

**ACADEMIC SENATE
OF
THE CALIFORNIA STATE UNIVERSITY**

AS-3376-19/FA (Rev)
March 14-15, 2019

**RESOLUTION IN SUPPORT OF FACULTY PUBLICATION RIGHTS WITH A
GREEN OPEN ACCESS POLICY FOR THE CALIFORNIA STATE UNIVERSITY**

- RESOLVED:** That the Academic Senate of the California State University (ASCSU) strongly encourages the Office of the Chancellor to instruct its Intellectual Property legal experts to review the Harvard and University of California (UC) Open Access policies in consultation with legal experts at Harvard and the UC, and to share the results of that review in a report by August 2019; and be it further
- RESOLVED:** That the ASCSU strongly encourage the Office of the Chancellor to create and approve a Harvard-UC Style Model Open Access policy by October 2019 that can be approved at each university within the CSU; and be it further
- RESOLVED:** That the ASCSU strongly encourage the Office of the Chancellor to create an Open Access Policy by February 2020 that extends to all CSU employees, akin to the UC Presidential Open Access Policy; and be it further
- RESOLVED:** That the ASCSU distribute this resolution to the CSU Board of Trustees, CSU Chancellor, CSU campus Presidents, CSU campus Senate Chairs, CSU campus Senate Executive Committees, CSU Provosts/Vice Presidents of Academic Affairs, CSU campus articulation officers, the California Faculty Association (CFA), California State Student Association (CSSA), Emeritus and Retired Faculty and Staff Association (ERFSA), Academic Senate for the California Community Colleges, Academic Senate of the University of California, California Community Colleges' Board of Governors, and the University of California Board of Regents.

***RATIONALE:** The taxpayers, students, alumni, and donors who fund the California State University deserve to have reliable and perpetual access to the articles written by our faculty. Most grant funders, both non-governmental and governmental – including the State of California – have adopted mandates or laws requiring the deposit of grant-funded articles in open access repositories.*

Similarly, faculty working on government contracts are often required to publish their work in an open access format. Open access articles provide additional resources to make education more affordable for students, in concert with the Affordable Learning Solutions initiatives of the State of California and the California State University. The Office of the Chancellor has already committed significant staff and technical resources to the development of a system-wide open access repository (CSU ScholarWorks) whose content will require legal licenses to host. The California State University, which strives to be a national model of public comprehensive higher education, would benefit from broader international awareness of our scholarly research. Two universities in the California State University system have passed such policies in their Academic Senate committees, policies in need of formal review by the Chancellor's Office. Such policies mitigate legal risk for faculties and universities, as we increasingly share and/or host scholarly articles on publicly accessible websites. Faculties across leading universities have adopted comparable open access policies to protect themselves and their articles, Faculty often unnecessarily sign away all copyright of their articles to publishers, when faculty can easily and collectively reserve those rights. Articles deposited in open access repositories are read and cited more quickly and broadly by scholars and the general public, furthering the pace and breadth at which scholarly knowledge is shared. Open access articles help bridge the information divide between persons affiliated with wealthy institutions and the majority of the world's population who lack such privilege.

Approved Unanimously – May 16-17, 2019

UNIVERSITY OF CALIFORNIA

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OFFICE OF THE PRESIDENT
California Digital Library415 20th Street
Oakland, California 94612

March 14, 2019

The California State University
Office of the Chancellor, Academic Senate
401 Golden Shore
Long Beach, CA 90802

Dear Statewide Senate of the California State University,

I am an attorney who specializes in copyright. I work at the University of California and have supported authors covered by our institutional open access policies since 2013.

Institutional open access policies like ours have become increasingly common since the first one was passed at Harvard in 2008. They operate by granting a broad nonexclusive copyright license from each author to the university in all scholarly articles written by the author following the policy's adoption. This pre-existing license then survives whatever subsequent agreements university authors later sign with publishers (even those transferring copyright), unless an author obtains a policy waiver for a particular article. The university and the author then rely on the rights granted in the policy's license to share the article in an open access repository, rather than looking to the rights granted in a particular publishing agreement.

