

The intellectual property of academics as teachers, scholars or researchers

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In keeping with recent Australian Universities' Review issues on accountability and sexual harassment, this issue on intellectual property aims to further the professionalisation of academic work practices and culture. Professionalisation is not antithetical to autonomy; on the contrary, it is a precondition of an informed exercise of their autonomy by publicly funded academics. By contrast with freedom and funding, the usual preoccupations, the attempt to relate intellectual property arrangements to academic professionalisation risks seeming at best an afterthought or, at worst, an external imposition on an ideally self-governing community of academic individuals. In fact, the exercise of that freedom is now largely inconceivable except within a system of legal norms and sanctions governing the ownership and use of intellectual property. Not that the production and circulation of knowledge would cease if intellectual property law were dissolved forthwith. But the fact is we now organise our intellectual work in large measure through a complex and expanding body of law about copyrights and patents, trademarks, circuit layouts and designs.

This body of law has important bearings on our work practices as teachers and researchers and on the experience of our undergraduate and postgraduate students. Regrettably, we lack definitive empirical evidence on matters as basic as the economics of copyright and patent protection in Australia, the levels of copyright and patent royalties received by Australian academics and their universities, and the earnings from copyright and patent licence fees. But we can easily identify the key issue: the ownership and control of intellectual property. Where should we set the limits of individual ownership and control on the one hand, and of institutional ownership and control on the other? Good answers are needed if we are to avoid falling into the apparently melancholy view of Margaret Thornton when she asserts that to 'lose copyright in their writings would mean that academics would be likely to lose one of their few remaining sources of autonomy and fulfilment within the academy'.

This issue of the *Review* explores aspects of the ownership and control of intellectual property without succumbing to the notion that if copyright and patent were abolished the academy would be transformed into a simpler and freer little republic of thought and expression. Indeed, if the task was to speculate about alternatives to copyright or patent, the first thing would be to ask whether any alternative is more or less onerous than the mechanisms it replaced. But the point is not speculation. A principal aim is to inform the reader on the provisions and implications of the intellectual property regime we actually have. A further aim is to contribute to the now urgent task of redefining the status accorded to intellectual labour.

We can begin by specifying the division of intellectual property into five sectors familiar in the academic sphere:

- traditional academic publication, individual or collaborative, of papers, monographs, books in series and textbooks;
- inventions developed by staff and sometimes commercialised via patents and licences.
- teaching materials developed and used by staff and institutions;
- computer software developed and used by staff and institutions;
- research and other publications by universities in their own name;

However, policy-making on these several forms of intellectual property is now unavoidably caught up in an array of circumstantial factors. Not in any order of relative importance, these include:

- the new communications technologies that affect the production and dissemination of knowledge, including e-mail, scanners and electronic data bases of digitised materials;
- new institutional arrangements for research conducted collaboratively by universities and outside companies or sponsored by the latter, the outside body or devolved unit - while not their employer - sometimes claiming exclusive right to control the (non)publication and commercial exploitation of intellectual property produced by the university researchers;
- the emergence of new campus personalities such as intellectual property officers or industrial liaison officers;
- administrative initiatives capable of producing benefit or causing concern (as when the AVCC's 1992 Conditions of Acceptance of Research Contracts affirms "as a general principle" that "ownership of intellectual property should be vested in the university" or when, late last year, a draft intellectual property statute proposed for the University of Melbourne broke with established practice by proposing that academic staff be partially divested of the royalties received from their published works).

On all sides of the grand and comforting assumption that academic teaching and research - imagined as the free creation and circulation of knowledge - is synonymous with the public good, we therefore see such a mix of circumstances that certainty of the sort needed for legislative action and informed administration is not immediately available. The premise of the following initial observations is that we should not claim to know the answer before we know at least something of these circumstances.

This is more easily said than done. Even in the short time of preparing this issue of the *Review*, circumstances bearing on academics' status as owners of intellectual property rights have changed to an extent that makes olympian notions of the status of intellectual labour and timeless intuitions about fundamental rights redundant. Let me simply list ten of these recent events, pausing briefly on the final three, again in no particular order of importance):

- the definitive establishment of Open Learning (television distance education) with its alternative modes of delivering teaching and the emergence of independent 'brokerage' of teaching materials;
- blanket claims by university administrations to the intellectual property of staff and students, as in the 1992 draft statute for the University of Melbourne;
- the development of novel arrangements for handling intellectual property aspects of research and commercialisation related to knowledge and products of Australia's indigenous cultures;
- the further reform of intellectual property law, whether by court decisions on the legal status of computer software or by the Prices Surveillance Authority's challenge to territorial copyright protection and restrictions on parallel importing of books, sound

recordings and computer software;

- claims of the new electronic 'library without walls' to be the 'one-stop bookshop' of the future, displacing traditional bookshops by storing and reproducing as required, in whole or in part, copyright materials that has been digitised and made instantly available worldwide from on-line data bases (unless the publishers by-pass the libraries and deliver materials directly to the on-line consumer!);
- the possible extension of the public lending right into an educational lending right whereby a remuneration (and therefore a charge) would accrue from each university library loan of copyright material;
- the slow advance of the Uruguay Round which, in reforming international trade relations, will bring within the GATT disciplines the trade related aspects of intellectual property rights (TRIPS).

