

## Trade in Education: The Role of Copyright<sup>1</sup>

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**ABSTRACT** *In Australia, as in many other countries, education is increasingly thought of in terms of trade. Given that copyright law has long functioned as a trade regulation device, it may be reasonable to expect that consideration would be given to the role that copyright may play in regulating the so-called education industry. However, the approach taken to copyright law is often disparate and confusing. This article re-examines approaches to ownership of copyright of works in universities and how copyright may be seen, not as a property right to be fought over but as a specific tool of regulation and governance.*

**Keywords:** education, ownership of copyright, trade, universities.

### Introduction

The last decade or so has seen a dramatic change in many facets of higher education in Australia. While reference is still made to the pursuit of knowledge and learning as primary goals of the academy, one of the most notable trends that has taken place in recent years is that education is increasingly thought of as a form of trade. We hear, for example, of the impact that trade in education has upon the balance of payments and how strong an export earner the education industry is for Australia. The West Committee Review, *Learning for Life, A Review of Higher Education Financing and Policy* (1997) begins its review of higher education in Australia with the following statement:

Education across all sectors is now Australia's fifth largest source of service export income, generating \$3 billion in 1996, up from \$2.1 billion in 1994 and \$2.5 billion in 1995. In 1996, over 53,000 overseas students were enrolled in higher education courses, compared with slightly over 17,000 in 1987. Relative to its size of its population, Australia is a highly successful exporter of higher education services, with more overseas students per capita than the USA, or the UK or Canada.<sup>2</sup>

Similarly, the Australian Vice-Chancellors' Committee (AV-CC) said in its response to the West Committee Review:

The generation of intellectual property in universities has the capacity to increase national wealth dramatically and to foster export industries. There is a national need for this to be enhanced, and funding to maintain and develop university research infrastructure and research programs is crucial in this respect. Under the Copyright Act, the ownership of intellectual property is vested in the employer, and universities recognise their responsibilities to manage and develop this asset effectively.<sup>3</sup>

Similar sentiments are being voiced and acted upon in a range of educational institutions throughout Australia.

Given that copyright law has long functioned as a trade-regulation device, it may have been reasonable to expect that at the same time as increasing attention was being given to education as a form of trade that some consideration would also have been given to the role that copyright may have played in regulating the so-called education industry. Despite this potential and the close connection that exists between copyright and the academy, the approach taken to copyright in this area has been disparate, confusing and, at times, disheartening.

In many cases, copyright law has been either marginalised or ignored.<sup>4</sup> For example, whilst the West Committee Report gives support to the increased use and involvement of information technology in the delivery of education, scant attention was paid to the issues of copyright and the cost of access to copyright works. The only sustained attention given to copyright was in the form of a commissioned article, *Intellectual Property: Preliminary Submission on Copyright Issues*.<sup>5</sup> While the Report did raise a number of issues in relation to copyright, it concentrated on the problems copyright present for the university as multimedia producers.

Another way in which copyright is thought about in this context is for it to be seen, both by academics and universities, as a potential pot of gold. As a consequence of copyright being seen as a potential cash-cow, it tends to be seen as something that needs to be controlled and exploited; in short, as a proprietorial right to be fought over.

This tension has been exacerbated by recent technological developments which have meant that academic employees increasingly produce copyright materials such as computer programmes, videos, sound recordings and electronic databases which have the potential, so the argument runs, for successful commercial exploitation. With new markets opening and expanding for the distribution and marketing of academic material, there is also greater recognition of the possibility for commercial exploitation of works such as journal articles, teaching materials, lecture notes and books. At the same time, the growing pressure which is being placed on tertiary institutions for them to become commercially productive and more self-sufficient is forcing universities to reassess their objectives and goals. Due to the reduction in government funding and consequent budgetary constraints, increasing student numbers and increasing community demands for accountability,<sup>6</sup> universities are re-examining the way in which copyright is being dealt with in the university community.

Copyright is also often portrayed as a barrier to the massification of education. In this context, copyright is spoken of in terms of the problems that it poses for universities and their libraries. This is particularly the case with respect to multimedia works and on-line creations. For example, it has been stated that 'the ability of the education sector to take advantage of opportunity afforded by the on-line economy may be hindered by the failure of the copyright framework which governs the buying and selling of information to adapt to the digital and network environment.'<sup>7</sup>

While these different ways of thinking about copyright and the role that it may play within the university sector may have their uses, in this article I wish to think about copyright law from a different perspective. In particular I wish to explore the potential role that copyright may play in the *regulation* of education. In particular, I wish to explore the role copyright plays in governing the flow of information.

