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# **Management of Copyright: A response to the Consultation Paper by the Information Futures Commission, Scholarly Information in the Digital Age**

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## Introduction

*If this Consultation Paper poses a single overarching question, it is this: How should we develop our scholarly information and technologies, services and infrastructure to achieve our research, learning, teaching and knowledge transfer aspirations over the next decade?*<sup>1</sup>

As a knowledge-based institution, the University is both a major creator of copyright works and a prodigious consumer of copyright works. Copyright works in all forms and formats are routinely used within the University for productive purposes, whether for the creation of new works or for educational purposes. So ubiquitous is copyright that consideration of copyright law is necessary for the development of a sound University-wide strategy for the creation, management and dissemination of scholarly information. Failure to do so may limit the University's ability to respond to the opportunities offered by digital technology in teaching, learning and research. So, part of the answer to the 'single, overarching question' quoted above from the Consultation Paper is that careful management of copyright is required if the University is to achieve 'research, learning, teaching and knowledge transfer aspirations over the next decade.'

Managing compliance with statutory and contractual obligations is a means of reducing risk to the University and investment in the development of policy, processes and infrastructure to support compliance will lead to benefits for the University both in terms of risk management and in managing the significant cost of compliance. But consideration of copyright should not be approached as solely a compliance issue. There is also a need for the University to consider aspirational goals. This applies in particular to the debates surrounding the merits of open access publishing of University scholarly works including theses. This is part of the debate noted in the Consultation paper about 'how we wish to make our scholarly material available to and usable by others.'

Copyright law ostensibly attempts to balance the rights of creators with the right of the community to use works for social benefit. In practice, this balance is both difficult to achieve and preserve. Since copyright law has such an impact upon core University activities, the University could choose to become active in seeking strategic reforms at national level. Developing our capacity for advocacy in this sector may be of great benefit to the University and would be a contribution made by the University to society in general.

Despite the fact that copyright protection has been seriously challenged by the ease of digital reproduction, rampant piracy and open access publishing, it is unlikely that copyright law will simply go away in the next 10 years. In global terms, the legal regime of copyright has actually been considerably extended as minimum national standards of IP protection have become closely linked with trading relationships. In 1993, membership of the World Trade Organisation

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<sup>1</sup> Information Futures Commission, University of Melbourne, *Scholarly Information in the Digital Age: A consultation paper that invites involvement and response* February, 2008, 4



(WTO) became contingent upon accession to the *Trade Related Aspects of Intellectual Property Rights (TRIPS)* and this instigated adoption of minimum levels of IP protection on an almost global level. Further, in a series of Free Trade Agreements such as the Australia-US Free Trade Agreement, the level of copyright protection has been raised yet again. The link with trading relationships is a powerful incentive to maintain standards of IP protection on a national level.

Copyright law has also become more complex over the last decade, especially with the advent of digital technology. Computer programs are new literary works; there is a new act in copyright – that of communication for online materials; there are requirements surrounding digital rights management, technological protection measures; requirements for internet service providers. Moral rights have been added to the basket of rights available under Australian law as has performers rights. All of these have direct implications for the management of copyright at the University. Licensing has also become a widespread practice, introducing contractual obligations in many areas of scholarly endeavour.

It is not realistic to expect our staff to have a clear understanding of the nuance and complexity of copyright law pertaining to their roles as creators, teachers, researchers and performers. It is desirable that all staff should have at least a basic understanding of their general rights and obligations with regard to copyright law and this is a task that should be systematically addressed at University level. Similarly since students are destined to be employed in a knowledge economy, it would seem to be a useful graduate attribute to have some knowledge of relevant IP regimes. But it is highly unlikely that many staff will have sufficient expertise to enable them to navigate the morass. Staff and students will continue to need a high level of support from experts if they are to manage this level of complexity and there is evidence to suggest that we will need to develop additional capacity in this area. Failure to provide adequate support may compromise key projects.

