

## System-wide review of the UC Open Access Policy; January 2013

### Summary of Divisional and System-wide Committee responses – C. Kelty

#### 1. Main Issues: Responses and Suggestions

The responses to the open access policy from the nine general campuses and four of the system-wide senate committees show general agreement that an Open Access policy is **in principle desirable but that the current draft is not yet acceptable**. The reasons given vary extremely widely, repeat many concerns that have previously been extensively considered by UCOLASC and they converge only in a handful of clear cases, outlined herein. For the most part reactions to the policy demonstrate that anxiety about the current state of the publishing industry is high, and that there is a great deal of fear, confusion and misunderstanding of both what is happening in the industry, what universities like UC can reasonably do to affect it, and what is actually proposed in the policy.

Attached at the end is a table representing the most common concerns expressed across all divisions. Not all of them could possibly be addressed in a revised policy, but a large number of them can. As such, suggestions for a revised policy includes the following:

- 1) *With the help of the UC Office of General Counsel Working Group, revise the license grant, if possible (See A below).*
- 2) *Re-draft the policy language to tighten the scope of the grant; use UC Davis suggestions where appropriate. (See A below)*
- 3) *Draft a MOU with UCOP/CDL outlining implementation details, cost estimates, and other issues under the control of the University (See B below)*
- 4) *Include some or all of the following (See C below):*
  - a) *Statistics and experience from other universities about their OA policy*
  - b) *Statements from small publishers and scholarly societies concerning Green OA.*
  - c) *List of publishers that allow Green OA in standard Author agreements*
  - d) *Best practices for Open Access Policies*

Included in Section 2 below are additional responses to other issues that have been raised about the policy, but that are either independent issues, or issues that cannot be resolved by the Academic Senate alone.

#### **A) Narrow the scope of the policy language and license grant**

The UCOP Office of General Counsel's Copyright Working Group circulated unsolicited comments on the proposed policy that included concern about the breadth of the license grant in the proposed policy. These concerns were echoed UCLA, UCSB and UCSD, and UCI has made it a condition of their approval that these concerns be met. This is a complex issue, but there are several facts that need to be understood.

1. The policy grants a license to UC, but it also dictates the rights that can be passed on to end users (i.e. anyone downloading the article from eScholarship) who access the content via eScholarship.

2. There are two kinds of “commercial” or derivative uses that faculty are concerned about. The first is what **UC** can do with the license we grant; the second is what **end-users** (readers, other scientists or scholars, other publishers) can do with the articles.
3. It is clear that *no one wants to grant UC the right to commercially exploit our work*— indeed, CDL does not want that right either, because they want to be an archive or a repository, not a commercial publisher. Ergo, the policy needs to be rewritten to clarify that UC is not allowed to do anything with the works other than make the articles available in eScholarship.
4. However, faculty members have diverse desires for how open their scholarship will be *to end-users*. Some want it to be maximally open (available for commercial purposes as well as non-commercial), some want to restrict it to non-commercial uses only, some want to restrict derivative uses as well. The only solution that benefits everyone is to allow faculty to *choose the Creative Commons license that meets their needs when they upload an article*. Ergo, the license grant in the policy needs to be at least generous enough to allow CDL to make the articles available under a CC-by license (so-called attribution only, which allows commercial and derivative uses).
5. The license grant is not the only part of the policy (this is a mistake that OGC-CWG makes); the policy also includes both the explicit statement of the scope of use allowed to UC, and an oversight mechanism by which the Senate can revoke this right. Ergo, it may be necessary to tighten the policy and oversight language to achieve both 3 and 4 above, but it might not be possible (or necessary) to change the license grant to achieve both 3 and 4.

In addition, the Davis division offered concrete suggestions for clarifying the policy without affecting its intent; they should be incorporated to the extent possible in a revised draft.

### **B) Specify the implementation and costs of the policy**

A second general concern was that the costs and implementation of the policy were not clearly spelled out. In part this is made difficult by the fact that UCOP and CDL have no incentive to spell them out unless the faculty pass a policy—and so it is a chicken and egg problem. However, an excellent suggestion by UCORP was that the Senate draft a Memorandum of Understanding with UCOP outlining several of the implementation issues. Such an MOU might provide the kind of detail necessary to answer many of the concerns that have been raised. At minimum it would have to lay out the following in order to address concerns raised by various divisions:

- the estimated start up and continuing costs of the implementation at CDL, and from where those costs would come (UCD, UCSB, UCLA, UCR, UCSD, UCFW).
- the details of the deposit, addendum and waiver/embargo process, including the choice of Creative Commons licenses by individual faculty to restrict either commercial or derivative uses of their work (UCD, UCR, UCSD, OGC-CWG).
- the limitations on the license grant, and expectations of what UC can reasonably do with the articles, now and into the future (UCD, UCM, UCLA, UCR, UCI, UCSD, OGC-CWG).
- the mechanism by which the obligation to deposit will be enforced, or compliance increased (UCD, UCSB, UCR, UCAP).
- the coverage of non-Senate faculty (academic employees such as clinical faculty, postdoctoral scholars, graduate and undergraduate students or contractors) (UCSC, UCSD, OGC-CWG).

