



Robert L. Powell
Telephone: (510) 987-0711
Fax: (510) 763-0309
Email: Robert.Powell@ucop.edu

*Chair of the Assembly and the Academic Council
Faculty Representative to the Board of Regents
University of California
1111 Franklin Street, 12th Floor
Oakland, California 94607-5200*

April 11, 2013

AIMÉE DORR
PROVOST AND EXECUTIVE VICE PRESIDENT

Dear Aimée:

After an extensive Senate review process, the Academic Council recently considered a proposed policy for increasing open access to scholarly works. The proposed policy would be a collective commitment by the Senate to make their scholarly articles available to the public now and in the future. It would also express the responsibility of individual faculty members concerning the management of their copyrights in scholarly articles. The policy has two components – a default non-exclusive license to the University to exercise copyright rights in faculty members' scholarly articles combined with deposit of the final version of each published article in the eScholarship repository of the CDL. The policy would include a generous opt-out provision and would not impose compliance sanctions. Because members of the faculty own the copyright in their scholarly works, it is essential that such a policy originate in the Senate. At the same time, its implementation would require substantial Administration engagement.

The proposed policy was developed by the University Committee on Libraries and Scholarly Communication in close collaboration with the University Librarians and the California Digital Library and has been broadly reviewed by the Academic Senate.

The Senate response has been generally very favorable to the idea of open access, but predictably has included many requests that the proposed policy be revised for clarification and assurance. The committee has revised the proposed policy to address some of the concerns. However, a number of concerns cannot be resolved without a firm and credible indication that the Office of the President would interpret the policy as the faculty do, and would provide the necessary resources and support (especially to the California Digital Library) to make the policy a reality.

We write now to request a formal statement that would address the following issues and would be circulated with a revised policy in a second round of review:

Oversight

- This policy originates as an Academic Senate Policy but would require joint oversight and a substantial UCOP role for implementation. Faculty thus want assurance that UCOP would

adopt it as a presidential policy, but that its implementation and any changes to the policy itself would be undertaken only in consultation with the Senate, and only on the basis of agreement by both parties.

Scope of the license grant

- The proposed policy rests on the 1992 University Policy on Copyright Ownership, which affirms faculty members' ownership of their copyrights. Thus, the proposed default grant of rights to the University as described in the policy will be made under the explicit assumption that the UC will be a responsible steward of these rights, granting them back to faculty as necessary, and making use of those rights only to the extent covered by this policy. Accordingly, faculty would like assurance that UCOP and CDL will not do anything with the articles other than making them openly and freely available, or granting those rights back to the authors themselves. Specifically, the license grant is made with the understanding that the University will not alter, sell or otherwise use articles for which the license is granted to generate revenue without express permission of the faculty copyright holder.

Implementation and improvement of the eScholarship repository

- For the policy to be effective, faculty authored work must actually be made freely available, and the primary mechanism for this will be CDL's eScholarship repository. Faculty would like assurance that the workflow and burden of making deposits to eScholarship will be eased through technological improvements in CDL's eScholarship repository, including development of an automatic deposit capability for those who wish to use it. Without these improvements, the deposit mechanism is too cumbersome and difficult to support the widespread use that will be essential to achieve the goal of open access.
- The details and estimated costs of these improvements have been spelled out in detail by CDL, and are readily available from them. Faculty would object to imposing these costs on the existing, extremely overtaxed budgets of the libraries.

Cost Allocation

Faculty are aware that publication does not happen for free, but have also come to recognize that its financial costs (not including their own freely contributed labor) are overwhelmingly borne by the libraries in the form of subscription fees for journals. Some publishers have proposed an alternative model that would achieve open access by shifting costs to authors in upfront payments for publication. While the faculty recognizes that the latter model has benefits for dissemination, they fear that they will be asked as individuals to shoulder publication costs that are now borne by institutions.

- Faculty would like UCOP to show a credible commitment to ensuring that the University will create institutional mechanisms at least as robust as library subscription budgets for covering publication costs, so that individual faculty authors are not left on their own to secure funds for publication. Specifically, the faculty would welcome hearing that no peer-reviewed research conducted at UC, regardless of discipline, would ever fail to be published because a faculty member could not afford to do so.

The faculty recognize that there is great uncertainty in the future of the scholarly publishing system, but feel that it is the obligation of the University to ensure that all research, across all disciplines, is adequately and equitably supported.

We will be happy to discuss this request with you at greater length and look forward to receiving a letter that would help reassure the faculty in these matters.

