



## Executive Summary of Business for Research and Knowledge Exchange Committee

Title	<b>UK Scholarly Communications Licence</b>
Author	Dr Ian Carter (T) 01273 877718 (E) i.carter@sussex.ac.uk
Type	Policy
Date	17/10/16
Strategic context	Publication of high-quality research outputs is a key strategic objective. Doing so whilst making their content publically available is important, and meeting our funders' policy requirements is essential.
Summary	The UK Scholarly Communications Licence is a means by which the University and its authors can meet funders' requirements for open access to their scholarly articles. It is effected through policy rather than by actions for each article. It is an implementation of the approach first introduced in the US by Harvard in 2008.
Resource implications	The way in which the Library teams support the OA process will change, and may create some resource implications.
Consultation	This paper has been made available in advance to HoS and DRKEs for comments and questions. It has also been provided to the relevant trades unions for information.
Effective date of introduction	Changes to policy to be effective from 1 January 2017.
Recommendation	The Committee is invited to <b>RECEIVE</b> the report and <b>RECOMMEND</b> the policy changes for approval.



## Research & Knowledge Exchange Committee

### UK Scholarly Communications Licence

#### A. Introduction

1. The University has been engaging in the development of the UK Scholarly Communications Licence (UK-SCL) since April 2015.
2. The initiative, led by Imperial College and currently involving about 70 institutions, aims to create an Open Access (OA) policy and licence that mirrors the approach introduced in the US by Harvard in 2008, and that can be implemented by each UK institution.
3. In the UK context, the aim is in particular to provide a means by which the Funding Bodies' REF OA requirements can be met, with minimal additional effort.
4. Of those institutions currently engaged, about half are aiming to adopt the policy and licence in late 2016 or early 2017. The more institutions that adopt the policy and licence, the more effective it will be.
5. With thanks to Chris Banks and Torsten Reimer of Imperial College for much of the following content, which derives from a paper for the College's Provost's Board.

#### B. The Context

6. Under the University's policy on intellectual property<sup>1</sup>, the University does not claim its rights of copyright in books or articles for learned journals written by members of staff. Members of staff are therefore able to decide about and responsible for the contractual arrangements with their publishers.
7. On acceptance for publication, authors typically sign away most of their rights to publishers. This has several negative effects:
  - a. It restricts authors' reuse of their own scholarly outputs for teaching and research.
  - b. It puts authors (and the University vicariously) at risk of litigation should authors use their own outputs in ways not allowed by the publisher.
  - c. It means the University retains no rights to most of the scholarly outputs of its researchers.
  - d. It makes compliance with funder open access mandates (in particular HEFCE and RCUK) more difficult or more expensive (where the author is forced to take the "gold" open access option), and in some cases impossible.
  - e. It prevents or delays open access, limiting the availability and impact of University research.
  - f. Management of embargos adds to the workload of the Library team; a substantial proportion of the time of managing repository deposits is occupied in administering publisher embargos.

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<sup>1</sup> The Policy on Exploitation and Commercialisation of Intellectual Property, last revised August 2015.

### **C. The Harvard Policy**

8. In 2008, Harvard's Faculty of Arts & Sciences voted unanimously to adopt a policy that addresses the above issues. Since then 80 similar policies have been adopted by institutions globally, including all of Harvard's faculties and other leading US universities including MIT, California, Princeton, Caltech, Duke, Boston and Illinois at Urbana Champaign, as well as smaller colleges and universities in other countries (Bifröst University, Bryn Mawr College, Jomo Kenyatta University of Agriculture and Technology, KAUST, Nairobi).
9. Under the Harvard policy, academics grant the university a non-exclusive licence to all rights under copyright, except commercial reuse, for all manuscripts of their articles. This licence predates and overrides publisher contracts and allows universities to sub-license to the author. The university can make manuscripts available online for re-use immediately on publication of the article.
10. Where publishers or academics object to the licence they can request a waiver. At Harvard, MIT and similar universities the waiver rate is below 5%. No publisher has refused to accept a paper from any of the institutions that have adopted this policy nor have they legally challenged the licence or deposit. It should be noted that in institutions like Harvard faculty voted in favour of the policy, despite a complete lack of an embargo; academic support was strong across disciplines, and remains so.

