

OPEN DOORS AND OPEN MINDS:

What faculty authors can do to ensure open access to their work through their institution

A SPARC / SCIENCE COMMONS WHITE PAPER

April 2008

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OPEN DOORS AND OPEN MINDS: WHAT FACULTY AUTHORS CAN DO TO ENSURE OPEN ACCESS TO THEIR WORK THROUGH THEIR INSTITUTION

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I. OVERVIEW

The Internet has brought unparalleled opportunities for expanding availability of research by bringing down economic and physical barriers to sharing. The digitally networked environment promises to democratize access, carry knowledge beyond traditional research niches, accelerate discovery, encourage new and interdisciplinary approaches to ever more complex research challenges, and enable new computational research strategies. However, despite these opportunities for increasing access to knowledge, the prices of scholarly journals have risen sharply over the past two decades, often forcing libraries to cancel subscriptions. Today even the wealthiest institutions cannot afford to sustain all of the journals needed by their faculties and students.

To take advantage of the opportunities created by the Internet and to further their mission of creating, preserving, and disseminating knowledge, many academic institutions are taking steps to capture the benefits of more open research sharing. Colleges and universities have built digital repositories to preserve and distribute faculty scholarly articles and other research outputs. Many individual authors have taken steps to retain the rights they need, under copyright law, to allow their work to be made freely available on the Internet and in their institution's repository. And, faculties at some institutions have adopted resolutions endorsing more open access to scholarly articles.

Most recently, on February 12, 2008, the Faculty of Arts and Sciences (FAS) at Harvard University took a landmark step. The faculty voted to adopt a policy requiring that faculty authors send an electronic copy of their scholarly articles to the university's digital repository and that faculty authors automatically grant copyright permission to the university to archive and to distribute these articles unless a faculty member has waived the policy for a particular article. Essentially, the faculty voted to make open access to the results of their published journal articles the default policy for the Faculty of Arts and Sciences of Harvard University.

As of March 2008, a proposal is also under consideration in the University of California system by which faculty authors would commit routinely to grant copyright permission to the university to make copies of the faculty's scholarly work openly accessible over the Internet.

Inspired by the example set by the Harvard faculty, this White Paper is addressed to the faculty and administrators of academic institutions who support equitable access to scholarly research and knowledge, and who believe that the institution can play an important role as steward of the scholarly literature produced by its faculty. This paper discusses both the motivation and the process for establishing a binding institutional policy that automatically grants a copyright license from each faculty member to permit deposit of his or her peer-reviewed scholarly articles in institutional repositories, from which the works become available for others to read and cite.

A. Why Did the Harvard Faculty of Arts and Sciences Adopt Its University License Policy?

Harvard's Faculty of Arts and Sciences voted to adopt a policy under which (1) faculty are required to deposit a copy of their scholarly journal articles in an institutional repository and (2) automatically to grant to the University a University License (see definition in Section C below) to make those articles openly accessible on the Internet. Each of these two components is independently important.

The deposit requirement by itself is valuable because it ensures that the University's collection of Harvard-authored scholarship will grow significantly. Institutions (primarily in Europe) that have adopted similar deposit requirements have experienced high rates of deposit,

while those with voluntary policies have had low participation. The deposit requirement is also effective even in the absence of a University License, since a large percentage of journal publishers' copyright agreements already permit authors to post their final manuscript in online institutional archives.

The University License serves three purposes: (1) it covers all the faculty's scholarly articles, including those published in journals that have not to date permitted authors to post articles in their institutional repositories; (2) it standardizes the terms of the Institution's right to host its faculty's work and make it openly accessible; and (3) it grants the Institution the right to make additional copies of articles – for permanent archiving, for example – and to permit others to use the articles so long as the use is not done for profit.

Harvard's policy emerged from a collaborative effort by the faculty and the university administration. Provost Steven E. Hyman, a member of the faculty of the Harvard Medical School, a neuroscientist and former Director of the National Institute of Mental Health, convened a faculty committee to study and recommend actions to improve scholarly communication. Professor Stuart M. Shieber, James O. Welch, Jr. and Virginia B. Welch Professor of Computer Science, chaired the committee. Having previously served on the FAS library committee and having used the SPARC/Science Commons Author Addendum to retain rights to his own scholarship for years, Professor Shieber was well acquainted with the obstacles to effective use of the Internet for scholarly communication. Professor Shieber and his committee spent nearly two years building consensus, working with the university administration, its library, faculty, and the university's Office of General Counsel.