While copyright law is often portrayed as being antithetical to the dissemination of ideas (whilst at the same time promoting creativity), rights of ownership may, however, be one way of ensuring broad dissemination of works.

In so doing the article highlights the positive role that copyright is able to play in

promoting the broader educational goals of the furtherance of knowledge and learning. It does this by seeing copyright not as a barrier to change, nor as a property right to be fought over. Rather it sees it as a specific tool of regulation and governance.

Two aspects of this approach are noteworthy. First, it draws upon an image of copyright as a technique employed to regulate the creation, distribution and consumption of specific cultural objects and practices. In the same way in which the 1711 Statute of Anne is often portrayed as a legal device intended to regulate the book trade, this article suggests that contemporary copyright law can also be seen as a potential tool with which to regulate trade in education. Secondly, and related to this, it attempts to prioritise the regulatory nature of copyright over a property based model. More accurately, it tries to displace a *particular* way of thinking about the proprietorial nature of copyright. In so doing the article harps back to earlier ways of thinking about copyright which, in recent years, have largely been ignored. The demise of the regulatory dimension of copyright and its replacement by a more neutral property based model are highlighted by Lynam Ray Patterson's comments on recent American copyright law, when he said:

...the 1976 Copyright Act continues the long tradition of treating the publishers' component of copyright law as trade regulation. Yet the statute is so complex, judicial precedents so confusing, and an understanding of copyright history so rare, that courts in recent years, have tended to treat copyright as more proprietary than regulatory.<sup>8</sup>

### **Potential Problems**

What then is this potential problem within the education industry that copyright law may resolve? While there are a number of potential problems currently facing the university sector not only in Australia but also in many other developed countries that could be addressed, I wish to focus on the peculiar situation that exists within universities in relation to the important issue of access to academic works.

Most university academics hold their copyright very near and dear to them. They argue, for example, that to lose copyright in their writings would mean that they 'would be likely to lose one of their few remaining sources of autonomy and fulfillment within the academy'.<sup>9</sup> Somewhat paradoxically, however, it is these very same academics who often assign their copyright to publishers in return for the privilege of their work being published: a privilege which, at least in some fields, only arises if the authors are willing to pay to be published. It is these same academics who complain when their university libraries are unable, due to budgetary restraints and increasing purchasing costs, to subscribe to the very journals in which they and their peers publish. (The American Association of Research Libraries, estimates that its members were spending 124% more on journals in 1996 than 1986 but getting fewer titles for their money.<sup>10</sup> Similar accounts are often heard of in Australia). This often leads to the curious situation in which university libraries have to pay large sums of money in order to gain access to works that have been created within the university sector.<sup>11</sup> As has been noted:

...if the copyright owner of academic articles written for periodical publication is the employer institution, the licence fees collected for educational copying will be returned to the institution, having had the Copyright Agency Limited's (CAL's) administrative expenses deducted and adding to the expense of tertiary education in the meantime.<sup>12</sup>

The anomalous nature of this situation is exacerbated by the fact that growing demands

for published manuscripts to be in camera-ready form means that the value added by the publisher is now less than it once might have been.

### **Possible Solutions**

One way in which these problems may be resolved is by re-examining the way ownership of copyright works is thought about and acted upon within the university sector. In so doing it is important to note that I am not suggesting that copyright ought to be seen as a potential income earner for either academics or university management. Rather, I am suggesting that copyright can, if used in an appropriate and sensitive manner, be used to help achieve the goal of promoting knowledge and learning. Given copyright's tendency to commodify the objects with which it deals, this proposal may seem paradoxical to some. As we will see, however, this is not necessarily the case.

In so doing it is necessary to rethink the way ownership is thought about within the academy. The current approach is one in which ownership tends to be seen in terms of the financial benefits that it may give rise to. So we hear, for example, the Australian Vice-Chancellors' Committee say that:

...although there may be situations where the creation of material in the course of clear duties under a contract of employment would 'incline the institution to insist upon the ownership rights', 'there may be situations where [a university] will be prepared to waive or vest those rights in favour of staff'.<sup>13</sup>

This would arise where there is 'no expectation that the property will be commercially exploited for the benefit of the institution'.<sup>14</sup>

Rather than seeing ownership as an issue to be resolved between academics and their managers, or as a potential barrier to particular education goals, ownership can provide an important way in which the university sector is able to re-establish control—so crucial in facilitating appropriate access and use—over academic literature.

