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A MODEL OPEN-ACCESS POLICY

STUART M. SHIEBER

The following is a model open-access policy in the Harvard style — with a freely waivable rights-retaining license and a deposit requirement. This language is based on and informed by the policies voted by several Harvard faculties, as well as MIT, Stanford University School of Education, Duke University, and others. I have added some annotations explaining why the wording is chosen as it is.

Further information explaining the motivation for and implementation of the Harvard open-access policies is available at the web site of Harvard's Office for Scholarly Communication (<http://osc.hul.harvard.edu/>). Extensive information about good practices for university open-access policies is provided in a widely endorsed guide from the Harvard Open Access Project (<http://bit.ly/goodoa>). Inquiries about the policy and this model language can be made to osc@harvard.edu.

We would greatly appreciate your help in assessing how institutions are using the model open-access policy and how it could be improved. Please let us know how you are using the model policy at <http://bit.ly/modelfb>.

This document will be updated over time as further refinements are made to the policy. This is revision 1.12 of December 18, 2015, 18:49:36. This work is licensed under a Creative Commons Attribution 4.0 International License.

1 The Faculty of *<university name>* is committed to disseminating the fruits
2 of its research and scholarship as widely as possible. In keeping with
3 that commitment, the Faculty adopts the following policy: Each Faculty
4 member grants to *<university name>* permission to make available his or
5 her scholarly articles and to exercise the copyright in those articles. More
6 specifically, each Faculty member grants to *<university name>* a nonexclu-
7 sive, irrevocable, worldwide license to exercise any and all rights under
8 copyright relating to each of his or her scholarly articles, in any medium,
9 provided that the articles are not sold for a profit, and to authorize others

10 to do the same. The policy applies to all scholarly articles authored or co-
11 authored while the person is a member of the Faculty except for any articles
12 completed before the adoption of this policy and any articles for which
13 the Faculty member entered into an incompatible licensing or assignment
14 agreement before the adoption of this policy. The Provost or Provost's des-
15 ignate will waive application of the license for a particular article or delay
16 access for a specified period of time upon express direction by a Faculty
17 member.

18 Each Faculty member will provide an electronic copy of the author's
19 final version of each article no later than the date of its publication at no
20 charge to the appropriate representative of the Provost's Office in an ap-
21 propriate format (such as PDF) specified by the Provost's Office.

22 The Provost's Office may make the article available to the public in an
23 open-access repository. The Office of the Provost will be responsible for in-
24 terpreting this policy, resolving disputes concerning its interpretation and
25 application, and recommending changes to the Faculty from time to time.
26 The policy will be reviewed after three years and a report presented to the
27 Faculty.

EXPLANATORY NOTES

line 1, *disseminating the fruits of its research and scholarship as widely as possible:*

The intention of the policy is to promote the broadest possible access to the university's research. The preamble emphasizes that the issue is access, not finances.

line 4, *grants:* The wording here is crucial. The policy causes the grant of the license directly. An alternative wording, such as "each faculty member shall grant", places a requirement on faculty members, but does not actually cause the grant itself.

line 5, *scholarly articles:* The scope of the policy is scholarly articles. What constitutes a scholarly article is purposefully left vague. Clearly falling within the scope of the term are (using terms from the Budapest Open Access Initiative) articles that describe the fruits of scholars' research and that they give to the world for the sake of inquiry and knowledge without expectation of payment. Such articles are typically presented in peer-reviewed scholarly journals and conference proceedings. Clearly falling outside of the scope are a wide variety of other scholarly writings such as books and commissioned articles, as well as popular writings, fiction and poetry, and pedagogical materials (lecture notes, lecture videos, case studies).

Often, faculty express concern that the term is not (and cannot be) precisely defined. The

concern is typically about whether one or another particular case falls within the scope of the term or not. However, the exact delineation of every case is neither possible nor necessary. In particular, if the concern is that a particular article inappropriately falls within the purview of the policy, a waiver can always be obtained.

One tempting clarification is to refer to scholarly articles more specifically as “articles published in peer-reviewed journals or conference proceedings” or some such specification. Doing so may have an especially pernicious unintended consequence: With such a definition, a “scholarly article” doesn’t become covered by the policy until it is published, by which time a publication agreement covering its disposition is likely to already have been signed. Thus the entire benefit of the policy’s nonexclusive license *preceding* a *later* transfer of rights may be vitiated. If clarifying language along these lines is required, simultaneously weaker and more accurate language can be used, for instance, this language from Harvard’s explanatory material (also used above): “Using terms from the Budapest Open Access Initiative, faculty’s scholarly articles are articles that describe the fruits of their research and that they give to the world for the sake of inquiry and knowledge without expectation of payment. Such articles are typically presented in peer-reviewed scholarly journals and conference proceedings.”

line 6, *grants*: Again, not “shall grant”.

line 7, *exercise any and all rights under copyright*: The license is quite broad, for two reasons. First, the breadth allows flexibility in using the articles. Since new uses of scholarly articles are always being invented — text mining uses being a prime example — retaining a broad set of rights maximizes the flexibility in using the materials. Second, a broad set of rights allows the university to grant back to an author these rights providing an alternative method for acquiring them rather than requesting them from a publisher.