The legal soundness of this practice is noncontroversial and the risk to universities adopting such policies is extremely small. The one law review article on the subject¹ concludes that such policies “create in universities effective, durable nonexclusive licenses to archive and distribute faculty scholarship and permit the university to license others to do the same.” The University of California notified approximately 200 publishers about our 2013 policy; a few publishers routinely require that authors get waivers, but not a single one asserted that without a waiver an author or the university would be violating contract or copyright law by distributing the article.

UC's institutional repository,² where the articles are made publicly accessible, hosts over 40,000 articles covered by our OA policies as well as about 60,000 other articles previously published in journals. We have received only seven copyright complaints since eScholarship was launched in 2002, covering 43 articles.³ All of them were standard DMCA takedown notices, which we resolved with minimal fuss by removing the articles. All of them objected to the version the author posted rather than the article in general; if the authors had posted the authors' final manuscript versions as

¹ Eric Priest, *Copyright and the Harvard Open Access Mandate*, 10 Nw. J. Tech. & Intell. Prop. 377 (2012).
<https://scholarlycommons.law.northwestern.edu/njtip/vol10/iss7/1>

² <https://escholarship.org/>

³ We have shared information on these notices publicly. See <https://osc.universityofcalifornia.edu/2017/09/apa-dmca-notices/>

instructed by the OA policy rather than the publisher's formatted PDF we wouldn't have received even these notices.

Since Harvard faculty passed their policy in 2008 they've been joined by dozens of other institutions, including Caltech, Florida State, Oberlin, MIT, Princeton, and the University of Arizona, and none of them have ever reported legal problems as a result. It would be wonderful to see the universities of the CSU system added to the list so that the important scholarship being written by its faculty can be freely read by Californians and the rest of the world.

Sincerely,

A handwritten signature in black ink, appearing to read 'Katie Fortney', with a stylized flourish at the end.

Katie Fortney, J.D., M.L.I.S.

katie.fortney@ucop.edu

Copyright Policy & Education Officer

California Digital Library

UC Office of the President

415 20th Street, 4th Floor

Oakland, CA 94612

cc: Angus MacDonald, Senior Counsel, Intellectual Property, UCOP Office of General Counsel



HARVARD LIBRARY

Office for Scholarly Communication

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T 617.495.4089
<https://osc.hul.harvard.edu/>

The California State University
Office of the Chancellor, Academic Senate
401 Golden Shore
Long Beach, CA 90802

To whom it concerns,

I write in support of the efforts by California State University, Fullerton, to adopt a rights-retention or "Harvard-style" open-access policy. As I understand it, there are questions on campus about the legal soundness and operation of this kind of policy. I hope the following points will help address those questions.

1. Harvard pioneered the "rights-retention" approach to university OA policies. Today every one of Harvard's nine schools has such a policy, each one approved by Harvard's Office of the General Counsel.
2. The first was adopted by our Faculty of Arts and Sciences in February 2008. In our 11 years of experience, the OA policies have caused no legal problems whatsoever. Our OA repository has received no takedown notices from publishers. The institution has not been sued or threatened with suits for implementing these policies. Our authors have not been sued or threatened with suits for complying with these policies.
3. Under the policies, Harvard faculty grant the institution nonexclusive rights to their future scholarly articles. They do not grant exclusive rights. In addition, they may obtain a waiver or opt-out for any given work. (This takes 30 seconds on a web form; Harvard grants waivers no-questions-asked.) The waiver option lets faculty decide for or against OA for any given work. In that sense, the policies only change the default to OA (or permission for OA), and do not compel OA. The policies are successful because changing the default tends to change behavior on a large scale. Our waiver rate is below 5%.
4. Some lawyers who look at our policies don't realize that we ask authors to affirm their school's policy in writing. That counts as a "written instrument" for the purposes of 17 USC 205(e). For more details, see this section of our guide to good practices for university OA policies.
https://cyber.harvard.edu/hoap/Implementing_a_policy#Individualized_writing
5. Two legal studies have analyzed the Harvard rights-retention approach, and both concluded that it is legally sound. See:
 - * Simon Frankel and Shannon Nestor, "Opening the Door: How Faculty Authors Can Implement an Open Access Policy at Their Institutions," a white paper from SPARC and Science Commons, August 2010.
<http://sciencecommons.org/wp-content/uploads/Opening-the-Door.pdf>
 - * Eric Priest, "Copyright and the Harvard Open Access Mandate," Northwestern Journal of Technology and Intellectual Property, vol. 10, no. 7, 2012.
<https://scholarlycommons.law.northwestern.edu/njtip/vol10/iss7/1/>

