copyright rights in the Article. Any modification of or additions to the terms of this Amendment or to the Publication Agreement must be in writing and executed by both Publisher and Author in order to be effective.

AUTHOR

(corresponding author on behalf of all authors)

DATE

PUBLISHER

DATE

### **Annotated Explanation of Sample Publication Agreement Addendum**

Following is an annotated explanation of paragraphs 3 through 6 of the sample Amendment to Publication Agreement:

1. Paragraph 3—if there is a difference in the terms of the main publication agreement and this amendment *and* the difference is great enough that the terms are considered contradictory, the terms of the amendment will be given legal effect and the contradicting terms of the main agreement will not be given legal effect (i.e. the amendment “trumps” the Publisher’s agreement).
2. Paragraph 4—this paragraph specifies what copyright rights the author retains in his or her work, and contemplates the author’s present or future (near or distant) exercise of that right. Each subparagraph addresses a different right:

subparagraph (a)—this means the author has the right to use his or her work fully for the purpose of teaching, conference presentations, and other scholarly/professional activity, and to update or use the work as a basis for a new work (in other words, a “derivative” work). It is a “non-exclusive” right, and the publisher may allow others to use the author’s work in these ways as well. If the author assigned all copyright and copyright rights to the publisher and did not retain these rights, the author would be in the same position as a complete stranger with respect to his or her use of the work. The author would have to rely solely on the fair use provisions of the federal Copyright Act and the “face-to-face” teaching exception in that Act (which allows the copying and other use of an entire work without permission of the copyright owner provided it is used in face-to-face teaching). The retained rights give the author greater rights than those available under fair use or the face-to-face teaching exception.

subparagraph (b)—this means the author has the right to make the work available in digital form, including in a non-commercial online digital repository, to others. An author would not have this right if it was not retained. It is “non-exclusive” and allows the publisher to also place the work in its own or another’s repository. It preempts a potential publisher’s objection to the provision by specifying that the right may not be exercised before publication of the work. The last sentence is

intended as an escape hatch if the publisher delays in publication: the author may terminate and make other arrangements.

subparagraph (c)—this means the author has the right to give the author’s employing institution the right to fully use the work and place it in an online repository in connection with academic and professional activities conducted by the employing institution. It is “non-exclusive” in order to allow the publisher the right to do these things as well.

Paragraph 5—this puts the publisher on notice that the author may have already granted copyright rights to another before signing this agreement, such as the right given to the University under the Open-Access Policy or to a federal agency in compliance with regulations of the agency that helped fund the underlying research. This precludes a publisher from later asserting that it was not aware that the author had given such rights, and that the author’s granting of such rights must be rescinded or that the author owes compensation (“damages”) to the publisher. A grant to the University under the Open Access Policy is subject to the opt-out provision. If the publisher refuses to allow open access placement of the work, the faculty member can either withdraw the work or use the opt-out mechanism.

Paragraph 6—this means that the publisher cannot claim that it and the author had an enforceable agreement on a term that is not included in writing in either this amendment or in the main agreement. In other words, the written terms of this amendment and the main agreement are the only legally enforceable terms; thus, even if the author agrees orally to something proposed by the publisher, or vice versa, it is not legally effective unless it is in writing and signed by both the author and the publisher.

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## **Appendix II. Original Academic Assembly Endorsed Policy Proposal (May 10, 2006)**

### **[Preamble]**

WHEREAS, in order to facilitate scholarly communication and maximize the impact of the scholarship of UC faculty,<sup>1</sup> the Academic Council's Special Committee on Scholarly Communication (SCSC) has proposed that the Academic Council consider the following recommended UC copyright policy change:

### **[Policy]**

A faculty member's ownership of copyright is controlled by the University of California Policy on Ownership of Copyright [<http://www.universityofcalifornia.edu/copyright/>]. University of California faculty shall routinely grant to The Regents of the University of California a limited, irrevocable, perpetual, worldwide, non-exclusive license to place in a non-commercial open-access online repository the faculty member's scholarly work published in a scholarly journal or conference proceedings. In the event a faculty member assigns all or a part of his or her copyright rights to a publisher as part of a publication agreement, the faculty member must retain the right to grant this license to the Regents. Faculty may opt out of this requirement for any specific work or invoke a specified delay before such work appears in an open-access repository. Such a license would preserve copyright ownership in the faculty author, thereby enabling him or her to control subsequent uses of the work.

### **[Attendant Implementation Language]**

The Regents will direct the Academic Senate, in collaboration with UC Administration, to establish support and control mechanisms for the use of scholarly work covered by this policy. The University, including assistance, as appropriate, from the Office of the General Counsel, will support faculty in their efforts to retain copyright with attention to maintaining a broad spectrum of publication venues. No income will accrue to the Regents, the University or the Academic Council by this non-exclusive copyright license.