The Harvard proposal approved by faculty vote stated that:

The Faculty of Arts and Sciences of Harvard University is committed to disseminating the fruits of its research and scholarship as widely as possible. In keeping with that commitment, the Faculty adopts the following policy: Each Faculty member grants to the President and Fellows of Harvard College permission to make available his or her scholarly articles and to exercise the copyright in those articles. In legal terms, the permission granted by each Faculty member is a nonexclusive, irrevocable, paid-up, worldwide license to exercise any and all rights under copyright relating to each of his or her scholarly articles, in any medium, and to authorize others to do the same, provided that the articles are not sold for a profit. The policy will apply to all scholarly articles written while the person is a member of the Faculty except for any articles completed before the adoption of this policy and any articles for which the Faculty member entered into an incompatible licensing or assignment agreement before the adoption of this policy. The Dean or the Dean's designate will waive application of the policy for a particular article upon written request by a Faculty member explaining the need...

Harvard's policy implements the two important and distinct aspects of open access. First, it mandates deposit in an institutional archive. Second, it creates an automatic license that attaches to the work before the transfer of copyright to the publisher. To strengthen compliance, Harvard's policy creates an "opt-out" system that requires an administrative waiver for any exceptions. To support the policy, the Harvard University Library will create a new Office of Scholarly Communication to support faculty, to encourage deposit, and to develop the open-access repository.

Other supporters included Robert Darnton, Carl H. Pforzheimer University Professor and Director of the Harvard University Library, who wrote an op-ed piece in the Harvard Crimson, supporting the policy and citing the following reasons for the policy's adoption:

- Promoting openness and free communication of knowledge
- Making scholarship available to the world and sharing intellectual wealth
- Resisting a publishing model that is leading to spiraling prices of journals
- Changing a system that is siphoning resources from library purchases of monographs (and thus adversely affecting library purchasing capacity for them)
- Realigning publishing in a way that favors learning
- Complying with the NIH mandate on public access
- Creating “a republic of letters in which citizenship extends to everyone.”

Faculty authors also benefit from the policy through an increased readership for their articles. A faculty Council member, Judith L. Ryan, Robert K. and Dale J. Weary Professor of German and Comparative Literature, stated in the Harvard Crimson that her understanding of “the problem this [policy] is supposed to address is the increasing monopoly that has developed on the part of scholarly journals, who are now making it increasingly difficult for people to access the material they publish.”

In addition to the benefits of open access cited explicitly by the proponents of the Harvard policy, SPARC and Science Commons have long advocated open access to scholarly articles as a critical component of advancing scholarly research. Even at institutions where adequate access to relevant journals is not a major concern, researchers are not able to take full advantage of technology to help them do research. Restrictions enforced by publishers on automated research prevent the full development and deployment of tools and technologies that could help researchers to overcome information overload, stay current with the state of the art, utilize emerging computational research methods, and to make serendipitous connections to discoveries in other fields. To take advantage of the full benefits of open access requires that more universities join Harvard in adopting policies aimed at increasing the rate of deposits in institutional archives that are freely accessible online.

B. What Can You Do On Your Local Campus?

The Harvard policy is an important turning point in the movement toward open access. It demonstrates that faculty can agree on the need to retain control over their intellectual property and create worldwide access to their work. It shows how faculty can commit to depositing their work in their institutional repositories and to ensuring that their work can be freely accessed over the Internet consistent with copyright law.

The experience at Harvard demonstrates the importance of internal champions who are willing to devote substantial time to building consensus among multiple stakeholders. Any faculty member can initiate change at his or her institution by becoming an advocate for such a policy and by helping to educate his or her colleagues about the benefits of such a policy change.

Advocacy and education are only a start. Since an institutional policy change requires coordination among multiple constituencies within an institution, it may be necessary for an advocate to also act as a coordinator. The coordinator can help the institution as a whole determine the right process, the right license, and the right implementation. This may involve participation by the administration, including the president, various deans, the general counsel, the librarian, as well as the faculty, including the relevant faculty committees, unions, and representatives.