- some expression of commitment on the part of UCOP to protect faculty from the increasing expectations of Gold OA (e.g. "author-pays" models of Open Access, even though the proposed policy does not support such a model, but rather a Green OA approach) (UCM, UCR, UCAP).

A document expressing these details could be fairly quickly drafted by UCOLASC in collaboration with UCOP, CDL and OGC, but would require some kind of approved cooperation with UCOP. Since many faculty members have expressed the concern that this is a policy being forced upon them by the office of the President, UCOLASC has been extremely reluctant to consult directly with any UCOP employees or units.

### **C) Compile data and statistics from other universities with OA policies and UCSF.**

Several divisions advised collecting more data either from other universities or from UCSF's experience (UCSB, UCI, UCFW). None of the responses specified what kind of data would be convincing, but it is, at the very least, possible to get rough data on the number of deposits, the number of opt-outs/waivers, and some anecdotal evidence about effects or problems that have arisen.

Many Faculty express concern about the harm an OA policy will cause to small publishers or scholarly societies. Statements might be gathered from a range of scholarly societies in different disciplines discussing whether this issue is in fact seen as a threat. A large majority of them already allow Green OA archiving of the articles they publish, and many of them, such as the MLA and the AHA, for instance, are already on record in support of an Open Access policy. These statements might be included, as well as a list of all publishers that allow Green OA.

Many of the implementation issues are already relatively standardized, enough so that a "best practices" document was recently created by a number of people involved with OA at other universities, which can also be distributed with a revised policy. ([http://cyber.law.harvard.edu/hoap/Good\\_practices\\_for\\_university\\_open-access\\_policies](http://cyber.law.harvard.edu/hoap/Good_practices_for_university_open-access_policies)).

## **2. Other Issues**

The remainder of the issues that would not be addressed by the above have either already been extensively discussed (and no better alternative proposed), or they are issues independent of the proposed policy, however urgent they may be.

### **The policy should be "opt-in" instead of "opt-out"**

All institutions without opt-out policies already have opt-in policies. Faculty may currently "opt in" to the practice of making their work (green or gold) OA by negotiating those rights with a publisher for each article they publish. The point of the proposed policy is simply to invert that relationship so that faculty don't have to negotiate in each and every case, but can instead opt out if they choose to, in any particular case.

### **The policy shifts publication costs to the authors and needs a "clearer business model"**

This concern, which was raised in several responses (UCM, UCR, UCAP, UCORP, UCPB), seems to assume that the policy will require faculty to pay to publish their work in Open Access venues, and therefore must solve the problem of the financial burden that would result. The proposed

policy makes no such requirement. The concern is a generally valid one, and it is an open question whether it is wise for scholars generally to promote Gold OA, but the current policy is a Green OA policy, requiring only that faculty retain a right to make a version of the work (published in the journal of their choice) available in a repository.

### **The policy will harm small scholarly publishers**

Several responses expressed concern that the policy will harm small scholarly publishers (UCB, UCSB, UCR, UCI). This concern, while generally valid insofar as small publishers face a very difficult funding environment, may be overly paternalistic in this context. The proposed policy's opt-out clause clearly gives both individual faculty and publishers the right to opt-out to protect themselves. In addition, it is clear from the opt-out statistics at other universities and at UCSF that few feel the need to so protect themselves—the opt-out rate is under 5%. In addition to that, a large percentage of publishers across the disciplines also already allow Green OA in their standard author agreements, indicating that they do not have an issue, even if faculty are concerned (A statement to this effect could be included in a revised policy, along with a list of publishers who are already in favor of a green OA model).

### **Co-authors will be adversely affected**

The question of co-authorship rights is perennially raised, and was raised again in this round (UCSB, UCLA, UCSD). Under US Copyright law, all co-authors on a publication share equal joint rights in a publication. Each author can choose to transfer their copyright in the paper to a publisher, or retain it if the publisher allows it. Under an OA policy, any co-author could grant a right to their own institution to make the work available. An OA policy cannot change the federal statute, and so cannot affect whether co-authors have equal rights under the law. So if Author A (UCLA) co-authors an article with Author B (at any institution), it is a matter of private negotiation whether Author A chooses to make the work open access or opt out of the policy. Author B is not required to agree, nor does s/he have any right to prevent Author A from exercising rights granted under copyright law.

