HARVARD-STYLE OPEN ACCESS POLICIES: A LEGAL AND ETHICAL QUAGMIRE

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Abstract. Many university open access policies are based on the faculty granting a share of copyright to all their articles to the school. We suggest that this approach to open access policy forces large numbers of faculty to regularly commit legal and ethical violations with unknown consequences, and that exploring alternative approaches is necessary.

1. Introduction

Open access in academic publishing is a complex multi-faceted issue. I will only discuss one aspect of this issue here, namely the institutional open access policies of colleges and universities. The first such policy was adopted in 2008 by Harvard’s Faculty of Arts & Sciences, [5, p. 56]. Since then hundreds of colleges and universities around the world have adopted similar policies, and the process is ongoing. Many of these policies are closely based on Harvard’s model [3].

2. Outline of a Harvard-style model

A Harvard-style open-access policy sets up an institutional open access repository with the goal of depositing as many as possible "post-peer-review" or actual published versions of faculty articles in that repository, where those articles are made freely available to the public. To accomplish this goal, the school declares that each faculty member grants to the school a nonexclusive copyright for all of his/her scholarly articles. This grant precedes, by design [2], the submission of an article for publication. Therefore, in case of subsequent dispute, the grant to the school takes precedence over any subsequent transfer of the copyright from the faculty author to the publisher. A Harvard-style policy always contains a provision by which a faculty member can request a waiver/opt-out from the policy for a particular paper. Once requested, such a waiver is granted automatically and the action of requesting a waiver restores the faculty member’s complete and unencumbered copyright to the article. The faculty member can then proceed with publishing this article anywhere without problems.
When an author publishes an article in a journal, he/she has to complete the publisher’s ”Consent to Publish and Copyright Agreement”. The great majority of journal articles are still published in non-open-access format, see [1, p. 530]. Most non-open-access copyright agreements explicitly allow the author to post a preprint or post-peer-review version of the paper on an preprint server and in open access institutional repository. The stated intent of Harvard-style open access policies is that the faculty author exercise this option if the journal’s copyright agreement permits it. The policies envision that a waiver will only be needed rarely, in unusual situations where the journal’s copyright agreement is incompatible with the school’s policy. Nevertheless, the faculty are allowed to request waivers for any other reason, such as philosophical disagreement with the policy, ethical objections, etc. Typically, the school’s library staff are charged with implementing the open access policy and helping the faculty understand what the publisher’s copyright agreements mean. On the surface, this system looks reasonable and flexible.

3. Legal and ethical burdens imposed on the faculty by the Harvard-styled model

But, as we well know, appearances can be deceiving, and that is the case here. I believe it was a major mistake for Harvard and the institutions that followed its example to implement an open access policy via the instrument of the copyright law. That decision meant that the question of compatibility of the school’s open access policy and the publisher’s copyright agreement became first and foremost a legal question. Answering this question requires professional legal expertise in specialized matters of copyright law. The faculty members are not qualified to make these decisions, and neither are the school library staff members charged with helping the faculty to navigate this issue. The same applies to the staff members at most journal publishers. Journal copyright agreements are written using complicated technical legal jargon. The staff members at journal publishers understand only a small fraction of this jargon; they can usually answer narrow logistical questions about allowed use but they most definitely cannot answer most of substantive legal questions.

For example, when a faculty member publishes an article in a non-open-access format, that faculty member has to sign a “Consent to publish and copyright agreement” with the publisher. In the agreement the author agrees to transfer to the publisher certain specific copyrights to publish and distribute the paper, subject to some conditions. Often the phrase “exclusive rights” is used. In the agreement the author swears that he/she has complete and unencumbered possession of the copyrights that he/she agrees to transfer to the publisher. But, assuming that the faculty member did not request a prior waiver for that paper
from the school’s open access policy, his/her copyrights to the paper have already been encumbered by the prior grant to the school by virtue of the school’s open access policy. This prior grant raises the following legal question: Does the faculty member still possess sufficient copyrights to his/her article required to be able to make the above attestation and to legally enter into the copyright transfer agreement with the publisher? The answer depends on the precise legal language used in the copyright agreement in terms of which rights exactly the faculty member agrees to transfer to the publisher, plus also on the exact language of the school’s open access policy in terms of what rights have been granted to the school. The copyright agreements vary greatly from publisher to publisher, and only a highly experienced copyright lawyer can figure out what’s what here. When I attempted to obtain the answer to this question from several journal publishers in relation to their copyright agreements and the text of the recently adopted UI open access policy, the publishers declined. They opined that this was a question for copyright lawyers, and that it was ultimately the author’s responsibility to ensure that the author was in full possession of the legal rights to the article required to sign the agreement. They indicated that they viewed the matter as separate from the issue of allowed use of the paper by the author, which they were happy to discuss.