There are a number of ways in which the university sector may be able to regain control of educational copyright for the benefit not only of individual institutions but also for the benefit of the broader education community more generally.

#### *Universities Claim Ownership of Copyright in Works Produced in the University*

The first possibility is for universities to claim ownership of copyright in the works which are produced in the university. Traditionally, universities in Australia have not claimed ownership over copyright in works produced within the university. However, the perceived increase in the value of copyright works may change current practices, if they have not been changed already. Some universities have attempted to claim ownership over all copyright works produced within the university. Such claims, however, have been shown to be without legal foundation. Other universities, while claiming copyright in materials produced by an academic during their contract of employment, grant a licence back to the academic to use those materials for the purpose of teaching and research whilst in the institution.

One of the advantages of universities asserting ownership of the copyright in academic works is that it should provide those universities with increased bargaining power. If used effectively, this should help to ensure better access and use of copyright works within the university community. To this end universities could, for example, negotiate with copyright owners or their publishers to ensure a licence back arrangement for the provision of works for educational purposes within the university.

An approach taken in the United States, which may be worth consideration in Australia, is that taken by the *Indiana Law Review*. As the editor, Kenneth Crews<sup>15</sup> explains, the *Review* requires all authors of articles to assign copyright to the journal itself, 'not to hoard them or to sell them, but instead to assure that they could be made as widely available as possible'. Once this is done the following contractual commitment is made.

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The American Libraries Association has begun to include similar statements in many of its publications, including its books and the *American Libraries Magazine*. This ensures that the works are as widely disseminated as possible.

While there are many obvious benefits with this approach it is not without its problems. As has been pointed out numerous times, ownership brings with it responsibilities. As well as proving unpopular with creators, such an approach would be difficult and time-consuming to administer. If staff were to adhere to the principles of copyright ownership and sought permission every time a work was updated, amended, used or reproduced, for example, it would result in a deluge of requests for assignments of copyright thus placing increased burdens on those who have been given the role of copyright management.<sup>16</sup> Faced with the problems that flow from such responsibilities, universities may not wish to have complete ownership of copyright in materials produced within the university.

Another potential problem relates to the situation where an academic moves from one institution to another. While the academic may be free to move from one employer to another, the same may not be the case with the products that they have created. This may mean, for example that if an institution owns copyright in course materials created by an academic, if the academic was to move to a new institution, the academic would need to obtain permission from their previous employer to reproduce the material. The National Tertiary Education Union (NTEU) suggests that a system whereby the parties mutually grant licences to use intellectual property would be consistent with the principle that 'knowledge and ideas should be available ... for the benefit of all'<sup>17</sup>

Academics and their unions would almost certainly oppose any action by universities to claim ownership of copyright in works created by them. However, should universities be in a position legally to exert ownership over the works produced within the university then, despite grave concerns of academic staff and their union, this may be for the greater good of the education sector as the cost of accessing their works would have to be reduced.

### *Shared Ownership of Copyright*

Another means by which the academic community may be able to reassert control over academic publications is for universities and academics to share copyright ownership in works created within the university. As has been suggested:

...ownership of copyright is not an all or nothing matter: not only may ownership of copyright be divided as necessary, but licensing one or other party to use copyright

material in certain ways provides a useful mechanism by which the legitimate interests of all parties may be protected.<sup>18</sup>

This would have to be achieved through contractual means.

Joint ownership of copyright would increase the bargaining power of both individual academics and institutions when dealing with publishers. In so doing it would help to achieve a more balanced publishing arrangement whereby copyright is retained and licenses are granted for the publication of the copyright material. While publishers may feel threatened by this loss of control over academic works, there is no reason why they need complete assignment of copyright in order for them to exploit their publications. For example, Reed-Elsevier, who is one of the biggest commercial publishers of scientific journals, has agreed that it can work with licenses from authors, rather than demanding that they transfer full copyright.