### **D. The Legal Context**

11. US and UK copyright law differ. Under English and Scots law, if an author signs an exclusive licence with a publisher after granting a non-exclusive licence in favour of the university, this could make the non-exclusive licence given to the university void. Extensive legal advice was sought for Imperial College and the UK community, working with Research Libraries UK (advice came from Jisc, a copyright consultant, an academic expert, an international law firm, a senior lawyer specialising in IP and commercial law, and College legal services). All agree that the non-exclusive licence grant to the university will stand under UK law, provided the publisher had knowledge, actual or constructive, of the earlier licence grant to the university.
12. To achieve this, those UK universities adopting the model would notify publishers and publisher bodies, both directly but also via Jisc (who negotiate licence deals for UK universities with publishers), sector bodies and the media. This notification will ensure that the non-exclusive licence will stand irrespective of what an academic author signs with the publisher.
13. Technically, if an academic signs an exclusive licence with a publisher they could be in breach of the author's obligations to the publisher on account of "derogation from grant and breach of warranty". However, the legal view is that – with a publisher knowingly accepting a paper, not asking for a waiver and then suing an author – a court would not enforce a breach of contract or warranty claim against the author. In addition, testing the licence in court creates a legal risk for the publisher (if the court rejects the publisher claim case law would be created), on top of a serious reputational risk. It is therefore assumed that the legal risk, whilst not zero, is effectively negligible.

### **E. Academic Consultation**

14. The Harvard model was presented to academics at Imperial College at departmental meetings (usually as part of open access presentations) and at Faculty Research

Committees. It was this early consultation that resulted in the development of the Licence. More recent feedback has been positive throughout, with strong support for regaining control over scholarly outputs and facilitating funder compliance. No substantial concerns have been expressed, although questions were raised on administrative overhead, legal aspects and the waiver process in particular. A minority of academics suggested not to issue waivers at all. Faculty Research Committees expressed a strong interest in discussing a finalised version of the proposed policy.

15. Other institutions have begun dialogue within their academic communities, drawing on Imperial's experience. At Sussex, the Licence was mentioned at the last Research & Knowledge Exchange Committee (24/5/16), but there has been no wide discussion as yet. This paper provides the basis for that dialogue. A draft version was circulated to Heads of School and Directors of Research & Knowledge Exchange during Summer 2016 for comments and questions, with an offer of dialogue and interactions, if required.

## **F. Sector consultation**

16. Imperial has consulted widely with UK universities, in and beyond the Russell Group, sector bodies and funders. Briefing documents have been prepared in consultation with the Russell Group policy office for various RG meetings (VPs (Research), Research Directors and VCs) and the UK-SCL has also been discussed at RLUK board meetings, with RLUK providing funding for the most recent rounds of legal advice on behalf of the whole sector.
17. Apart from universities (see Appendix) there has been active interest from other organisations such as: HEFCE, Jisc, LERU, LIBER, RLUK, SCONUL and the Wellcome Trust, and also the Dutch EU presidency. Several of these organisations are expected to endorse the UK-SCL and a number of LERU institutions are now actively considering implementation.
18. Workshops on policy development and implementation have been held with UK universities and additional comments were sought via (closed) on-line surveys. A closed mailing list has been set up, with 170 subscribers from some 70 institutions. The institutions considering implementing the UK-SCL as a group of early adopters include: Aberystwyth, Birkbeck, Birmingham, Bristol, Cardiff, Dundee, Durham, East Anglia, Edinburgh, Glasgow, Hull, Kent, Leicester, Liverpool, London Business School, Manchester, Nottingham, Nottingham Trent, Oxford Brookes, QUB, Queen Mary London, Reading, Royal College of Music, Sheffield, St Andrews, Stirling, Surrey, Sussex, UCL, Warwick, Wolverhampton, York.
19. Oxford and Cambridge have both been supportive of the initiative but recognise that their IP policies would require change, and their internal mechanisms for implementation mean that if they were to choose to adopt, it would be some years before they would be able to do so.

## **G. Summary of UK-SCL**

20. Under the UK-SCL each member of staff grants the university a non-exclusive, irrevocable, worldwide licence to make manuscripts (i.e. the accepted manuscript) of his or her scholarly articles publicly available under the terms of a Creative Commons Attribution Non-Commercial (CC BY NC) licence. Under this licence, non-commercial reuse is permitted, as long as the author is credited. The university can sub-license these rights to all authors of the paper and their host institutions.

21. The university will make metadata available publicly upon deposit and the manuscript immediately upon publication, whether online or otherwise. On request the university will usually (but does not have to) grant a waiver to these rights, usually for a fixed-term period. (Note: the approach to length(s) of the waiver period are still under discussion.)

## **H. Benefits**

22. Adoption of the UK-SCL has the following benefits:
  - a. Single means by which authors can comply with RCUK, HEFCE and other “green” policies.
  - b. Ensures academics can continue to publish in their journal of choice irrespective of whether the journal allows open access or not.
  - c. Significantly reduces reliance on exceptions to ensure outputs remain eligible for the REF.
  - d. Authors do not need to negotiate with publishers directly.
  - e. Reduced costs for compliance and REF eligibility (minimise effort for embargo handling and checking of publisher policies).
  - f. The university retains appropriate rights on a significant part of its scholarly output.
  - g. A larger share of university outputs would be available freely, and sooner than currently, thereby increasing the impact of university research.
  - h. The university would likely receive further credit in the “research environment” component of the next REF for going beyond the minimum policy requirements (although widespread implementation of UK-SCL would negate this).
  - i. Minimises reliance and expense on hybrid open access publishing:
    - i. Reduces “double dipping” (paying twice through subscriptions and APC)
    - ii. Minimises effort on managing hybrid APC payments (they are the messiest)
    - iii. Minimises complex publisher offsetting negotiations
  - j. Maximises the funding available to support pure open access journals.