Each college or university has a distinctive culture, and the most effective means for advocating for an open access requirement is likely to vary. The goal in all cases is to adopt a policy that is binding upon the entire faculty. Often this will involve a faculty vote, administrative action, or both. Here are some of the tasks to undertake:

- Identify potential avenues of policy change at your institution. At larger institutions, it may be most effective to seek the creation of a special committee or task force charged with reviewing the college or university's scholarly communication practices and policies and making recommendations about the desirability of an open access mandate. This can be particularly effective if the group includes influential faculty from a range of departments. In other cases, raising the issues within an existing committee may be more effective. It is equally important to identify those in the administration who are most likely to support an open access policy. Look into your institution's policies, by-laws, faculty governance structure, and charter to understand how this process may come about. You may wish to speak to members of the administration to understand the process for initiating a policy change. In many cases, the general counsel may also assist you in understanding the institutional requirements.
- You will need to educate your colleagues or your administration on the policy choices, such as the license options, that are available. You may need to work with the general counsel to understand how your proposal would fit in with the institution's legal policies and how the policy change might be implemented in practice.
- Identify and secure resources that will be needed once a policy is adopted, such as the capacity to manage the deposit of scholarly articles and to make them available online. This will usually be undertaken by your institution's library.

C. What Is a University License and Why Is It Important?

In addition to adopting a policy that mandates faculty deposit of their final article manuscripts in the institution's digital archive, adopting a University License is an important institutional response that can ensure broad and open access to the results of its faculty research outputs.

As used in this paper, a "University License" is a grant of permission by a faculty member to his or her employing academic institution to use his or her peer-reviewed scholarly articles for certain purposes. These typically include depositing the article in an institutional repository, complying with funder requirements, and making the article publicly available for download. The scope and limitations of such a license may vary depending on the policy objectives of the institution, which will be discussed in more detail later in this paper.

The U.S. Copyright Act grants each author, automatically upon the creation of an original work in a tangible medium, the exclusive rights to reproduce, distribute, publicly display, and publicly perform the work and to prepare derivative works, provided the work shows a modicum of creative expression. U.S. authors may also have protection in other countries by treaty, and while the scope of protection may vary, these exclusive rights are generally similar.

An author may authorize others to exercise these exclusive rights either by granting permission, known as a "license", or by assigning ownership of the copyright. A license can be exclusive (granted to a single person or entity for its duration) or non-exclusive (able to be granted to an unlimited number of people at the same time). Under U.S. law, granting an exclusive license or an assignment requires a written agreement while a non-exclusive license may be granted informally, such as by verbal permission.

Under U.S. Copyright law, a work prepared by an employee within the scope of his or her employment is generally regarded to be a "work for hire," for which the employer is considered to be the author. However, there is considerable uncertainty and disagreement in the U.S. about whether scholarly articles fall within this "work for hire" category. To clarify the situation, many universities have policies, agreements, or established practices stating that faculty own the

copyright in their scholarly works. Many of these faculty authors, in turn, assign ownership of (or grant an exclusive license to) their copyright to journal publishers through publication agreements that they sign prior to publication.

Unless the publication agreement or publisher policy provides otherwise, once copyright ownership is assigned (or an exclusive license is granted) the author retains none of his or her rights under copyright to copy or distribute the article or to authorize others to do so. Thus, the author may not be permitted to copy or distribute his or her own article, including substantially similar pre-print manuscripts, or permit his or her employing institution to do so, unless the publisher's policy permits. Even where the publisher's policy may permit some forms of deposit or personal archiving, these policies may be difficult to obtain and interpret.

The complete transfer to publishers of exclusive rights under copyright can create a number of issues for authors:

- They may be unable to contribute to an institutional repository that is intended to preserve and showcase faculty scholarship. This limits the repository's completeness and scope and reduces the number of potential readers of the author's work.
- They may not be legally permitted to distribute copies of their work to colleagues, collaborators, and grant providers.
- They may be unable to comply with the terms of a grant or the policy of a grant provider that requires public access. Examples of private grant providers that have public access policies are the Wellcome Trust and the Howard Hughes Medical Institution. In addition, under the Revised Public Access Policy adopted by the National Institutes of Health, grantees are required to ensure that peer-reviewed journal articles reporting research supported by NIH grants are deposited in PubMed Central for public availability within 12 months of first publication. In order to comply with these policies the grantee must either choose to publish in a journal whose policies permit compliance with these requirements or negotiate (or pay) for the rights to do so.