Saying no more on the foregoing than that it is hard to detect a common trend that joins them, let me mention three other recent and relevant events, making ten in all.

First, the Law Council of Australia's recent proposal for a thoroughgoing reform of intellectual property law and its administration. In *Intellectual Property Law Reform and Administration* (1992), the Council aims to end the 'present fragmentation of administrative responsibility' by establishing a unitary system of research, policy making and administration to replace the present scatter of bodies responsible for the different sectors of intellectual property law - copyrights, patents, designs, trademarks, circuit layouts. The proposal includes the formation of an 'overall "peak" council of all interested parties to keep open channels of communication between those administering and formulating intellectual property laws, those working in the area, and the owners of such rights'. Given their part in the creation, exploitation and consumption of intellectual property - universities and academics can be and are both producers and pirates - universities and academics individually and collectively should follow this development with interest. The Law Council's proposal also has a historical interest: for law reform and administrative purposes, it levels the traditional division between copyrights and patents, between intellectual reflection and industrial application and, by extension, between academic writing and inventions. This deeply established legal and philosophical threshold marks a division formerly drawn between the cultural and the industrial, the personal and the technical, Shakespeare and Watt. Much anxiety has been expended in the past on this division of the 'two cultures', to assert it or to heal it. Administrative reform is now likely to reshape this old landscape.

Second, the regulation of photocopying for educational purposes. This issue, familiar to all, is anything but settled. True, the instituting of a system of statutory (that is, compulsory) licences allowing educational copying under the *Copyright Act* has given a base from which to address the problem, the statutory licence granted by the Act being an Australian legal and educational initiative. But 'anthologisation' has now emerged as an unforeseen problem. Anthologisation is the compilation of 'books' of readings extracted from existing sources, protected or in the public domain. It represents a new teaching instrument that has emerged in an unforeseen intersection of circumstances. These include the ease of copying via reprography; the expansion of student numbers without a corresponding provision of materials for study, whether by individual purchase or by library holdings of all key texts in multiple copies; the greater sophistication of reading lists; the better course preparation by teachers who now not only read the set texts in advance but also 'customise' them into selections tailor-made for a given course; and the high Australian price of printed books. If the expansion of student numbers is in the general good, then so too it might seem is anthologisation, understood as a means of providing - in the absence of alternatives - for the support and success of ever larger numbers of students.

However, anthologisation is now the subject of a suit for breach of copyright taken out against the Victoria University of Technology by the Copyright Agency Limited (CAL) for the Australian Book Publishers' Association. The case is set down for the Federal Court in Sydney in February 1993. At issue is whether the statutory licence administered by the CAL for multiple copying for educational purposes extends to the new practice. The court will have to decide the precise legal status of 'anthologisation'. Is it an illegal re-publishing in book form (whether or not for profit) of protected materials in a manner that substitutes for actually purchasing and using the whole of the work or works from which extracts are selected? Does anthologisation unfairly undercut the authors' and publishers' market both in relation to sales of the original edition and in respect of the market for extracts (which this new academic practice, more sensitive than the publishers to the local political, demographic and financial circumstances of university teaching today, has itself brought into being)? Is anthologisation within the Act?

In posing and answering such questions we make an interesting discovery: our interests and rights as authors of intellectual property conflict with our interests and rights as educational users of intellectual property. So much for the notion of 'fundamental' rights! Instead of invoking metaphysical abstractions, a deal will have to be done, in some cases between two competing sets of interests that one and the same individual might have as author and as teacher. Specialists in intellectual property law will also have interests as scholars of intellectual property. Depending on our purpose, so we would occupy one or another of these statuses. Our professional identity is more complex than we might like to think.

Third, the journalists. Broadly speaking, under the *Australian Copyright Act 1968*, you do not own copyright in what you write if you are employed to write: the employer is the first owner of the copyright where a 'work is made by the author in pursuance of the terms of his employment ... under a contract of service'. However, section 35(4) of the Act creates an exception for journalists in the form of a split copyright. For purposes other than journalistic publication - for instance re-publication of articles in book form or in press clipping services - the journalist-author and not the employer holds copyright. In July 1992, however, Australian newspaper proprietors persuaded the Federal Attorney General to refer this exception to the Copyright Law Review Committee for reconsideration. The Australian Journalists' Association (AJA), now part of the Media, Entertainment and Arts Alliance, acted to protect their copyright, establishing relations with the CAL and the Australian Copyright Council, a body which admits as members organisations that represent owners of copyright.

