BRIEFING NOTE: PRELIMINARY FINDINGS

University rights retention and academic publishing contracts in a world of Open Access mandates

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Executive Summary

This summary provides a brief overview of preliminary findings and recommendations arising from the Australian Research Council Discovery Project 'Producing, Managing and Owning Knowledge in the 21st Century University' (DP200110578). This research seeks to understand the tension between research impact and the legal and policy framework that governs the ownership, management, and dissemination of research outputs in Australian research institutions. Our ambition includes harmonisation and simplification of the policy terrain, with a view to supporting open access in ways that do not increase publication charges, subscription and statutory licence costs and administrative burdens on universities and researchers.

We have completed initial interviews with the NHMRC and ARC and conducted a cross-institutional analysis of Intellectual property (IP), authorship, open access (OA) and Aboriginal & Torres Strait Islander research policies of 6 universities (UNSW, USYD, QUT, UoN, UTS, UniSA). This has provided some insights into the various mandates at the researcher interface level and informs preliminary recommendations about ways the number of applicable policies could be reduced and harmonised sector wide, with support from management and external stakeholders.

Recommendations are inspired by five related policy objectives in the context of achieving a more efficient and productive research environment across the sector:

- minimise sector exposure to article processing charges (APC);
- minimise sector exposure to statutory educational licence fees;
- improve implementation and compliance with Aboriginal and Torres Strait Islander research policies;
- create downward pressure on database subscription fees;
- improve the utility of institutional repositories; and
- minimise sector dependence on private data repositories for research metrics.

Research team

The Chief Investigators include researchers with experience in senior university management and in Aboriginal and Torres Strait Islander research leadership; a former Australian Law Reform commissioner and chair of the Digital Economy Inquiry; a former and a current member of the ARC College of Experts, also both former ADRs; a DECRA Fellow and Post-doctoral researcher. Combined we have considerable intellectual property expertise, including in educational statutory licensing, publishing contracts and legal education, and a practical understanding of research policy demands at a range of institutions across different career levels.

The team includes: Professor Kathy Bowrey, Faculty of Law & Justice, UNSW; Emeritus Professor Tom Cochrane, Faculty of Law, QUT; Dr Marie Hadley, Newcastle Law School, UoN; Emeritus Professor Jill McKeough, Faculty of Law, UTS; Dr Kylie Pappalardo, Faculty of Law, QUT; Professor Irene Watson, PVC Aboriginal Leadership and Strategy, UniSA; Professor Kim Weatherall, Faculty of Law, USYD.

The problem

Navigating knowledge ownership and retaining rights in the interests of researchers, libraries and in teaching is complex and fraught. Copyright law has rules about ownership and credit for research outputs, but a range of policies affect ownership and use of university research. The ARC and NHMRC mandate open access to research. Research integrity policies require recognition of collaborations in the form of authorship. Where research involves Indigenous communities, additional complex questions of communal input, control and benefits arise, which are reflected in codes of practice and specific collaboration agreements. Inevitably policies diverge or conflict. Researchers may struggle to reconcile these tensions.

Universities have reformed IP Policy in the wake of *University of Western Australia v Gray* [2009] to strengthen employer claims to employee IP. Our legal analysis suggests that these reforms are not as effective as has been assumed, particularly in the context of publishing agreements and in light of publisher practice. Academic publishing is a major industry where four companies: Elsevier, Springer Nature Group, Wiley and Clarivate wield considerable global influence affecting the terms and conditions of publishing contracts, subscription licences, and access to data. A confusing policy terrain for researchers and differences in Australian university IP policies and practices plays into the hands of international publishers when negotiating publishing contracts. Default clauses in publishing agreements routinely ignore university assertion of IP ownership and rights retention clauses. University IP policies try to retain institutional use of employee works in education and research without licence, avoid statutory licence fees and support institutional deposit. But policy wording and technicalities vary widely across the sector, which could mean varying legal effectiveness, and also makes it difficult to publishers to issue contracts via publishing portals that respect university rights.

Sector OA mandates routinely apply to journals and conference proceedings, and encourage OA for books and book chapters. Authors are left to negotiate with publishers to meet these policies as best they can, with APC or embargos. Current initiatives toward mandatory OA without embargo are advancing without so far offering any additional help to authors. Additional complications arise from the promotion of interdisciplinary and multi-disciplinary research, without addressing disciplinary differences in publishing practice. An essential role is played by independent local publishers who operate on a very different scale. Policy impacts on these outlets, including university presses, Australian and regional journals, and Humanities databases such as Informit, need to be very carefully mapped. Responsible policy also needs to consider international and regional impacts so that when international students graduate and return home, they can retain access to essential research publications.

Preliminary Recommendations

The following preliminary recommendations are designed to streamline the legal and policy interface, with a view to strengthening rights retention by authors and universities as appropriate to match the increasing momentum of OA mandates in Australia, without cost blowouts.