Adopting an institutional policy that employs a University License is an effective institutional response to these concerns. Compared to other options, most of which rely on a myriad of negotiations between individual authors and individual publications, a University License may constitute the most comprehensive and least administratively burdensome option in the long term.

II. PLAN OF ACTION

Whether your role as an advocate is to educate others or to serve as a coordinator, or both, you should familiarize yourself with some basic policy options and develop a plan of action. The plan needs to identify the most effective process to achieve adoption of the policy, the deposit requirement, the desired scope of the University License, and opt-out provisions. It should also incorporate an implementation strategy once such a policy is adopted.

A. What Is the Right Process for Bringing About Policy Change?

Harvard University adopted its open access policy as a result of a faculty vote, but this may not be the only option available. The strategy for your institution will be dictated by rules established under your institution's charter, by-laws, rules, and procedures.

Start by talking with your institution provost, faculty leadership, and general counsel's office about the options. Some institutions may take the position that the institution owns the copyright in the scholarly articles published by its faculty, and subjecting the policy to a faculty vote may contradict such a legal position. In other cases, the administration may be reluctant to back a mandate without faculty consent.

B. If a Vote by Faculty is Needed, How Can I Bring One About?

1. What Process Is Mandated To Adopt the Policy?

Given your institution's policies and procedures, determine whether, under your institution's policies, a faculty vote is necessary for the policy to be adopted. If so, what are the procedural requirements for such a vote to be taken? If it is not binding on the faculty, what additional action by the administration is needed? Who are the internal champions for change that need to be lined up behind the proposal? If a faculty vote is not necessary, will it nevertheless be helpful to demonstrate campus support for the policy to the administration? Is there a way for you to take a poll of faculty to measure support for the policy?

Once you have determined the procedural requirements and identified internal champions, you may wish to work with an existing committee or ask for appointment of an ad hoc task force to examine the institution's scholarly communication policies and practices and to make recommendations concerning the University License. The committee should identify the motivations for adopting a deposit requirement and a University License, specify the parameters of the license, and make recommendations regarding the internal resources needed to support faculty in making the transition and to maintain the institutional repository.

2. Why Is a Deposit Requirement Important?

With a deposit requirement, all faculty covered by the policy would agree to obligate themselves to deposit their journal articles in your repository. This will create a much more comprehensive archive of the covered institution's research output. Without such a requirement, experience suggests that an open access policy is unlikely to be effective. In developing the language of the requirement, consider which version of the article should be deposited — the author's final manuscript (which includes any revisions made after peer review) or the final published version. An advantage of the author's manuscript is that it is the final electronic version over which the author has control. In addition, many publishers permit archiving of final manuscripts in their copyright agreements. A disadvantage is the fact that it is not the citable version. Consider as well the question of timing. An optimal policy would stipulate that deposit should occur when the article is sent in for layout and copy editing. However, due to some journal requirements, it is also acceptable to require deposit no later than the date of publication.

3. What Is the Right Scope of the University License?

Prior to any vote on adopting a University License, the scope of license must be defined and explained to the faculty. In general, a license can be a very flexible tool that allows the bundle of rights that constitute copyright to be divided, restricted, or limited in many ways. To simplify our discussion, we will consider three likely options ranging from broad to narrow grants of rights to the institution. Which option is chosen depends in part upon the preferences of the faculty, the resources available to help faculty in negotiating with publishers, and the objectives of the institution in adopting the policy.

The rights under copyright that can be licensed are the rights of reproduction, distribution, creation of derivative works, public display, and public performance. A license to any or all of these rights can be supplemented by specific license limitations, such as the duration, geographical scope, revocability, and right to sublicense, or any other restrictions that the licensor wishes to specify. A grant can also be of an exclusive or non-exclusive license, but for purposes of this paper, all versions of the University License considered will be non-exclusive, because otherwise publication in a non-institution journal would not be possible.

Case 1—Broad License Grant

As a practical matter, the broadest possible license grant to the institution is a *non-exclusive, perpetual, irrevocable, worldwide* license to exercise all of author's exclusive rights under copyright, including the right to grant *sublicenses*. Ideally the policy should broadly encompass all of the author's rights under copyright rather than specific enumerated rights.