## Teaching & Learning

Students now apparently expect 24x7 access to course reading materials for teaching and learning. Technically this can be provided easily by simply uploading articles to the LMS subject site. However, in copyright terms this is not simple at all. Copyright works can only be made available online under the provisions of the Part VB statutory licence as it is established under the Copyright Act and this entails a number of administrative requirements that are burdensome for staff as well as access restrictions to the material. Works acquired under licence from the Library databases also have to be used according to the terms and conditions of the licence and these are not consistent so that for example, some licences permit use in print reading packs and online, but some do not.

In such a complex environment, it is strategically appropriate for the University to minimise the burden of compliance for staff by developing processes that manage compliance on their behalf. So, the Library in conjunction with the University Copyright Office set up the Readings Online Service to manage the process of making works available to students via the LMS. It is still



a small service and is in need of significant resources to allow for expansion. For compliance reasons it would be desirable for the Library to also centrally manage the compilation of print reading packs up to the point of print, distribution and sale. If the University wishes to promote teaching and learning in the digital environment, then there is a need to support staff and build capacity to manage attendant risks. To be effective, this may require central oversight of relevant processes where guidelines would be framed by the Copyright Office with support from Legal Services, that would be used to direct processes managed by Library staff who are trained to manage compliance. These would greatly assist with the achievement of learning, teaching and research aspirations over the next decade.

### **Copyright & the Changing Nature of Scholarly Practice**

The Consultation paper points to the changing nature of scholarly practice. These changes in scholarly practice are invariably accompanied by copyright, licensing and other intellectual property hurdles. Cross-border research collaborations cross jurisdictions. National statutory copyright regimes, while generally in harmony with international treaties, vary to some extent. The anomaly between 'fair use' as it operates in US law and 'fair dealing' as it applies in Australia serves as a well-known example. Cross-border collaborations are established under formal agreements, and expert legal advice is required in establishing the terms of these agreements.

In eResearch, the creation of datasets leads to questions related to ownership of, and access to data. The same is true of research that may involve collaboratively generated material using social networking technologies. The Consultation paper notes that social networking tools allow scholars 'to become creators of new forms of content.' But, in this schema, who owns what? And what can be done with this content? These are all intellectual property questions that need to be resolved to the satisfaction of all parties. Similarly, it is perhaps a fine sentiment to promote and disseminate the scholarly works of the University in an open access repository, but the associated copyright issues are probably just as challenging as the technical aspects of maintaining a repository.

Digitisation is raised in several places as a means of extending 'access by those outside an institution's immediate audience of students and staff.' But digitisation projects are generally fraught with copyright problems that need to be taken into consideration before the project proceeds. Tracing copyright owners and seeking permission is both time consuming and can be expensive. Moreover, there is no guarantee of success – owners often cannot be traced, or fail to respond. There is still no provision in Australian copyright law to enable such 'orphan' works to be copied and communicated online although the Federal Government did instigate a review in 2007. In conducting such digitisation programs, the University needs to develop policy around risk management decisions.



## Licensing

In recent years, as is noted in the Consultation paper, the University has increasingly acquired access to materials under licence, especially in the form of electronic journal databases. As a contract between parties, use of the works in the database is governed by specified terms and conditions. This has benefits for both copyright owners and consumers of copyright works insofar as it offers flexibility and the opportunity to negotiate mutually agreeable terms. A licence can permit more extensive rights than those allowed under the *Copyright Act*. Conversely it is possible to contract away rights that are granted under the Act.