To interest its members in the issue, the AJA Newsletter was blunt: 'Copyright is about money for journalists. ... Journalists get paid for the work they do for their newspaper or magazine. Copyright means they get paid for any secondary uses of their work, such as photocopying, books or use in data banks'. The AJA explored hitherto unexplored relations, specifically with the CAL and the Australian Copyright Council, organisations that had dealt with authors and publishers but not with unions. The stakes are high. In September 1992, \$100,000 was distributed through the CAL to copyright-owning journalists whose work had been reproduced under licence in universities and other educational institutions for teaching purposes. A similar arrangement will remunerate journalists for copying of their work by Federal Government departments; through the CAL, the AJA anticipates that the 'hundreds of millions of copies of journalists' articles made each year ... will see fees estimated at between \$5 and \$10 million, most of which will be paid directly to the journalists whose work has been copied'. Albeit without a section 35(4) of their own, academics as employee-authors should find these circumstances worth noting, whether in relation to royalties or to the increasing remuneration from licence fees collected by the CAL for subsidiary uses. Of course, as authors, academics must first retain their copyright if they are to be represented by the Agency.

Here the industrial and employment side of the question begins to loom. Although it implies a treatment for academics that is more

favourable than that for other employee-authors (except journalists), the strong custom and practice of universities has been not to include traditional scholarly subject matter - academic papers, monographs, textbooks - in the category of works made 'in pursuance of' the terms of employment.

Where teaching materials are concerned, the picture is different. Some university statutes have assumed the institution's capacity to claim full copyright in this form of intellectual property. In fact the validity of this claim has not been decided at law; we have no actual decision as to the authority of university administrative powers relative to the powers of the Copyright Act. In practical terms, it would be absurd if, on moving to a new post and in the absence of a prior contractual agreement to the contrary, we left behind not only our old phone number but also our future capacity to give a lecture already given at the former workplace. Such transfer of 'information' - which applies equally to an academic's research 'capital' - is part of the accepted flow in the teaching and research personnel marketplace. The 'value added' through work experience at one institution can be legally exploited at another. Indeed, any other practice would be intolerable for the orderly workings of what is, in this respect, a de facto unified national system.

Conversely, where course materials have been collectively produced for an institutional venture, an individual's departure should not prevent the further use of the materials by her or his former employer. Difficulties can arise where materials are topped and tailed by someone other than the author, or where materials written for use in one context are delivered in another. Such enforced publication happens when an independent company or consortium - of the sort that exists in Victoria - delivers to students in, say, an Islamic context materials that the author would not have chosen to deliver there. After all, it is both polite and intelligent to say one thing to one audience and something different to another. Here is yet another problem to be managed. The answer is neither to denounce the 'commodifying' forces of late capitalism nor to adopt a luddite cringe and never put a lecture into a form that someone or something else could appropriate. Sketching indecipherable hieroglyphs on a transparency might baffle

the aliens of the 'consortium' and thus elude their property claims but it does not represent a rational and professional conduct. The task is rather to define and institute such conduct.

The foregoing are some of the legal and cultural circumstances. Listing them shows something of the multiple forces acting on us to the extent we operate within the field of intellectual property. The papers that follow, four by intellectual property lawyers, three by non-lawyers with an interest in the question, seek to inform the reader on how intellectual property should be administered in the universities. The new 'electric' academic needs intellectual property guidelines.

The relations of academics, individually as well as through FAU-SA, to bodies such as CAL and the Australian Copyright Council remain to be elaborated. We shall likely see realignments of what, in such fluid circumstances, begin to look outdated positions of resistance and strategies of opposition. Beautiful hypotheses totter in the face of circumstances. New dispositions will be forged, not least a shift from thinking, as infringers, how best to elude the Copyright Act and the CAL inspection to thinking, as authors, that we and the CAL are, for some purposes, on the same side. For the time being, the universities remain key sites for the production and dissemination of new knowledge. Clarification should thus be sought for at least minimum standards of protection for academics' intellectual property rights, particularly in industrial circumstances where the emergence of enterprise bargaining makes the role of federal industrial awards less certain. Intellectual property is increasingly a concern for government and the private sector. For this reason, the academic teaching and research community - as producer of and dealer in intellectual property - cannot be untouched by changing public policy and legal and commercial circumstances.

These observations are not intended to induce a negative posture. Rather than encouraging indignant or even apocalyptic talk of the 'debilitating' of science, the 'commodification' of humanistic culture and the 'appropriation' of academics' fundamental rights, the following papers point towards an acceptable management of the difficult issues of intellectual property ownership, control and consumption in universities.