A *perpetual* license means that the license lasts for the duration of the copyright (subject to any right of the author to terminate under statute). *Worldwide* means that the scope of the license is everywhere copyright protection exists, which is particularly important for online distribution through the Internet. *Irrevocable* means that the copyright owner (either the author or the publisher to whom copyright is assigned) may not terminate the license at will.

The right of *sublicense* means that the institution may authorize others to exercise the copyright. For example, it would allow an institution to authorize a third party to copy and distribute the article, thus allowing distribution through a Web portal other than the institutional repository's Web site. This right would also allow the institution to grant rights to public repositories or funders in compliance with funder mandates.

Many license grants also state that the license may be exercised "in any medium" in order to avoid any interpretation that would restrict the scope of the license grant only to means of reproduction or distribution available with current technology. However, this may not be always necessary, especially if the license is broadly constructed.

Case 2—Intermediate License Grant

An intermediate case involves license restrictions that modify the scope of the license grant in Case 1. The license called for by the Harvard FAS policy contains a limitation that the articles not be "sold for a profit" by the institution. Thus the author is still free to grant to a journal publisher an exclusive license to sell the articles for a profit or to reserve that right to himself or herself.

Another potential license restriction is to specify that the license may only be exercised after a certain period of time (i.e., the "embargo period"). Some funders specify a maximum

embargo period, and thus it may make sense to make the public accessibility from the institutional archive consistent with the funder mandated public accessibility date.

Case 3—Narrow License Grant

A narrow license grant might provide the institution only the right to deposit the article in the institutional repository and make it available only by means of the repository's Web site. Some publisher's policies already permit the author to deposit a copy in the author's institutional repository, but not elsewhere. In some cases the publishers require that such access is limited to the institution. A narrow license grant would therefore not include the right to grant sublicenses under the author's copyright (e.g., to NIH or another grantor). The result would be that the article is available for free download only from the institution's archive.

While this approach may simplify authors' interactions with publishers, a narrow license grant has several drawbacks:

- The narrow license grant does not allow for the creation of derivatives, so that abridgements, translations, or other modifications of the article later may still require the permission of the copyright owner (which may be the publisher). Therefore, unless the author takes additional steps to reserve rights, he or she may be unable to re-use his or her work in future works.
- It may not provide an adequate mechanism for complying with funder mandates that require deposit in a public repository such as PubMed Central.
- Limiting the availability of the article may reduce its impact by making it harder to find.
- Failure to anticipate future technology may eventually necessitate revisiting the issue.

Another approach to a narrow license would be to secure only the rights to deposit in accordance with funder mandates. However, to do so would be to miss a critical opportunity to further scholarship and institutional learning within the organization. In addition to some of the drawbacks indicated above, such a policy would make it difficult for the institution to enrich its own repository, to showcase faculty scholarship, and to develop its own unique initiatives for furthering collaboration and scholarship.

4. What are the opt-out options?

In order to ensure faculty flexibility in dealing with publishers, consider incorporating into the policy an opt-out provision at the article level. The Harvard policy allows faculty to waive both the deposit requirement and the University License for a given article upon request. An alternative approach is to allow faculty to waive the University License only, but not the deposit requirement. Such a policy would ensure that all faculty articles are digitally archived, but those that are deposited by faculty who waive the University License would not be made openly accessible, unless the faculty member allowed it at a later date. Such a policy maximizes archiving while also maintaining faculty flexibility in negotiating with publishers who do not accept open archiving or accept it only after a lengthy embargo period.

C. What Is Needed to Implement a Policy Change?

The need to discuss with faculty the details related to an open access policy is a vital first step. Mechanisms to communicate with publishers are an essential second step.

In some cases, the publication agreements that faculty authors are asked to sign may state in "boilerplate" language that the author represents to the publisher that no previous licenses have been granted. If certain statutory formalities are met, a non-exclusive license such as the University License will prevail over a conflicting assignment of copyright to a publisher without

the need for further action on the part of the author. This is a main advantage of adopting a University License.