#### *Universities as publishers*

Another way in which the academy may be able to regain control over academic publications is if universities were to re-examine their role as publishers.<sup>19</sup> This could be done through traditional means or through the establishment of publications in a networked environment.<sup>20</sup> The development of electronic environments for the collection and distribution of information may provide universities with an opportunity to develop alternatives to the current commercially dominated system of information creation, distribution and use. To this end, universities are exploring the feasibility of forming electronic text centres which would digitise available scholarly information and make it available to scholars over computer networks. Commercial interests appear to militate against the development of these information resources by restricting what information can be included and at what cost.<sup>21</sup>

The idea of the university as publisher is admittedly not a new one. While many universities may not recognise their role as publishers—ranging from informal publications such as academic calendars, brochures, teaching materials, anthologies etc. to the formal publications such as monographs and journals—many are already publishers of sorts. However, it cannot be overlooked that previous attempts by universities to publish have not been altogether successful.

While Australian universities have rapidly adopted and developed computer networked communications, their history in print-based publishing is patchy. The experience of university presses, in particular the closure of the Australian National University Press and Sydney University Press, is significant. As commentators have noted those presses which have been more successful, such as University of Queensland Press and Melbourne University Press, have depended on direct subventions, philanthropic income, and campus bookshop sales to remain viable. The only real exception to this has been 'Oxford and Cambridge University Presses, and several commercial publishers, [who] have successfully published academic work in Australia'.<sup>22</sup>

Another potential problem with the university as publisher is the suggestion, no matter how suitable their materials might be, academics may not produce electronic publications unless universities and their management recognise and support such moves in the hiring, promotion, tenure and research committees and research organisations, as well as the necessary funding support from granting bodies or institutions.<sup>23</sup> This concern is shared by the relevant unions.<sup>24</sup>

*Academics Retain Ownership of Copyright but Do Not Assign Copyright to Publishers*

An alternative approach to copyright ownership might be that the current ownership practices may be retained whereby the institutions do not exert ownership of copyright produced within the university, instead it remains with the academic author. If this approach were to be adopted, however academics would have to be re-educated about the importance of copyright to the university in an attempt to persuade academics to examine publishing contracts more carefully and not assign their rights to publishers. Under this approach it would be up to academics to change the way publishing companies work, by being more fussy about the terms they accept.

In such an arrangement, a licence could be granted to publishers to publish academics' works on the condition that a licence is given back to the institutions which allows for use for educational purposes. This would surely result in a dramatic reduction in the current costs paid to copyright owners to access what is often the academic's own work. One concern may be that junior academics with little or no track record in publishing may find it difficult to negotiate with academic publishers; however, universities could assist by providing assistance and training wherever possible.

### **Conclusion**

While these four options all go some way towards facilitating the university sector re-establishing control over academic works, they are not without their own problems. While the reallocation of rights may not be the panacea that academics and university management may be looking for, it is clear that thinking creatively about copyright may provide an important starting point.

### **Notes and References**

1. I would like to thank Dr Brad Sherman for his helpful comments on earlier drafts of this article.
2. The Higher Education Financing and Policy Review Committee (The West Committee). *Learning for Life, A Review of Higher Education Financing and Policy: A Policy Discussion Paper*, Canberra, 1997 at p. 16.
3. Other reasons for supporting the development of intellectual property include the following spin-offs to universities and the nation:
  - the promotion of the fundamental objectives and purposes of the institution in teaching, research and furthering knowledge for its own sake;
  - the protection of the integrity and welfare of the institution;
  - the expansion of the potential for increasing regional and international links; the ability to obtain an appropriate return for the use of facilities, resources and services provided by the institution outside the mainstream activities of teaching and research;
  - the encouragement and development of institutional growth, progress and success through ventures and industry and commerce in mainstream and peripheral activities for full commercial return;
  - the provision of fair and reasonable remuneration for staff and students in return for profitable and sound performance;
  - the provision of incentives for staff and students in developing and applying intellectual activity in the fields of industry, commerce, science, literature, and the arts; and
  - the attraction of the highest quality staff.