## **I. Risks**

23. Adoption of the UK-SCL has the following risks:
  - a. Publishers could take legal action against authors, but this is unlikely to succeed (see above) and would create a significant publicity risk for publishers.
  - b. Publishers could challenge the policy under competition law, but the legal advice is that this is unlikely to succeed as university repositories do not compete with publishers commercially.
  - c. Academic resistance; this would mostly depend on how academics are consulted and how the model is explained. So far academic feedback at Imperial has been very positive and at US institutions faculty have actively agreed to the policy.

- d. Publishers refuse to publish under the licence terms: globally, not a single paper is known to have been rejected due to such a licence. Where publishers object, they request a waiver.
  - e. Waiver requests increase significantly; this is probably the most significant risk.
24. With regard to the risk of increased waiver requests:
- a. At US institutions, waiver request are usually below 5%, and that proportion has not increased notably. Harvard has had success negotiating with publishers who request waivers, and is about to reach an agreement with several publishers not to request waivers, sometimes in exchange for a short embargo. Some publishers have expressed a willingness to deposit manuscripts into the Harvard repository, under the terms of the licence.
  - b. Jisc have agreed to negotiate with publishers as part of normal licensing agreements; the aim is to reach a blanket non-waiver agreement.
  - c. Different from the Harvard model, the current proposal is to issue waivers for a fixed period; even if waiver requests increase significantly this would ensure the university can use the rights in due course.

## **J. Practicalities of Implementation**

- 25. The terms of the licence have been agreed amongst the group of institutions (mostly represented by their libraries) actively involved in the drawing up of the model policy. The model policy itself has been drawn up on the advice of the lawyer with whom Imperial and RLUK have been working closely.
- 26. In addition to the model policy, the lawyer is drawing up an advisory note for those institutions wishing to adopt the licence but who wish to couch the policy in language in use in their own institutions. This advisory note will include details of the terms which need to be taken across into institutional policies in order to ensure that the policy remains robust.
- 27. The implementation would require adjustments to both the University's IP Policy and to its Statement on Open Access to Research. Marked up revisions to both of these documents are attached, with the opportunity being taken to make a small number of other minor revisions to the IP Policy. The revisions reflect the latest advice on UK-SCL, and may be subject to further adjustment before they are finalised. As this is a University Policy, it requires approval through the normal committee processes with final approval by Council.
- 28. There are continuing discussions on aspects of detail, in particular what the standard waiver periods might be, and whether the terms of the licence needs to include ND (non-derivative) for some types of article.
- 29. It is anticipated that the first group of universities will be ready to adopt the licence and policy towards the end of 2016 at the earliest. Ideally, Council would approve the policy changes at its November meeting, for effect at the beginning of 2017 (or other such date as might be agreed). If the policy was not ready for that Council meeting, the next meeting is in March, so the implementation might be from, say, May 2017. Most institutions considering early adoption believe that a minimum number, say five, of substantial institutions need to be involved in the first wave.

## K. Decisions

30. The Committee is invited to:
- a. approve adoption of the policy in principle;
  - b. advise on the composition of the group of “first mover” institutions required for implementation;
  - c. approve the revised versions of the University’s IP and OA policies;
  - d. initiate discussion in Schools to discuss the detailed terms with authors.

## L. Appendix: UK Universities involved in UK-SCL discussions

Aberystwyth	Anglia Ruskin	Aston
Bath	Bedfordshire	Birkbeck
Birmingham	Bournemouth	Bristol
Bucks	Canterbury	Cambridge
Cardiff	City	Cranfield
Cumbria	Dundee	Durham
East Anglia	Edinburgh	Essex
Exeter	Glasgow	Heriot Watt
Huddersfield	Hull	Imperial
Kent	King's College	Lancaster
Leicester	Liverpool	Liverpool John Moores
London Business School	London Met	LSE
Manchester	Nottingham	Nottingham Trent
Open University	Oxford	Oxford Brookes
Portsmouth	QMUL	Queen's University Belfast
Reading	Royal Agricultural University	Royal College of Music (for Conservatoires UK)
Salford	SGUL	Sheffield
SOAS	Southampton	St Andrews
Stirling	Surrey	Sussex
Swansea	UCL	University of the Arts
Warwick	Westminster	Wolverhampton
Worcester	York	

## M. Attachments

- i) Marked-up Policy on Exploitation and Commercialisation of Intellectual Property
- ii) Marked-up Statement on Open Access to Research
- iii) Marked-up SRO Policy