Intellectual property rights in the Australian university context: An overview

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1 Introduction

The purposes of this article are:

- to describe the existing legal position within the Australian universities with respect to the ownership and exploitation of intellectual property rights by staff, students and outside contractors;
- to identify issues that require attention in this area; and
- to suggest some possible solutions to these problems.

2 The subject-matter covered by the rights in question

It is as well to begin this discussion with a brief description of the subject-matter covered by the rights which are compendiously referred to as "intellectual property". These are:

- **Patents for inventions:** useful developments in the areas of science and technology that may be protected by the grant of a patent or petty patent (for less significant inventions). Patents confer a monopoly form of protection that prevents anyone else from exploiting the subject matter of the invention. They run for a limited term of 16 years and must satisfy certain strict requirements before they are granted. These include the need for the alleged invention to be "new", "inventive" and "useful". The patent application procedure is often protracted and costly, but the protection, once obtained, can be very powerful as it gives the patentee virtually absolute control over the use and exploitation of the patented invention.
- **Circuit layouts, or the plans for integrated circuits ("ICs"):** these have only recently become the subject of specialised protection and last for between 10-20 years, depending upon the time when first commercial exploitation of the IC takes place. Unlike a patent, there is no registration procedure, but the protection granted is essentially protection against copying, not a monopoly right (as in the case of a patent). There are also a number of significant exceptions to the protection granted, particularly in the area of reverse engineering, which reduces the value of this protection.
- **Plant variety rights:** once again, these have only recently been made the subject of legislative protection. They are intended essentially to provide breeders of new plant and seed varieties with proprietary rights in those varieties. There is an application procedure which must be followed and certain criteria must be satisfied before protection is granted. This lasts for 20 years and is akin to that of a patent, although it is considerably narrower in scope. Significant amendments to the plant variety rights legislation are likely to be made in late 1993.
- **Registered designs:** this is a monopoly form of protection which is granted for 16 years in respect of new and original designs for the shape, configuration or ornamentation of useful articles. To obtain protection, the design must be registered and there are certain strict tests that must be satisfied.
- **Copyright:** this covers two broad categories of subject-matter:
 - (a) "Works" or creations of a literary, dramatic, artistic or

musical character. Protection arises automatically once the work comes into existence (there is no need for registration or any like procedure as in the case of patents or designs). The term of protection is very lengthy: the life of the human author plus 50 years. Furthermore, the scope of protection granted is extremely wide: it not only prevents unauthorised copying and adaptations of the work, but also extends to other forms of public dissemination, such as performance, broadcasting and cable diffusion. There is no aesthetic or qualitative criterion for the obtaining of protection: so long as the work is not copied from elsewhere and represents the result of the author's efforts and skill, there is no requirement of novelty or inventiveness as in the case of patents or designs. Furthermore, the range of subject-matter protected as works is very wide. Among other things, it includes databases and compilations, computer programs, photographs, design and technical drawings, and buildings.

(b) *Subject-matter other than works.* This category covers subject-matter of a more industrial or manufacturing character where corporate, rather than human, authors are concerned. It covers sound recordings (including CDs, tapes and cassettes), films (including videograms and discs), the broadcast signals of radio and television transmitters, and the typographical layouts of published works. The term of protection given to these subject-matter is shorter than for works (usually for a period of 50 years) and the rights granted are also more limited in scope. Nevertheless, as a matter of marketplace reality, the owners of sound recordings and film copyrights are often able to command higher royalties for the use of their material by third parties than are the owners of copyright in works.

- **Live performances:** protection of a very limited nature has been recently granted to live performers (actors, musicians, dancers, lecturers, mime artists and the like) to prevent the unauthorised recording and broadcasting of their performances. This is not a copyright, but it may enable performers to charge fees for the use of their performances by third parties in particular circumstances. There is a possibility that this form of protection may be enhanced in the medium future.
- **Trade marks:** these are statutory monopoly rights that are given with respect to distinctive marks or insignia, eg a name, invented word, symbol or the like, which a trader uses to identify a good or service with which the trader is associated. Registration is required and the conditions for this are quite strict. Trade marks, however, may be extremely potent weapons in the marketplace, as they are the "flagship" for particular products or services and can therefore be extremely valuable. Protection is for an indefinite term, but it is possible to seek the revocation of the registration of marks where they have not been used, have become generic or have become confusing or deceptive. Sweeping changes in the trade mark law have recently been foreshadowed by the Commonwealth Government and it is possible that new legislation to give effect to these changes may be introduced in the course of 1993.
- **Passing off and unfair competition:** these are non-statutory forms of protection which may enable a trader to protect his or her