1. **Enterprise Bargaining Agreements (EBA) should explicitly assert university ownership of employee copyright.**

In terms of hierarchy, an EBA prevails over individual employment contracts. With the exception of the University of Newcastle, universities we reviewed only assert IP ownership through the IP Policy without reference to the EBA. This leaves the content of any duty on staff to publish, such that could give rise to university first ownership of a publication, defined only in specific workload policies and agreements that govern the particular organisational unit in which an employee is located. This leads to considerable complexity in determining which employment contexts and university connections would give rise to university ownership by virtue of their status as an employer. Publications by teaching-only and sessional staff would routinely sit outside the scope of rights retention strategies. There is a significant and potentially growing number of staff in these roles. The distinction between research and teaching material is also not sufficiently robust to minimise university exposure to copyright payments.

The failure to specify university ownership of employee IP in the EBA does not necessarily render university assertions of ownership via IP Policies unenforceable, but due to the complex interaction between industrial law, particular university policies and s35 *Copyright Act* 1968 (Cth), university ownership is constructed through an unnecessarily complicated, insecure foundation.

The forthcoming High Court *Ridd v James Cook University* decision may help clarify the authority of university policies in relation to the EBA, but the case does not involve the duty to publish and the status of an institutional IP Policy. A firmer claim to university ownership of IP would be achieved by explicit reference to IP ownership in the EBA. Regardless of the outcome in *Ridd*, it is prudent that the EBA and IP policy clearly align.

2. **Clauses that determine authorship, Aboriginal and Torres Strait Islander authorship, IP and cultural property rights should be incorporated into institutional IP Policies.**

Authors should not have to consider three separate policies to determine ownership of IP in publications. University copyright in publications is dependent upon correct attribution of co-authorship, IP and cultural rights (as identified in ethics processes and associated collaboration contracts with Aboriginal and Torres Strait Islander communities) by authors. Wrongful attribution impacts the efficacy of rights retention clauses by universities. Wrongful attribution in publishing agreements impacts the enforceability of publishing contracts, as well as potentially giving rise to proceedings for research misconduct. Poor practice potentially exposes named authors, publishers and the university to copyright infringement proceedings arising from subsequent uses of the research. Such risks can be minimised by integration of all authorship and ownership considerations into the IP Policy.

3. **Australian universities should adopt the strongest formulation of university rights retention. The IP Policy (and EBA) should state that *the university owns the IP and retains the right to use the work for education and research***

Assignments, licences, waivers and exclusions are used in IP Policies to retain university rights to use works by employees and minimise the requirement to pay for copyright licences to publishers. Australian authors are routinely offered non-compliant contracts that do not respect these legal restrictions on freedom to

contract. Work arounds, such as paying APC, can involve paying the publisher to provide open access that the university could provide with the infrastructure and rights it has retained.

The strongest formulation for university rights retention is where the IP Policy (and EBA) say that *the university owns the IP and retains a right to use the work for education and research* (QUT; UTS). In these cases, a publisher would not be able to rely upon the publishing agreement to exclude the university from dealing with the copyright work for education and research purposes and making the work accessible through the institutional repository. However, it would be an infringement of the publisher's published edition copyright or type-setting were the university to reproduce or make available the proof or published version of the literary work without permission.

Where the IP Policy says that the author owns the IP and the university retains a non-exclusive licence to use the work for teaching and research (UNSW, USYD, UniSA), but the author subsequently assigns the entire copyright to the publisher, there are real doubts whether their university would retain a licence that would subsequently allow them to use the work for teaching and research or retain a copy of it in the institutional repository. Universities should cease the practice of asserting that the author is owner of copyright where the university retains a non-exclusive licence to use the work for teaching and research. Universities should also cease the practice of waiving ownership of academic publications (UoN).

4. Australian universities should adopt identical IP rights retention approaches in IP Policies that are compliant with OA mandates.

Authors have neither the expertise nor the bargaining power to negotiate bespoke copyright terms. Some research indicates that even where rights retention is secured without payment, publisher practice does not conform, and non-infringing copies of publications are removed from research community sharing portals. It is impracticable to require the big four STEM publishers, Elsevier, Springer Nature Group, Wiley and Clarivate, to tailor their interfaces to address the diverse Australian legal formulations designed to achieve effective rights retention. Transactional costs for all parties are reduced and a stronger sector bargaining position for universities would be secured through adoption of identical rights retention clauses in IP Policies.

5. Considerations in negotiating with publishers

Authors and libraries are the usual parties who enter into negotiation with publishers. For authors, publishing agreements are commonly issued through automated author portals. Editors are increasingly limited in varying terms and conditions supplied to authors. For appropriate contractual terms to be on offer, universities need to approach the major publishers and communicate the legal requirements that flow from an Australian sector-wide approach to rights retention. This would reduce confusion for authors and minimise publisher transaction costs in administering author submission portals.

Through negotiations of this kind it is possible to accommodate the different circumstances of different publishers, and to consider best practice that is supportive of Australian publishing and the diversity of the publishing landscape. For example, publishing can be different between disciplines, such as Computing, as compared to Humanities and Social Sciences.