### **The inclusion of copyrighted material in publications will cause great risk**

Thanks to the spirited activism of UC Art Historians, this issue was mentioned in nearly every response. The concern is that the proposed policy will make it impossible to publish work that includes licensed copyrighted material such as images, stills, or other valuable copyrighted materials. Among the large range of fears are that: the issue is not clearly understood (UCFW), that scholars will have to negotiate “worldwide all-language, unlimited use, universal” licenses for images (UCB, also UCSB), that it will “hamper their ability to obtain copyrighted images” (UCSC), that they will “be especially harmed by ‘the proposal’s admission that there are no restrictions on commercial uses by end-users” (UCSB); that they cannot grant open access to their articles without great copyright risk” (UCPB), that they will be unable to publish their work (in a letter from UC Faculty, echoed by the UC Faculty Association). Anecdotally, there are fears that copyright holders would be more likely to bring suit against scholars, or that copyright holders (such as libraries or museums) would otherwise prevent them from making use of images in the future in any form.

Whether or not we pass an OA policy, faculty members who choose to make their work open access *must take responsibility* for copyrighted materials they use in their works. If they do not

have permission, or cannot claim fair use, they may face legal risk. This is true not only of art historians, but of everyone who makes use of a copyrighted work, whether by licensing it or by claiming fair use. The proposed policy neither creates this situation nor can it change it, for it is created by the structure of copyright law and the contracts for permission commonly used.

However, under the proposed policy, anyone can opt out for any reason without any negotiation with anyone. It is as simple as pushing a button to create a waiver form. This solution allows individuals to assess their own personal risk preference in each case. If an author is deeply worried about the implications of doing so, s/he may opt out. In no case would anyone be forced either to make that work available or to (re)negotiate rights for any copyrighted material. The OA policy does not put anyone at risk for signing a restrictive copyright license—quite the contrary, it protects scholars by giving them the ability to opt out. In effect, scholars who are concerned about the copyrighted work they use may continue as normal; the only plausible effect might be that scholars would have a stronger negotiating position with the weight of the university behind them.

A further issue concerns the requirement to deposit. Some faculty members perceive a legal risk involved in depositing a single copy of an article containing a licensed image in a “dark” archive (an archive that no one except the author and the staff at eScholarship can access), and suggest either that deposit should also be optional or that art historians (and perhaps others) should be explicitly excluded from coverage by the policy.

It is not clear that this risk is significant, nor is it clear whether the risk would accrue to the individual or to the archive. Section 108 of the copyright statute explicitly protects libraries and archives that make copies of a work for the purpose of preservation. A document on Fair Use Guidelines authored by the Visual Resources Association, and available on the College Art Association website, states the following about scholarly articles containing copyrighted images:

*“Principle:* Preservation of such materials – as a means of facilitating teaching, research and study, and preserving the scholarly record – should generally be permissible as an exercise of educators’ fair use rights.

*Suggestions:* Educational users may be best positioned to assert fair use if they:

Make only that number of copies reasonably necessary to achieve the teaching and research needs of the institution or individual (as well as the associated needs in preserving that content for such purposes). Such copies can include copies that are readily accessible for teaching and research purposes, as well as those that may be placed in a “dark” – or typically inaccessible – archive.”<sup>1</sup>

There are no reported legal cases of a scholar being sued for archiving a paper with copyrighted material in it (licensed or otherwise). It is not clear what would be the damages for doing so. Additionally if the policy’s enforcement mechanism is simply to encourage faculty to deposit, no faculty member would ever be forced to deposit an article, only encouraged to do so.

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<sup>1</sup> Visual Resources Association: Statement on the Fair Use of Images for Teaching, Research, and Study, p. 8 (at [http://www.collegeart.org/ip/ip\\_fair\\_use](http://www.collegeart.org/ip/ip_fair_use)).

Further, the proposed remedies for this perceived risk are unfeasible. Allowing opt-out from deposit effectively neutralizes the policy, making it little more than a resolution in favor of open access (which the Academic Council has already passed, in 2009). Creating an exclusion also seems impossible, either in the specific case of art history, or in the general case of authors who use copyrighted material in their publications. The former would be difficult to make precise, since there are many different departments and institutes in the UC system in which art historians operate, and many art historians in non-art history departments. The latter would effectively exclude everyone in all disciplines who use any copyrighted materials in their work.

On balance, while this issue is obviously one that needs attention, it is not one that the proposed OA policy can affect either positively or negatively.