

University of Maryland, College Park

Equitable Access to Scholarly Articles Authored by University Faculty

DRAFT ONLY – REVISED VERSION: 9/16/21 – STILL UNDER REVIEW

I. Purpose

The University of Maryland is committed to disseminating its knowledge and research as widely as possible. In furtherance of its land-grant mission of teaching, research, and public service, the University adopts this policy of *Equitable Access to Scholarly Articles Authored by University Faculty* to increase the visibility, readership, and impact of the University of Maryland's Scholarly Articles, and to ensure that the Scholarly Articles are permanently available in the University's digital repository to readers and researchers worldwide.

II. Definitions

A. University Faculty

For this policy, University Faculty shall include individuals who receive a salary or other consideration from the University for performance of services on a benefits-eligible basis and who also hold faculty rank, including tenure-stream, permanent-status-stream, and PTK faculty.

B. Scholarly Article

A Scholarly Article is a work that describes the fruits of University Faculty members' scholarship and research; is deemed a form of "Traditional Works of Scholarship" in *IV-3.20(A) UNIVERSITY OF MARYLAND INTELLECTUAL PROPERTY POLICY*; and is given to the world for the sake of inquiry and knowledge by the University Faculty member without expectation of payment. Such articles are typically presented in peer-reviewed scholarly journals and conference proceedings.

C. Author Accepted Manuscript

The Author Accepted Manuscript (AAM) is the version of a Scholarly Article that has undergone peer review and has been accepted for publication by the publisher.

D. University

The University of Maryland, College Park.

E. University Libraries

The University of Maryland Libraries, College Park, is identified as the "University Libraries," and is the unit charged with ensuring that the Scholarly Articles addressed in this policy are collected, organized, provided, and preserved. The University Libraries administers and manages

the University's digital repository, which enables discoverability of and equitable access to the Scholarly Articles.

F. Equitable Access

For the purposes of this policy, equitable access refers to the removal of permission and cost barriers related to the open discoverability, retrieval, and use of UMD's scholarly articles.

III. Policy

A. Equitable Access License

Equitable access to Scholarly Articles will be achieved by an Equitable Access License. Each University Faculty member grants permission to the University of Maryland to make available their Scholarly Articles to the public. Specifically, each University Faculty member grants an irrevocable, worldwide, royalty-free, nonexclusive license to exercise any and all rights under copyright relating to each of their Scholarly Articles, in any medium now known or later developed, and to authorize others to do the same for the purpose of making Scholarly Articles widely available to the public ("Equitable Access License"), provided that the articles are not sold for a profit. This policy does not transfer copyright ownership of Scholarly Articles to the University. Copyright ownership remains with University Faculty as described in *IV-3.20(A) UNIVERSITY OF MARYLAND INTELLECTUAL PROPERTY POLICY*, subject to this Equitable Access License.

B. Scope

This policy applies to all Scholarly Articles authored or co-authored by a University Faculty member, except for any articles completed before the adoption of this policy and any articles for which the University Faculty member entered into an incompatible licensing or assignment agreement before the adoption of this policy. See Section III.D below for information about opting-out, waivers, and embargoes related to this policy.

C. Deposit

No later than the date of publication for a Scholarly Article, the University Faculty member will provide an electronic copy of the University Faculty member's Author Accepted Manuscript to the University Libraries, at no charge, in an appropriate format (such as PDF). Questions about deposit should be referred to the University Libraries. The University will make the Scholarly Article available to the public in an open access repository.

D. Opt-Out / Waiver / Embargo

Upon written direction by a University Faculty member submitted to the University Libraries, the Equitable Access License will be waived by the University for that Scholarly Article. Upon written direction by a University Faculty member submitted to the University Libraries, access to

a Scholarly Article covered under this policy will be removed, delayed, or embargoed for a specified period of time.

E. Policy Interpretation/Changes

The Office of the Senior Vice President and Provost will be responsible for interpreting this policy, resolving disputes concerning its interpretation and application, and recommending policy changes as needed.

END OF PROPOSED POLICY. PLEASE SEE NOTES THAT FOLLOW.

ADDITIONAL NOTES TO FACILITATE REVIEW OF POLICY

Further Information:

For questions, additional detail, or help with compliance with this Policy, please contact the University Libraries at libadmin@umd.edu.

Related Policies and Documents

USM's *Statement Supporting Open Access Dissemination of Scholarship*, 2017
<https://www.usmd.edu/newsroom/docs/USMOpenAccessStatement.pdf>

UMD's Intellectual Property Policy
<https://policies.umd.edu/assets/section-iv/IV-320A.pdf>

Berlin Declaration on Open Access to Knowledge in the Sciences and Humanities, 2003,
<https://openaccess.mpg.de/Berlin-Declaration> with signatories including UMD:
<https://openaccess.mpg.de/319790/Signatories>

EXPLANATORY NOTES NOT PROPOSED AS PART OF THE POLICY BUT PROVIDED HERE ONLY TO FACILITATE REVIEW OF THE DRAFT (content adapted from Harvard University's Office of Scholarly Communication)

Section I, Lines 5-10, regarding disseminating knowledge and research 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.

Section III, A, Line 46, use of the word "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.

Section III, A and B, Scholarly Articles: The scope of the policy is scholarly articles. 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.

Section III, A, Line 47-48, 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>.

Section III, A, Line 50-51, 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 course packs 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.

Section III, A, Line 49, 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/termsfuse>) 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.

Section III, A, Line 49, authorize others to 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.

Section III, B, 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.

Section III, D, Line 71, will be waived: Not "may be waived." 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.

Section III, D, General note about the waiver of 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.

Section III, D, Lines 73-74, will be delayed: 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.

Section III, C, Line 65, University Faculty member's Author Accepted Manuscript (AAM):

The author-accepted 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 AAM, and insofar as there are additional rights in the publisher's definitive version beyond the AAM, that version would not fall within the license that the author grants.

Section III, C, Line 64, no later than the date of 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.

Section III, E, Policy Interpretation/Changes: Specifying a review makes clear that there will be a clear opportunity for adjusting the policy in light of any problems that may arise.

See the FAQ for this policy at: <https://pact.umd.edu/key-issues/equitable-access-policy-faq>.

DRAFT REVISION NOTES: Revised after PACT review on 2/8/21; Revised after Library Forum on 2/11/21; Revised after PACT review on 7/16/21; Submitted for second legal review on 7/19/21. Revised after OGC final review and PACT discussion on 9/16/21.