

Response to the consultation paper SCHOLARLY INFORMATION IN THE DIGITAL AGE – CHOICES FOR THE UNIVERSITY OF MELBOURNE February 2008

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Copyright and Scholarly Information in the Digital Age

Copyright law will play an important role in the University's future strategy for scholarly information. This paper responds to some of the copyright issues from the Consultation Paper. In particular it highlights some of the issues arising out of the research project *Cultural Collections, Creators and Copyright: Museums, Galleries, Libraries and Archives and Australia's Digital Heritage* which is currently being undertaken by the Centre for Media and Communications Law at the Melbourne Law School.

Only a short time ago universities could operate giving limited attention to copyright due to the existence of statutory educational licences in the Australian *Copyright Act 1968*. In the digital environment however, this is no longer the case. As Jessica Litman pointed out in the early 90s:

*Technology, heedless of law, has developed modes that insert multiple acts of reproduction and transmission – potentially actionable events under the copyright statute – into commonplace daily transactions. Most of us can no longer spend even an hour without colliding with the copyright law.*²

In the contemporary educational setting copyright law and the licensing agreements which now govern access to so much scholarly material need to be considered as part of a broader and more complex legal and social intellectual property structure. In addition young people, who have grown up with access to technologies which allow the simple reproduction and dissemination of digital media, are likely to have different attitudes to copyright protection than previous generations.

I therefore consider it will be important for the University to incorporate a clear policy position on copyright and related legal and social intellectual property issues in its 10-year strategy for scholarly information and technologies. One

¹ Robin Wright is a researcher at the Centre for Media and Communications Law currently working on the ARC funded project *Cultural Collections, Creators and Copyright: Museums, Galleries, Libraries and Archives and Australia's Digital Heritage* she also has a background in copyright administration in the education sector. The opinions contained in this paper are her own personal views and do not reflect those of the Centre for Media and Communications Law.

² Jessica Litman, 'The Exclusive Right to Read' (1994) 13 *Cardozo Arts & Entertainment Law Journal* 29.

thing I have experienced in both my research into copyright and cultural institutions, and the practical implementation of digital projects, is that invariably at the commencement of any discussion about using digital technologies to disseminate media, the debate focuses on the technical requirements for implementation and user preferences, with little discussion of copyright. However in most cases, copyright will turn out to be the determining factor in what can or cannot be achieved (often to the great frustration of those working on a project). It is therefore important that copyright is seen as a key constitutive element in any future plan, rather than simply as a potentially problematic issue which can be dealt with at the end.

Responses to Consultation Paper

The changing nature of scholarly practice

Digital collections may have a greater reach and attract to a university a broader, more diverse audience of both scholars and the public.³

Although existing scholarly works are indeed being digitised, in most cases these digitisation projects have produced significant copyright issues. Our research has indicated that cultural institutions wishing to undertake mass-digitisation, even if some or all of the material may be out of copyright, face significant problems due to the time required to undertake the necessary copyright research. This can involve a significant cost per item. In addition the difficulty of clearing copyright or even determining if copyright still subsists in an item, can have an impact on the type of material which can be included in a digital collection and therefore also on the overall use of the collection.

The university in society

[Copyright] exists to maximise good by balancing the incentive to create (owners' or creators' rights) with the public good of information being disseminated and used (users' rights).⁴

The appropriate balance of copyright is subject to constant challenge in the contemporary environment and the university as both a creator and a user of copyright is in a unique position to determine and endorse how it maintains this balance in its own dealings with copyright material. This would allow the university to promote an environment of respect for the value of this copyright balance through the activities of both staff and students and external organisations who deal with the university.

In any adoption of an 'open access' approach to scholarly communication, one issue that will have to be considered is the inclusion of third-party copyright material in research publications. In certain situations the reproduction of a reasonable portion of a copyright work is permitted under Australian copyright legislation as Fair dealing for the purpose of research or study.⁵ However the matters to be taken into account in determining what constitutes a 'fair

³ 'Scholarly Information in the Digital Age' 9.

⁴ 'Scholarly Information in the Digital Age' 13.

⁵ *Copyright Act 1968* (Cth) s. 40.

dealing' include 'the purposes and character of the dealing' and 'the effect of the dealing upon the potential market for, or value of, the work or adaptation'. Therefore it is possible that any further publication of this third-party owned material by the university or another party, including through the inclusion of such research material in open repositories, may alter the purpose for which that reproduction or communication is being undertaken and therefore could potentially lead to claims of copyright infringement.

This is an issue which a number of institutions and the commercial publishing sector are currently grappling with. It would require policy direction on how the issue is to be addressed by the University if any open access projects were to be undertaken and consideration of the potential costs which may be incurred to clear copyright in such material if that were required.

In the US, the Harvard Law School has just adopted a mandatory open access policy,⁶ however US copyright law differs from Australian law in providing a broad 'fair use' defence.

Collecting our heritage

Many of our collections require conservation or preservation work. As well as reducing risk, investment in these activities would allow us to leverage the collections for their full potential value to scholars at the University and in the broader community.⁷

The impact of copyright on plans for providing wider access to the University's collections should not be underestimated. It is likely that the preservation and further dissemination of much of this material would be through the use of digital technologies and would therefore involve the reproduction and communication of material that may be subject to copyright. The issue of 'orphan works' is a significant problem for many Australian archives and museums, where the organisation may not have full records regarding the copyright owner and cannot determine who currently owns copyright in the material. Australia does not have any legislation which enables the use of copyright material in such situations although the government has indicated that a review of this issue will be undertaken at some time in the future.⁸

The need to clear copyright, whether or not the copyright owner can be located, can result in considerable costs and delays for projects where digital technologies are being used to preserve or disseminate older collections of material. Again significant amounts of time may need to be devoted to copyright clearance and/or the development of risk management strategies to address the problem. It may also mean that

⁶ 'Harvard Law faculty votes for 'open access' to scholarly articles' 7 May 2008, http://www.law.harvard.edu/news/2008/05/07_openaccess.php

⁷ 'Scholarly Information in the Digital Age' 16.

⁸ The issue of orphan works has been the subject of a recent report in the US – United States Copyright Office, *Report on Orphan Works*, (2006) <http://www.copyright.gov/orphan/orphan-report.pdf>.

only a small portion of material can be made available online and therefore may not satisfy the demands of users.

Copyright issues for consideration

A number of issues currently being debated in the copyright community may also be relevant to the development of a future plan for scholarly information. These include:

- The terms of publishing agreements between commercial publishers and academic staff
- The role of open licensing models such as Creative Commons
- The use of technological protection measures and digital rights management technologies to control access to copyright material
- The use of material in the public domain
- The impact of collaborative and networking technologies on copyright ownership
- Risk management strategies for the digitisation of 'orphan works'

The university as a leader in copyright management

The proposed 10-year strategy for scholarly information and technologies provides an opportunity for the University to provide policy guidance for staff and students on negotiating the complexities of the contemporary copyright environment. The University is excellently placed to support and promote the protection of the rights of copyright owners while also taking a pro-active position on the use of copyright exceptions and emerging forms of open intellectual property licensing. This could potentially position the university as a leader in the area of educational copyright management within Australia.

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