Licence agreements must meet the needs of the licensee as well as the licensor. In the Library context, most licences permit greater amounts of journals to be copied than would be allowed under the *Copyright Act*. However it has not been unheard of for licence agreements for journal databases to be silent upon, or actually prohibit rights that are allowed under the Part VB statutory licence. Database agreements often reflect US copyright law where there is no equivalent of the Part VB licence. In particular, the right to copy materials for print reading packs is sometimes restricted. This situation with vendor licensing appears to be improving, but over the next three years, it would still be highly desirable for the University to conduct a careful review of licence agreements entered into on behalf of the Library to ensure a broad scope of permitted uses that is unambiguously equivalent to the use allowed under the *Copyright Act*. There is no guarantee that these negotiations would be successful, but surely an attempt should be made. Collaboration with other universities through the Council of Australian University Libraries (CAUL) is already in place for purchase of electronic resources, but this avenue could perhaps be strengthened.

Licensing is a satisfactory model for acquisition of resources, but the agreements need professional scrutiny. Furthermore, licences invariably carry obligations regarding use and access. Access and identity management are managed by Library systems and IT support. The rights and limitations conferred by a licence need to be transparent to all users to avoid potential and inadvertent breach of licence conditions.

## Licensing and the Part VB statutory licence

As libraries turn to acquiring access to resources through licensed databases, it has been suggested that we should expect a concomitant reduction in the sector's dependence on the Part VB statutory licence for reproduction of text and graphics for reading packs and online use via LMS. This appears to be a logical position since materials would not be reproduced in reliance on the statutory licence. Further, it follows that the cost of the statutory licence should diminish. The Part VB statutory licence administered by Copyright Agency Ltd (CAL) is costly – this year incurring a charge in excess of \$1.2 million for this University alone. It is recommended that the University investigate the extent of its dependence upon Part VB for use in reading packs and in the LMS. It certainly cannot be assumed that our dependence on the statutory licence has declined. With the advent of the LMS, we probably copy a greater amount overall since



duplicate copies are frequently made for both print reading packs and handouts as well as online. Accurate data is required, but this can only be collected if there is a degree of central management of these processes.

## Open Access and Digital Theses

The Consultation paper devotes significant attention to consideration of the trends in open access publishing and asks whether we should ‘embrace the Open Access movements and similar movements ... with a sense of public-spirited sharing and collaboration...?’ It further asks whether we can have it both ways – embracing open access while still licensing our own intellectual capital on a commercial basis. A hybrid model is certainly possible, where the University could decide upon categories of materials that are to be made available on open access.

However, any mandating of open access will require extensive discussion and negotiation within the University community since it is a source of potential tension. This particularly applies to any plans to make higher degree theses available for open access on the web. Although students are now required under University statute to submit a digital copy of their thesis to be stored in the Library, there is significant resistance in some disciplines to making the work available on the web. Objections centre upon possibility of compromising the work of a research team and it is also claimed that placing a work on open access could also affect the student’s ability to publish in a prestige journal.

Open Access publishing takes many forms – open access journals, digitised cultural collections, eprint repositories such as the University of Melbourne e-Prints Repository (UMER) that showcase the intellectual capital of the University, public lectures and conference presentations. They do have great benefit in promoting the scholarly works of the University and have an important knowledge transfer function. However they also carry copyright obligations that must be actively managed. For a start, permission must be obtained for all copyright works published to the web that are not owned by the University, even including scholarly works by our own academic staff. Publisher permissions must be gained for works that have already been published in other publications. But even more problematic is the issue of third party copyright materials that may be included within these works – the accompanying images, substantial poems, music and film clips, and so on. These are copyright works as well and the author needs permission to use them in this way before the work can be licensed to the University. It is an arduous process managing the risks attached to this process.

The copyright issues that accompany new forms of scholarly practice can all be resolved, but they cannot be resolved easily. They require expert support and resources, and where possible, the development of infrastructure that removes the burden of complex compliance hurdles from academic staff. But expert support should be based upon clear policy and the University needs to provide clear policy frameworks surrounding the intellectual property issues related to scholarly practices such as open access and risk management. In general the University needs to build capacity in the management of intellectual property and especially in copyright and licensing so that the expectations of the



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University community related to research and teaching and learning can be achieved.



## Document Control

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