Also see Stuart Shieber's blog post on Priest's article, "Is the Harvard open-access policy legally sound?" The Occasional Pamphlet, September 17, 2012.

<https://blogs.law.harvard.edu/pamphlet/2012/09/17/is-the-harvard-open-access-policy-legally-sound/>

In case it counts as a third example along these lines, the OA policy at Harvard Law School was adopted by a unanimous faculty vote (May 2008).

6. There are many benefits to a rights-retention OA policy. But the main one is that it solves the copyright or permission problem. An institutional OA policy may encourage or require deposit of new work in the institutional repository. But in many or most cases, the institution will not have permission to make those works OA. It must deposit them "dark" (non-OA), hold them in an offline queue, or spend funds on staff time to seek permission from publishers. By adopting a rights-retention policy, the school always has permission to provide OA to articles published after the adoption of the policy, except when the authors have obtained waivers. After that, the chief task is to gather copies of the new work. That task is not easy and every school with an OA policy must deal with it. But schools with rights-retention policies only face one problem (the gathering problem), not two (the gathering problem and the copyright problem).

Here's a list of the Harvard OA policies, in case you'd like to study the language directly. The nine separate school policies are essentially identical.

<https://osc.hul.harvard.edu/policies/>

If I can answer any questions, please just let me know.

Best,



Peter Suber
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The California State University
Office of the Chancellor, Academic Senate
401 Golden Shore
Long Beach, CA 90802

March 14, 2019

To the Academic Senate of the California State University:

I am writing to support the adoption of an open access policy for the California State University system. In my capacity as an academic librarian and an attorney, I have extensive background with these policies; I helped shepherd such a policy through the Academic Council at Duke University in 2010, where it was adopted unanimously. As Dean of Libraries at the University of Kansas since 2016, I now serve the first public university in the United States to adopt open access as a faculty policy. At both institutes, these policies have provided benefits to both faculty and to the public, without creating additional liability.

Indeed, it is my belief that open access policies that provide a license to the university to place some version of faculty-author articles into an institutional repository actually reduce liability for the university. It is, of course, common for faculty to post their articles on university-controlled websites. When a university holds a license in such articles that pre-dates any subsequent transfer of rights, the risk of liability for copyright infringement because of this common practice is lessened.

Based on the membership of COAPI, the Coalition of Open Access Policy Institutions, there are more than 75 institutions in the U.S. that have adopted a faculty open access license. In the decade since these institutions began adopting such licenses, there has been no litigation related to materials made available under an OA policy. Instead, publishers have become increasingly willing to work with authors and institutions to improve access to scientific and scholarly writings. It is now undisputed, I believe, that open access is the future of scholarly dissemination, and university-based policies offer faculty authors an opportunity to take better control of that future.

As a faculty member myself at a university with a public mission, I remain firmly convinced that widespread open access benefits our authors and serves our mission. It is far too easy today to find falsehood and junk science on the Internet; open access policies are our opportunity to redress that fact with solid, research-based information. The tremendous public benefit of these policies, combined with the lack of real legal risk, makes the adoption of OA policies, I hope, an easy decision.

Sincerely,

A handwritten signature in black ink, appearing to read "Kevin L. Smith".

Kevin L. Smith, M.L.S., J.D.
Dean of Libraries
University of Kansas