Sincerely,



Robert L. Powell, Chair
Academic Council



Christopher Kelty
UCOLASC Chair

Cc: Academic Council
Martha Winnacker, Senate Executive Director

Encl.



UNIVERSITY COMMITTEE ON LIBRARY AND SCHOLARLY COMMUNICATION
Christopher Kelty, Chair
ckelty@UCLA.EDU

Assembly of the Academic Senate
1111 Franklin Street, 12th Floor
Oakland, CA 94607-5200
Phone: (510) 987-9466
Fax: (510) 763-0309

March 22, 2013

BOB POWELL, CHAIR
ACADEMIC COUNCIL

RE: REVISED PROPOSED UC OPEN ACCESS POLICY

Dear Bob,

I hereby submit for consideration by the Academic Council a substantially revised version of the Open Access policy that was circulated to the divisions in the Fall of 2012. The responses from the campuses were thorough, thoughtful and diverse in their concerns, and UCOLASC has worked hard to understand and address nearly all of them in this revised policy. It is clear from the responses that many faculty members across the divisions are in favor of an open access policy and expect to review a revised version, but that circumspection and precision are to be desired in any policy of this significance.

In the months since senate faculty have considered this policy, change has continued to sweep through the publishing world. In February, new legislation was introduced into both the US Congress (FASTR) and the California Legislature (AB 609). If adopted both the laws would require of UC Faculty that they make publicly available any federally or state funded research publications (a full analysis is included with the attached policy). In addition, days later, the White House Office of Science and Technology Policy also issued a directive to funding agencies to develop similar open access policies. UCOLASC strongly supports all of these initiatives and feels that none of these requirements would be incompatible with the proposed UC policy. The proposed policy would allow any federally mandated deposit to also satisfy the policy. However, it is clear that UC faculty members have a narrow opportunity to act quickly and decisively to control the kind of policy that governs their work, as faculties at other universities have and continue to do.

We repeat here that the attached policy has one main goal: to allow faculty to ensure that their work reaches the broadest possible audience. The proposed policy (like all so-called "Green" open access policies) achieves this by *proactively preserving* the rights that faculty members have in their scholarly works. To do this, the policy grants broad but non-exclusive copyright licenses for our scholarly articles to the University of California. This naturally comes with risks, but the benefits are these: it is a simple mechanism to *collectively* preserve these rights for all our works rather than giving them individually and exclusively to publishers, and it enables the University to assist us in making our works more widely available via the eScholarship repository at CDL.

It is clear from the responses that there is much anxiety about the scope of this policy and the kinds of limitations that are necessary to make it feasible. As such a major feature of the revisions is the attempt to clarify what Faculty intend this policy to achieve, and to fix more precisely the limits of what we wish to allow the University to do with this license grant. Although we recognize the risks, UCOLASC feels that the benefit of this policy for faculty is significant, and that it is necessary to maintain control over the future use and availability of our scholarship in a changing publication system.

Significant concern was also expressed about the changing economics of publishing and its relationship to this policy. We want to be very clear that the proposed policy *does not require faculty or the university to pay any fees or charges to publish articles* (that is, it is not a “Gold” open access policy). Faculty members are expected to continue to publish in the journals of their choice (whether subscription-based or fee-based), and the California Digital Library is expected to assist us in making versions of those articles more widely available than the publishers will. For better or worse, saving money is not the goal of this policy; the costs of publishing are substantial and fixed, and cannot be directly impacted by this policy. Where it might potentially have an impact is that a *strong* green open access policy gives faculty and the university greater bargaining power in negotiations with large publishers, possibly lowering subscription costs, or giving the University an advantage in shaping the models that will emerge.

Thus, as part of submitting these revisions UCOLASC also advises the Academic Senate to seek assurance and commitment from the Office of the President that all peer-reviewed research articles accepted for publication will be published, regardless of the ability of faculty to pay for publication costs. It is clear that Universities already subsidize the publishing industry through subscription costs, and that this institutional commitment should be maintained in the future, and equitably balanced across the disciplines, whether publishers increasingly adopt pay-to-publish models or not.

Finally we would like to emphasize how effectively the opt-out clause (also known as the waiver) in this policy serves to allay many of the concerns raised by the divisions. Faculty may waive the license for any reason; no one need ask permission or negotiate, only visit a website and indicate the intention with a title and journal name. If a faculty member has included copyrighted material governed by a restrictive license or contract, they may opt out (and in the revised policy are not required to deposit, either). If a small scholarly society sees this policy as a threat, they may require authors at UC to opt out in order to publish in the journal, or faculty may do so voluntarily to protect such societies (although currently only 5% or fewer of existing publishers require a waiver at other universities with open access policies, suggesting that as many as 95% are generally at ease with policies such as this one). If faculty are concerned about whether a co-author might object to making a work open access, they may opt out. If a faculty member considers something not to be a “scholarly article” they may opt out. And if for any reason, a faculty member thinks that open access for a particularly article will not benefit them, or will harm them, they may opt out.