Most universities with Harvard-style open access policies appear to be either unaware of this issue or choose to ignore it. Since their library staff and the publisher staff are not able to help the faculty with resolving this legal ambiguity (assuming the faculty are aware of the issue at all), the faculty end up signing the copyright agreements in many cases without possessing the requisite legal rights to do so, thus breaking the law. The legal repercussions of this situation, for the school, the faculty members, the publishers and the copyright agreement itself, appear unknown and unexplored. There is a significant possibility that the faculty are exposing themselves to legal jeopardy, as well as committing additional violations of state law and state ethics regulations in some cases.

Even if the faculty member does possess the requisite rights to the article, the issue of legal compatibility of the journal copyright agreement and the school’s policy is often not a simple matter. For example, the Harvard template contains a key restriction, “provided that the articles are not sold for a profit”, which disallows the school’s commercial use and sale of faculty articles. The University of Illinois open access policy, based on the Harvard template, states that the goal of the grant of the copyright to the UI for the faculty articles is “for the purpose of making his or her scholarly articles widely and freely available in an open access repository”[4]. However, the UI policy replaced the above proviso with the sentence: “Any other systematic uses of the licensed articles by the University of Illinois must be approved by the Campus Senate.” The very existence of this
sentence indicates that in principle other uses, including commercial uses, of the faculty articles by the UI are possible in the future. The legal implications of this variation from the Harvard model language are murky at best. All non-open-access journal copyright agreements and some open-access copyright licenses expressly forbid commercial use of the article by the author and the author’s institution. At least one academic publisher flatly stated to me that in his opinion this fact makes the text of the UI open access policy incompatible “on its face” with the standard copyright agreement of that publisher. One could reasonably argue that the UI policy is legally incompatible with essentially all non-open-access journal publishing agreements, and with many open-access licenses as well.

4. Conclusions

Numerous other legal pitfalls placed by Harvard-style policies in the path of the faculty remain unexplored. We have not even touched on the issues of joint authorship, for example.

The crucial point is that Harvard-style open access policies place an unsustainable legal and ethical burden on the faculty members of determining the legal compatibility of the school’s open access policies with the journal’s copyright agreements. Neither the schools nor the journals are in the position to provide competent legal advice to the faculty on this matter, and they don’t do so in practice.

Technically, there is a solution: In case of doubt the faculty can always request waivers/opt-outs. My point is that, under the Harvard model, the case of doubt applies to almost all articles published in non-open-access format and to many articles published in open access format. If all of the faculty start requesting waivers in these cases (as they should, if they were to act ethically and honestly), that would completely defeat the intent of the policy. Moreover, that’s not what is actually happening. Many faculty members simply ignore the Harvard-style open access policies adopted by their schools, considering them too burdensome. They sign the journal copyright agreements as if the school’s policy did not exist, and often commit legal violations in the process. A significant portion of the faculty do try to comply with the school’s policy. They are usually not aware of the legal pitfalls, may get incomplete, incorrect or incompetent legal advice, do not obtain a waiver/opt-out for the policy, and may sign the copyright agreement in violation of the law. Another, substantial, portion of the faculty, request waivers and many of them do not participate in the implementation of the policy.

Many will argue that these legal violations are too minor and immaterial to worry about, similar to speeding, and that we should concentrate on the bigger picture. Basically that the ends justify the means. I disagree. Here the issue concerns the very core of what we do as scientists and academics. We produce
research and we publish it. I am willing to cede control over many areas of my life to various anonymous and faceless forces. But I do want to understand what happens to the articles I produce and what their legal status is. And I don’t want to be forced by my university to play Russian roulette with the copyright law, even if everybody else is doing it.

There are other ways of designing a school’s open access policy that are not based on using the heavy club of the copyright law. For example, such a policy might say that each faculty member is required to post the latest version of their published article at the school’s open access repository or an external open access repository/preprint server or to the author’s webpage, when and if the publisher’s copyright agreement allows such posting. The language of the policy needs to be sufficiently flexible to allow for multiple ways of compliance, to accommodate differences between disciplines and to allow individual departments to fine-tune the details. No copyright is transferred from the faculty member to the school. This option solves all the legal and ethical problems presented by the Harvard-style open access policies while likely achieving similar if not better results, and more substantive compliance. The issue of legal compatibility of the school’s policy and the publisher’s copyright agreement disappears completely. The faculty members retain complete and unencumbered rights to their work, and are free to sign whatever copyright agreements with the publishers they like.

The bottom line is that there do exist viable alternatives to the Harvard-style approach to universities’ open access policies. We must explore these alternatives.

References


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