Recommendation 10 reads:

- The AV-CC recommend (i) that the Review Committee note the crucial importance of a strong research base and associated research activity on universities to the generation of intellectual property; and (ii) that Government, universities and the Business Council of Australia jointly review the processes leading to the patenting and commercialisation of intellectual property developed within universities with a view to improving these, and assessing the effectiveness of current mechanisms', The Higher Education Financing and Policy Review Committee (The West Committee), *op. cit.*, Ref. 2.
4. Where intellectual property is considered, most attention has been given to patents and the successful commercialisation of academics' research.
  5. B. Godwin & I. McDonald, August 1997.
  6. See A. Monotti, 'Ownership of copyright in traditional literary works within universities' *Federal Law Review*, 22, 1994, 340 at p. 341.
  7. B. Godwin & I. McDonald, *Intellectual Property: Preliminary Submission on Copyright Issues*, in The Higher Education Financing and Policy Review Committee (The West Committee), *op. cit.*, Ref. 2.
  8. L. Ray Patterson & Stanley W. Lindberg, *The Nature of Copyright, A Law of Users' Rights*, University of Georgia Press, Athens and London, 1991, pp. 177–178.
  9. Unsourced quote attributed to Margaret Thornton by D. Saunders, 'The intellectual property of academics as teachers, scholars or researchers', *Australian University Review*, 1993, 36, 1, pp. 2–4 at p. 2, cited in Australian Copyright Council, *Teachers and Researchers as Creators*, ACC, Sydney, 1997, p. 45.
  10. *The Economist*, 'Publish On-line or perish' *Australian*, 5 February 1998, p. 40. The increase in the number of scholarly journals published, escalating prices, the declining value of the dollar on international markets, and static budgets in research libraries mean that few new journal titles are being added to library collections, and many subscriptions have been cancelled in research libraries throughout the country.
  11. That is, university libraries are faced with repurchasing the scholarly articles of their own faculty authors, often at greatly inflated prices. See L. N. Gasaway, 'Scholarly publication and copyright in networked electronic publishing', *Library Trends*, 43, 4, 1995, pp. 679–700 at p. 681.
  12. J. McKeough, *Blakeney & McKeough Intellectual Property: Commentary and Materials*, 2nd edn, Law Book Company, Sydney, 1992, p. 93.
  13. Australian Vice-Chancellor's Committee (AV-CC), Discussion Paper, 1995, p. 9.
  14. Australian Copyright Council, *Teachers and Academics as Creators*, ACC, Sydney, 1997. p. 36.
  15. Director of the Copyright Management Centre Indiana University-Purdue University in 'Copyright and libraries in 1995: strengthening owner's rights and a proposal for greater access', Paper presented at the Annual General Meeting of the American Library Association, Chicago, Illinois, 24 June 1995, p. 3.
  16. See A. Monotti, 'Power to modify the vesting of copyright in an employer: subsection 35(3) Copyright Act 1968 (Cth) and Australian Universities', *EIPR*, 715, 1997 at p. 718.
  17. National Tertiary Educational Union (NTEU) Model Intellectual Property Policy at 3, referred to in the Australian Copyright Council, *Teachers and Academics as Creators*, Bulletin 91, ACC, Sydney, 1995, p. 36.
  18. Australian Copyright Council Bulletin Teachers and Academics as Creators, Bulletin 91, ACC, Sydney, 1995, p. 31.
  19. For example, see the Australian National University's Network Information Forum No. 1, *Electronic Publication of the Australian National University's Research and Teaching Output*, 23 July 1996 and Forum No. 2 *A Virtual University*, 6 September 1996.
  20. L. N. Gasaway, *Scholarly Publication and Copyright in Networked Electronic Publishing*, *Library Trends*, 43, 4, 1995, pp. 679–700 at p. 681.
  21. Report of the AAU (Association of American Universities) Task Force on Intellectual Property Right in an Electronic Environment, April 18 1994, <http://www.nlc-bnc.ca/ifla/documents/info-pol/copyright/intllpty.txt> at 3
  22. P. Spearritt & J. Thomas, 'Academic intellectual property in a new technological and industrial context', *Australian University Review*, 39, 1, 1996, pp. 29–33 at p. 30.
  23. G. Barwell 'Electronic Publishing: A Measure of Success', in Australian Vice-Chancellors' Com-



- mittee (AV-CC), *Key Issues in Australian Electronic Publishing, Collected Reports of Electronic Publishing Working Group*, Canberra, 1995–6.
24. See National Tertiary Education Industry Union (NTEU) submission to the Copyright Law Review Committee (CLRC), Discussion Paper, *Copyright Reform: A Consideration of Rationales, Interests and Objectives*, Attorney-General's Department, Canberra, February 1996 pp. 2–3.