Revisions to the Proposed Policy Language

All changes are clearly designated in the annotated policy attached to this letter, which also includes several clarifying notes and definitions. Two key areas of revision concern the deposit obligation and the scope of the license grant and its use by UCOP.

Although it was not widely expressed in the campus responses, it was clear from many Faculty members that the requirement to deposit *even if an author had waived the license* was too confusing. As such, the policy has been revised so that the deposit will be obligatory if the author does not waive the license. Or stated differently, waiving the license releases the author from the obligation to deposit. Those who do not

waive the license are still presumed to have granted the license and would still be obligated to deposit. The revised policy specifies however, that faculty may nonetheless still deposit even if they waive the license—in order to signal to publishers that we are not forfeiting the right to keep archived copies of our works.

Perhaps the major concern expressed by many divisions is the scope of the license grant, specifically, anxiety about what UCOP might be able to do with such a broad license grant. *There is total system-wide unanimity that UCOP and CDL should not be allowed to profit from our works or use the articles for commercial gain.* However, there are two parts to this consensus:

- a. Faculty wish to constrain the uses that UCOP itself may make of the license grants *en masse*—the only intended uses of the license grant are for CDL to make the articles freely available in eScholarship, and for UCOP to grant all licensed rights back to the faculty members.
- b. But, there is also a very clear desire to allow individual faculty members to ultimately decide what they themselves, and any readers who download the articles, may do with *any particular* article. Authors may wish to preserve rights to republish work, or excerpt it, or translate it or for other commercial uses. And authors may also wish to restrict end users to non-commercial uses or to prevent derivative works.

In order to preserve both intentions, the revised policy grants the same broad license so that faculty may be assured of preserving the greatest range of rights in (b), but it explicitly prescribes that the only uses approved by CDL are those in (a).

For this to work, *the Senate must oversee this policy*, and must take responsibility for altering, or if necessary, rescinding the policy if the prescribed uses are exceeded. Because the policy rests on the right of faculty to grant these licenses, this also provides us with the power to stop granting such licenses, as long as the policy stays under the control of the Senate.

The annotated policy also makes clear that faculty will ultimately control the approved uses of the articles made available by eScholarship, specifically through the choice of Creative Commons licenses applied to their works; the default license in the system would include a restriction to non-commercial use only (i.e. CC-by-NC).

Implementation

Many divisions demanded more information or clarity about the implementation of this policy by CDL, the costs of the policy, and various other types of information that would require collaboration and specification by the Office of the President and the California Digital Library.

As such, UCOLASC urges the Academic Council to obtain from the Office of the President a clear statement that outlines both the commitment to the policy and the details of implementation. Specifically this document would spell out the *joint oversight* of the policy by both UCOP and the Senate; it would explicitly affirm that no commercial uses would be made of the articles by CDL; it would affirm that UCOP will commit to funding the eScholarship repository in order to ease the process of deposit, and develop the capacities for automated harvesting of published articles. Finally, as mentioned earlier, this letter should also demonstrate that the University will create institutional mechanisms at least as robust as

library subscription budgets for covering publication costs, so that individual faculty authors, in whichever discipline, are not left on their own to secure funds for publication.

UCOLASC genuinely appreciates the extensive time and attention that the Senate has given to this important issue.

Sincerely,

A handwritten signature in black ink, appearing to be 'CKelty', written in a cursive style.

Christopher Kelty, Chair
UCOLASC

Revised Draft of Proposed Open Access Policy for the University of California; Version of 3/20/13.

Preamble

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 these facts, and for the primary purpose of making our scholarly articles widely and freely accessible, the Faculty adopts the following policy:

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. Faculty members grant this license for the purpose 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. Any other systematic uses of the licensed articles by the University of California must be approved by the Academic Senate. This policy does not transfer copyright ownership, which remains with Faculty authors under existing University of California policy.

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. Upon express direction by a Faculty member, the University of California will waive the license for a particular article or delay access to the article for a specified period of time.

Deposit of Articles

To assist the University in disseminating and archiving the articles, Faculty commit to helping the University obtain copies of the articles. 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, for inclusion 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. 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.

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.

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. 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.

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.