Even though the university is being allowed to exercise a broad set of rights, it is not required to exercise them. Universities are free to set up policies about which rights it will use and how, for instance, in making blanket agreements with publishers. For example, a university may agree to certain restrictions on its behavior in return for a publisher’s acknowledgement of the prior license and agreement not to require addenda or waivers. Harvard has provided a model agreement of this type as well: <http://osc.hul.harvard.edu/docs/model-pub-agreement-090430.pdf>.

line 9, *not sold for a profit*: This term may be preferable to the vaguer term “noncommercial”. The intention is to allow uses that involve recouping of direct costs, such as use in coursepacks for which photocopying costs are recovered. Given that open access availability allows seamless distribution using a medium with essentially zero marginal cost, even this level of commercial activity may not be needed. Indeed, Harvard has

stipulated in agreements with publishers that it will refrain even from cost-recouping sales: “When Harvard displays or distributes the Article, Harvard will not charge for it and will not sell advertising on the same page without permission of Publisher. Even charges that merely recoup reproduction or other costs, and involve no profit, will be forbidden.” Allowing cost recovery does provide an additional set of rights that can be negotiated in this way. Alternatively, the policy can eschew all sales if deemed preferable, in which case, the phrase “for a profit” can be dropped.

line 9, *authorize others*: The transferability provision allows the university to authorize others to make use of the articles. For instance, researchers can be authorized to use the articles for data mining. The terms of use of the institution’s repository can take advantage of transferability to make available an appropriately scoped set of rights automatically for articles covered by the policy. The Harvard DASH terms of use (<http://osc.hul.harvard.edu/dash/termsofuse>) provides an example.

Most importantly, the transferability provision allows the university to transfer the broad rights in the policy *back to the author*, so that authors can legally distribute their articles from their own web sites (as they often do illicitly now), to use them for their classes, to develop derivative works, and the like. In that sense, the policy leads to authors retaining rights, not just universities obtaining rights.

line 10, *do the same*: This ordering of phraseology, introduced in the MIT policy, makes clear that the transferability provision applies both to the retained rights and the noncommercial limitation.

line 11, *articles completed before the adoption*: Application of the license retroactively is problematic, and in any case suspect. This clause makes clear that the license applies only prospectively.

line 14, *Provost*: The model language is envisioned as a university policy, where the university academic arrangements are overseen by a Provost. For a school-wide policy within a university, with oversight by a Dean, some occurrences of “Provost” may be replaced by “Dean” where appropriate, as was done in the Harvard policies.

line 15, *will waive*: Not “may waive”. The waiver is at the sole discretion of the author. This broad waiver policy is important for the palatability of the policy. It is perhaps the most important aspect of this approach to open-access policies. The ability to waive the license means that the policy is not a mandate for rights retention, but merely a change in the default rights retention from opt-in to opt-out.

Many of the concerns that faculty have about such policies are assuaged by this broad waiver. These include concerns about academic freedom, unintended effects on junior

faculty, principled libertarian objections, freedom to accommodate publisher policies, and the like. Some may think that the policy would be “stronger” without the broad waiver provision, for instance, if waivers were vetted on some basis or other. In fact, regardless of what restrictions are made on waivers (including eliminating them entirely) there is always a de facto possibility of a waiver by virtue of individual faculty member action demanding an exception to the policy. It is far better to build a safety valve into the policy, and offer the solution in advance, than to offer the same solution only under the pressure of a morale-draining confrontation in which one or more piqued faculty members demand an exception to a putatively exceptionless policy.

In any case, with several years of experience with these policies, it has become clear that waiver rates are exceptionally low even with this completely open waiver provision.

line 15, *license*: The waiver applies to the license, not the policy as a whole. The distinction is not crucial in a pragmatic sense, as it is generally the license that leads to waiver requests, not the deposit aspect of the policy, and in any case, an author has a de facto waiver possibility for the deposit aspect by merely refraining from making a manuscript available. Nonetheless, if it is possible to use this more limited formulation, it is preferable in reinforcing the idea that all articles should be deposited, whether or not a waiver is granted and whether or not they can be distributed.

line 15, *delay access*: Duke University pioneered the incorporation of an author-directed embargo period for particular articles as a way of adhering to publisher wishes without requiring a full waiver. This allows the full range of rights to be taken advantage of after the embargo period ends, rather than having to fall back on what the publisher may happen to allow. Since this is still an opt-out option, it does not materially weaken the policy. An explicit mention of embargoes in this way may appeal to faculty members as an acknowledgement of the prevalence of embargoes in journals they are familiar with.

line 16, *express*: An author must direct that a waiver be granted in a concrete way, but the term “express” is preferred to “written” in allowing, e.g., use of a web form for directing a waiver.

line 16, *direction*: This term replaced an earlier term “request” so as to make clear that the request cannot be denied.

line 18, *author’s final version*: The author’s final version—the version after the article has gone through peer review and the revisions responsive thereto and any further copyediting in which the author has participated—is the appropriate version to request for distribution. Authors may legitimately not want to provide versions earlier than the final version, and insofar as there are additional rights in the publisher’s definitive version beyond the

author's final version, that version would not fall within the license that the author grants.

line 19, *no later than the date of its publication*: The distribution of articles pursuant to this policy is not intended to preempt journal publication but to supplement it. This also makes the policy consistent with the small set of journals that still follow the Ingelfinger rule. An alternative is to require submission at the time of acceptance for publication, with a statement that distribution can be postponed until the date of publication.

line 26, *reviewed*: Specifying a review makes clear that there will be a clear opportunity for adjusting the policy in light of any problems that may arise.