

BRIEFING PAPER

Open Access and IP Issues for NTEU Members

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There are a number of IP developments that are coalescing that will impact upon research performance assessment, libraries and publishing in the tertiary sector in the next three – five years. The Australian Chief Scientist, Cathy Foley, is leading a whole of government approach to promote open access science and research across Australia. The initiative mirrors EU and UK developments that have already led to a requirement that all publications accepted for research assessment be open access. In some places whether or not publications are open access is also a factor considered in hiring and promotion rounds. Universities Australia, NHMRC, ARC, Wellcome Trust, Elsevier, Springer Nature Group, Wiley and Clarivate are in discussion about how open access may be implemented in Australia.

The unfolding open access agenda will significantly affect worker's rights and academic freedom. If there is not a proactive union engagement with the redesign of the research publishing landscape it will be designed by commercial publishers without regard for worker's interests. There will continue to be more restraints on academic freedom, job insecurity and data uses that undermine solidarity and the capacity to talk back to power. Open access politics differs from the conventional situation where universities usurp established rights of workers. The sector financial crisis is driving the change. This provides an opportunity for the NTEU to improve the working conditions of members as part of negotiating the shift to open access publishing.

BACKGROUND

1. The evolving digital publishing landscape coupled with declining support for publicly funded universities is exacerbating the shift to open access publishing. Removing impediments to access to knowledge and reducing the costs of education is in the public interest.
2. Free access to knowledge is a significant issue for academics, students and the broader community and has political implications for our region. Access to journals is controlled by four companies, Elsevier, Springer Nature Group, Wiley and Clarivate.
3. The salient issue for workers is the architecture supporting the publishing landscape in which individual authors have little negotiating power to retain rights sufficient to share their work with others or comply with funder and institutional deposit mandates.
4. Contracts are issued via multinational publisher portals where it is very difficult, if not impossible, for Australian authors to negotiate fair or appropriate terms. The default position transfers all rights to the publisher.

5. Publishers are directly and indirectly closing down independent self-archiving and academic sharing of publications where this is possible. Not-for-profit author sharing portals are being acquired by the publishers and threats of legal actions are forcing survivors into agreements with them.¹ Financial projections of major publishers are already factoring in the commercialisation of the data streams generated from author sharing of publications. Data generated by academics is a major anticipated source of profit for publishers as conventional subscription publishing revenue continues to shrink whilst open access increases. Anticipated data markets include valuing the commercial worth of individual author employees and research teams and supplying this information to government and external parties.²
6. There are significant workplace and privacy issues for academics that flows from data sharing with funders, governments and employers from metrics generated by publication and academic community sharing portals. There are no accountability and transparency measures to protect workers.
7. Contractual terms entered into by academic authors often require the library and university to purchase back access for use of the publications for staff and students. Statutory education licence fees are also applicable to these works. This increases the cost burden on universities, leading to an overall reduction in access to knowledge resources. Librarians report that the high cost of accessing essential STEM resources currently impacts disproportionately on acquisition of Humanities and Social Science publications.
8. Aboriginal and Torres Strait Islander rights will continue to be ignored and overlooked, with communities left without effective control over research about them without mainstreaming of these issues in contractual negotiations over copyright.
9. A sector-wide approach is needed to improve the situation for Australian authors, respect Indigenous rights to knowledge and culture and provide for data privacy.
10. Publisher portals have accepted licence terms imposed by funders and for some EU and UK universities that facilitate Open Access and self-archiving by the author.
11. Due to the way IP Policy and employment law intersect, as copyright experts we have significant doubts about the efficacy of university IP Policies without a direct incorporation of a revised and much improved Policy into the EBA. Without this foundation, the university has no clear standing to negotiate terms on behalf of authors that could help enable workers and the university to retain rights sufficient to allow for community sharing and uploading to the institutional repository.
12. This problem creates an opportunity to advance other issues affecting workers, to secure the interests of authors in self-archiving and sharing and promote data privacy.

¹ For example, Elsevier's research products include Scopus, SciVal, Science Direct, SSRN, Mendeley, Pure and bepress. Academia.edu (Mendeley) and bepress/SSRN (Elsevier) are in competition with not-for-profit ResearchGate. ResearchGate has been subject to take-down notices and subsequently reached agreements with Springer Nature, Cambridge University Press and Theime.

² See Scholarly Publishing and Academic Resources Coalition, *Landscape Analysis: The Changing Academic Publishing Industry- Implications for Academic Institutions* (SPARC, 2019), 32.

STRATEGIC CONSIDERATIONS IN EBAs

1. The EBA needs a clearer statement of IP rights of the university and the employee author with a view to securing rights retention of both parties sufficient to support the bargaining position of the author is securing self- archiving and open access rights.
2. It is not feasible to place responsibility upon individual authors to secure necessary rights. Universities and NTEU need to collaborate on the specific legal construction of the rights retained by individuals. It is in the university interest to co-operate here too.
3. The university mandate of deposit of a publication in an institutional open access repository needs to be matched with retention of the author's right to self-archive the publication to share with research communities.
4. The NTEU could demand a clause that requires that data generated by the institutional repository or publisher portals not be used in performance management.
5. Due to the way employment law intersects with IP Policy and Australian common law, publications by casual employees cannot be covered by blanket IP clauses. Residual payments for subsequent reuses of works authored by casual staff should be demanded (like an actor-residual right for broadcasts). The employer needs to accept this term in order to exclude the publication from statutory licence obligations when the material is used in teaching. In essence, for published works this provision is cost-neutral and simply ensures that the casual employee is the recipient of the licence fee. For unpublished works (such as teaching hand outs), it simply reflects the need for a copyright licence for the university to reuse such works under Australian law.

GOING FORWARD

As copyright experts we are deeply concerned that the NTEU relies upon a publisher-dominated organisation, the [Australian Copyright Council](#) for advice on copyright matters. This organisation has no experience with or sympathy for the issues of workers in the tertiary sector. It works for profit publishing founded upon unpaid labour provided by authors, reviewers, and editors, creating a tax on knowledge.

We would welcome the opportunity to discuss these issues further with the NTEU.

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