

Copyright, Scholarship, and Institutional Open-Access Mandates

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For many, making works of scholarship universally accessible and free of journal subscription fees aligns with the noblest goals of higher education. The internet provides the technology platform to globally distribute open access scholarship, and some studies indicate that articles made freely available on the internet enjoy substantial boosts in readership and citations. Open access scholarship might appear to be a win-win for faculty authors (and by extension their universities), readers, and university libraries increasingly under budget pressures from skyrocketing commercial journal prices, but the movement faces profound challenges.

In most fields, commercial publishers own the most esteemed journals. Scholars, concerned with tenure, promotion, and prestige, seek to publish in top journals, and are usually willing to do so according to a journal's terms. Open access scholarship threatens commercial publishing business models, and many journals refuse to accept previously published works (including works freely distributed on the internet) or deny or restrict an author's right to post a "post-publication" version the article online. Some scholars argue that universities and research funding institutions have the leverage and incentives that individual authors lack to extract from publishers terms that best facilitate open access to scholarship.

Short of claiming outright ownership of faculty copyrights under the work for hire doctrine, as some legal scholars recommend, what role can universities play in promoting open access and how proactive can universities be in the dissemination of faculty scholarship before they encounter significant copyright-related risks? Some universities, including Harvard, have enacted official policies that purport to "require" faculty to make scholarly publications available for open access by granting the university, solely by virtue of the policy's existence, a nonexclusive, noncommercial right to copy and distribute each faculty member's work, subject to the faculty member's right to opt out of the policy for a particular work upon request. Harvard's policy has become a template for other institutions seeking to promote open access scholarship, but is fraught with copyright and policy questions. What if publishers, already hostile to the open access movement and facing declining revenue, become litigious and challenge the open distribution of works for which they claim copyright ownership but were ostensibly previously licensed for open distribution under this model? Do universities actually hold the rights they purport to, and what if they don't?

On one hand, a mandatory open-access policy promotes and facilitates the development of open access scholarship by eliminating the tedious and politically perilous exercise of seeking express—and ideally written and signed—licenses from all faculty. Adoption of such policies does increase the number of articles faculty submit to open-access repositories and increases awareness of open access among faculty and the general public. But the model doesn't square well with a number of Copyright Act provisions, including the Act's preference for written and signed licenses (for example, Section 205(e), which grants a nonexclusive license evidenced by a signed writing priority over a subsequent transfer of copyright ownership), its termination of transfer rules, and its work made for hire rules.

Examining the relevant rules-in-use suggests that the state of copyright ownership in faculty scholarship is an indeterminate mess. I argue this is attributable at least in part to a certain kind of uniformity cost: the Act's "one size fits all" economic conception of copyright. The Act's awkward fit with nonmarket production models creates uncertainty about ownership and permissions relating to works created under such models, including scholarship. This uncertainty creates palpable risk for universities that post faculty scholarship in institutional open-access repositories, and that threatens to chill efforts to involve universities in the open access movement. On the other hand, uncertainty and ill fitting top-down rules engender experimentation by institutions (the "Harvard" open access policy and Creative Commons are examples). These "locally developed" rules are aimed not at the allocation of economic rights (something dealt with squarely in the statute) but rather the governance of a commonly-held resource—information. This kind of experimentation benefits copyright law when it aims to fill gaps not conceived of by Congress and is consistent with the utilitarian goal of information dissemination, and I discuss the implications for courts as well as for copyright reform efforts.