To be certain, however, the author should provide some form of notice to the publisher at the time that the publication agreement is entered into that any representations are qualified by the grant of the University License or any other license mandated by funders. Science Commons and SPARC both offer author's addenda that may be attached to a publication to help the author reserve rights to distribute a work in an institutional archive, among other possible rights, and to put the publisher on notice that these rights have previously been granted. Harvard has also created its own addendum for this purpose, which is attached as Appendix B.

III. CONCLUSION

Adopting a policy with an automatic University License and a deposit requirement has many benefits for the individual author, the institution, and the public. A successful local effort to implement such a policy is likely to require committed advocacy and educational efforts. A broad range of institutional stakeholders must be involved and must act in a coordinated fashion to bring about the required action.

Options for initiating such an action include faculty vote, administrative action, or both. In addition, various licensing options must be considered and an appropriate approach selected. Finally, it is important to plan the implementation of the policy carefully to ensure that adequate resources are devoted to maintenance of the institutional repository and that assistance and guidance is offered to faculty as they adapt their agreements with journal publishers.

Recent developments create new opportunities for academic institutions and their faculties to advance their missions. By working together to explore, develop, and implement policies that enrich institutional repositories and provide open access, they can not only meet the challenges of complying with funder mandates but also ensure the preservation and widespread dissemination of faculty scholarship.

* * * * *

APPENDIX A

Action Steps Checklist

Here is a summary of key steps to implementing a University License policy at your institution:

1. Identify key internal supporters and champions.
2. Research your institution's rules and procedures to understand the right process for initiating the policy change.
3. Work with provosts, faculty governance, and the general counsel's office to determine critical policy and legal requirements that must be met by the policy.
4. Work with an existing faculty committee or create an ad-hoc committee to study your institution's scholarly communications policy.
5. Communicate the plan to faculty and key stakeholders and conduct surveys or obtain other feedback to determine faculty support.
6. Identify and take advantage of events for education and awareness building, such as seminars, discussion panels, presentations, and colloquia. Consider holding a workshop to discuss open access and the Harvard policy.
7. Develop a set of policy recommendations, including the scope of the University License, the deposit requirement, and opt-out provisions.
8. Identify critical resources and support that will be needed to implement the policy, including responsibility for maintaining an institutional archive. Prepare to provide resources to assist faculty in complying with the policy and working with publishers.
9. Plan for success: work with the institution library to make sure there is a repository to maintain and allow download of deposited articles and that it has sufficient capacity – or that there is a plan to create one.
10. Find the faculty who already are posting their work on the Internet by searching the Web and asking around. By their actions, they are signaling an understanding of why open access is important. Do the librarians have stories of access problems faced by faculty or other researchers?

This document is the addendum developed for Harvard FAS faculty in association with the Harvard FAS open access policy of February 12, 2008. The two paragraphs in italics are optional paragraphs used at the author's discretion.

ADDENDUM TO PUBLICATION AGREEMENT

1. This Addendum modifies and supplements the attached publication agreement (the "Publication Agreement") concerning the article titled _____ (including any supplementary materials, the "Article") in _____.
2. The parties to the Publication Agreement as modified and supplemented by this Addendum are: _____ (corresponding author) (individually or, if more than one author, collectively, "Author") and _____ ("Publisher").
3. The parties agree that wherever there is any conflict between this Addendum and the Publication Agreement, the provisions of this Addendum will control and the Publication Agreement will be construed accordingly.
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Date

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About SPARC

SPARC, the Scholarly Publishing and Academic Resources Coalition, is an international alliance of academic and research libraries working to correct imbalances in the scholarly publishing system. Developed by the Association of Research Libraries, SPARC has become a catalyst for change. Its pragmatic focus is to stimulate the emergence of new scholarly communication models that expand the dissemination of scholarly research and reduce financial pressures on libraries. Action by SPARC in collaboration with stakeholders – including authors, publishers, and libraries – builds on the unprecedented opportunities created by the networked digital environment to advance the conduct of scholarship.

About Science Commons

Science Commons designs strategies and tools for faster, more efficient web-enabled scientific research. Science Commons identifies unnecessary barriers to research, crafts policy guidelines and legal agreements to lower those barriers, and develops technology to make research data and materials easier to find and use. The goal of Science Commons is to speed the translation of data into discovery and to unlock the value of research so more people can benefit from the work scientists are doing.