The Council of Australian Librarians (CAUL) reports that librarians can face considerable difficulty in negotiating database licence terms and avoiding year-on-year inflated costs. Sector finances lead to struggles to maintain collections and impacts the buying of desired works. Adopting our proposals, as the university comes to own increasing numbers of employee publications (directly and particularly through cross-licensing with other universities) in addition to the number of works that are published OA, should improve the bargaining position of the university in renegotiating the cost of library database subscriptions and the scope of exposure to statutory licensing fees. Reliance upon publisher portals creates a precarious pathway to long term OA, as publishers routinely review what content is maintained and available. Journal inclusions in library subscription databases may vary over time and availability is affected by changes to subscription bundling agreements offered to institutions. Effective institutional record keeping and an interface between the institutional repository and library database is essential to achieving downward pressure on costs, through accurate data capture about works for which the university does not need or already has a licence to use.

6. Australian universities should negotiate clauses that enable deposit of the *published* version of the research through the *relevant* institutional repository and support author *self-archiving.*

Research integrity concerns and researcher efficiency is better served where standard university clauses provide for OA deposit of the *final published* version of the research. It is impracticable to request authors to return to earlier unformatted copy to reinscribe late changes. Universities should strive to secure clauses that permit upload of the published version of the copy. APCs and transformative agreements (TAs), such as read-and-publish (R&P) or publish-and-read (P&R) agreements, are mechanisms that also facilitate OA with respect to the final published version. However, this charge may remunerate publisher contributions well beyond the market value of published edition copyright (the text layout, which is all the publisher owns), whilst discounting the free labour provided by the author, peer reviewers, editors and research infrastructure provided by the university and funders that underpin the reputation and commercial value of the journal.

Most OA Policies require deposit in a named institutional repository, however, historically disciplines and researchers have more diverse archival practices. There can be multiple technical pathways that lead to upload to the named institutional repository. These pathways could be impacted by the way copyright law works if the right to deposit is limited to a named portal. Compliance would be enhanced by a clause that secured the right to upload to the *relevant* repository.

UNSW OA policy recommends a publisher addendum that provides for the right of the employee author to *self-archive* research on personal webpages where this includes a link to the publisher website. We support this practice, however the obligation should instead be to mandate inclusion of a link to the institutional repository.

In addition to personal websites many authors make published versions of publications available on academic social and research networking platforms. Many social and research networking sites used by academics have transitioned from being not-for-profit to commercial entities as part of a strategy by publishers to consolidate research data relevant to metrics that assess publication and researcher value. For example, Elsevier's research products include Scopus, SciVal, Science Direct, Mendeley, Pure, Academia.edu (Mendeley) and bepress/SSRN. Research impact is enhanced by promoting diverse points of access, thus decentralised means to access publications is important. As publisher profits are increasingly dependent upon data services rather than exclusive access to works (including selling data generated by author publications to funders, governments and commercial users), it is also important to maximise points of access to publications and researcher data generated outside of locked down systems. It is in the sectors' interest to support market choice in academic social and research networking platforms. Having multiple points of access to the same work in different hands helps create downward pressure on publisher pricing of research data services and database subscription services by the leading providers.

Universities and unions need to open up discussions about the longer term implications of the creation of large data sets through privately owned academic research and social networking sites and advise employees about the potential uses and privacy implications of data generated through these interactions.

7. **Institutional repositories should make works available subject to a Creative Commons Attribution Non Commercial (CC BY NC) licence.**

The Creative Commons Attribution Non Commercial (CC BY NC) licence is already well supported in the sector and easily understood by the public as a form of OA that makes works freely available to use. Attribution and non-commercial use terms are required to protect reputational interests, prevent unauthorised versions of works circulating and to minimise opportunities for predatory publishers.

8. **Sector wide standard terms in publishing contracts entered into by employee authors with all publishers should explicitly state that the publication is not subject to an educational statutory licence.**

In the current case before the Copyright Tribunal over educational statutory licencing costs, *Copyright Agency Limited v Universities Australia*, evidence was introduced to show that universities have policies and guidelines that encourage academics to create and use OA material. The Statutory Licence is to be used as 'a licence of last resort', given the availability of employee-generated material owned by the employer. University copying under statutory licencing has dropped by about 50 per cent since 2013.

Where the university implements an effective rights retention policy that permit educational uses of publications by them, works by employee authors may be excluded from the operation of the licence. However, many publishing agreements explicitly state that the publisher is entitled to retain royalties generated by statutory licensing schemes. The applicability of the statutory licence scheme to employee publications should be carefully considered in all model publishing contracts.

As works are often co-authored with employees of various universities and due to staff mobility, universities should enter into cross-licensing agreements to permit the use of works by employee authors in each other's institutions.

Next Steps

A detailed legal analysis that underpins these recommendations, including insights into current practice informed by interviews with senior management, research managers and researchers, will be published in a research report in late 2021. Model clauses, policy harmonisation model/s, and best practice guides for stakeholders will be developed to supplement these recommendations in 2022. If you would like to be kept abreast of these developments, please email marie.hadley@newcastle.edu.au and ask to be added to the Project Updates email list.