

Bielefeld 2000 Conference

Thursday 10 February 2000

## **Universities and scholarly publishing**

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### **Introduction**

In July 1996, an article appeared in Scientific American by Ann Okerson entitled: 'Who owns digital works?' In this article, Okerson says among other things that so-called electronic rights are falling more and more into the hands of publishers and/or multimedia producers. In this way, new legislation is increasingly extending the exclusive rights of copyright owners, while restrictions surrounding the exclusive right of the copyright owner are becoming tighter.

The tipping of the copyright balance in the direction of the multimedia producer makes information more and more expensive and difficult to obtain, instead of providing freer access to information at a reasonable price. This is not only happening in the United States but also in Europe, where many people are aware of this tendency.

The Dutch universities were confronted with this reality when they set up a digital library. A lot of written material by university staff has not been included in digital university libraries, because it is not clear whether the electronic rights in these works are owned by the university or by the publishers.

This was a reason for SURF/Innovation of Scholarly and Scientific Information Systems (IWI) to fund research into the intellectual property rights in scholarly publications, and to find a solution that will enable electronic publications by university staff to be used in the future. IWI is an administrative forum in which the fourteen Dutch universities, the Royal Library, the Royal Netherlands Academy of Sciences and Letters and the Netherlands Organization for Scientific Research (NWO) participate.

In this lecture, I would like to inform you about the results of this study. First of all, I will discuss the causes of the problem pointed out by Okerson, of information which is increasingly expensive and more difficult to obtain. Next, I will tell you something about the methods advocated by the Netherlands educational and research institutions to solve this problem, and give further information on the details of the proposed policy.

### **Causes of the shift in the copyright balance**

One of the factors shifting the copyright balance in the Netherlands is in any case the lack of clarity regarding Article 7 of the Copyright Act, the employers' article. Neither literature nor case law nor university regulations have been able to put an end to this lack of clarity or answer the question of who owns the copyrights on scholarly publications.

In the Netherlands, copyright is defined as the author's exclusive right to publish and reproduce his or her work. This right is individual and absolute. Only the author can give permission to use or prohibit his or her work from being used, for example for publication in a magazine or book, or storage in a database.

In many cases, it is clear who is to be considered the author: the creator of the product of the mind, or in other words: the 'auctor intellectualis'. However, the concept "author" must be distinguished from the concept "copyright owner". The Netherlands Copyright Act has several provisions in which, contrary to the main rule that the author owns the copyright, someone other than the author is deemed to own the copyright. Article 7 of the Copyright Act is one of these provisions. This article concerns the situation in which an employment relationship exists between the employer and the author, and certain literary, scientific or artistic works are produced in the course of this employment. Freelancers therefore fall outside the scope of this article, because they do not have an employment relationship with their clients. The employee's job description must be examined to see whether any of his or her works qualify as such. This is the determining factor. The employer owns the copyright on works produced in the context of the employment contract. Works produced by an employee purely as a hobby are outside the scope of applicability.

In almost all cases, Dutch businesses and organisations own the copyrights on the works produced in the course of employment; however, Article 7 of the Copyright Act does not apply to the largest producers of information, the universities and research institutes associated with the universities. The situation in Dutch higher education is as follows.

### **The existing situation and its significance in actual practice**

The IWI study has shown that at universities and university research institutions, the staff own the copyrights on the works they produce. There are only a few exceptions to this rule. These are situations in which work is carried out on explicit instructions and in the context of the university appointment. The university owns the copyright on this work. The IWI study also showed that this applies to very few works.

Because of the need to publish and the world-wide significance given to ranking, university staff are quick to assign the work they produce, whether or not in the course of their employment, to the publishers, under conditions stipulated by the publishers. This often involves full assignment of copyrights and, if legally possible, full waiver of moral rights. One of the consequences of the assignment of copyrights, both now and in the past, by the authors of scientific publications to publishers is the strong position the latter now take on the scholarly publications market. This strong position enables publishing houses to charge high prices (and increase them regularly) for their various publications. Furthermore, this gives them control over the price universities have to pay to quote from them and in some cases they can prohibit quotes from parts of material protected by copyright. The diversification of titles carried by publishers also places a heavy burden on the budgets of scholarly libraries and universities.

This has been a bitter pill for the universities to swallow. In the past, the fact that Article 7 of the Copyright Act did not apply resulted in double payment for the use of material. But in not too long a time, the unavailability of material may also start to play

a part. Add to this the unfamiliarity and frequent disinterest of researchers with respect to the copyright on their works, and the only possible conclusion is that action must be taken to prevent the spectre of expensive and difficult to obtain information from becoming reality.

### **Solutions**

Through IWI, an answer was sought to the question of how individual researchers could be prevented from assigning their copyrights to others than the university, which would make the electronic exploitation of material protected by copyright impossible for the university. A condition for success was that more decisive action had to be taken by universities. This could be made possible by a copyright policy on which the universities could reach joint agreement.

The Netherlands has fourteen universities. The legal status of university staff has been governed since 1999 in a Collective Bargaining Agreement (CBA) for Dutch Universities. Previously, the universities had Legal Status Regulations for Academic Research and Education that gave the individual universities the discretion to make their own regulations on a great many subjects. Intellectual property was one of those subjects. Different universities did indeed make their own regulations, but there was little unity among these rules. In 1986, attempts to regulate the copyrights of university staff by law failed after much protest from the academic community.

Attempts last spring to incorporate a provision into the CBA for Dutch universities under which the universities would be entitled to the copyrights on scholarly publications also came up against heavy opposition. However, a basic article has been included in the current CBA. This article states that the parties recognise that the current legal rules on copyright are not always unambiguous and that the parties aim to make agreements on this in the short term, which will take account of the interests of the employer and employee. The agreements will not have an adverse effect on academic freedom and the personal rights of the employees.

The IWI study closed last year with a completely worked out copyright policy for all universities. It contains a proposal for the reallocation of copyrights. Reallocation in the sense that publishers should be prevented from obtaining all commercial exploitation rights.

Reallocation is mainly an economic and political problem. It affects the right of free access, market forces and the price to be paid for tailor-made information. Dutch publishers increasingly want to become producers of databases and suppliers of associated services, while offering the biggest possible package of information to the users. This is in conflict with the interests of universities. Parts of the information package should be produced in-house, namely the parts that have already been paid for by paying the researcher's salary. From the political point of view, it is important for universities to keep up the level of their education and research by having necessary information available at an affordable price. According to the publishers, publishing is only possible if the publishers have the necessary commercial exploitation rights. Only then, they argue, can they recover their investment. In order to acquire the necessary rights, they want to sign contracts with the individual authors. Model contracts should facilitate the drawing up of good contracts.

IWI has responded to this tendency. It has designed a model contract that individual scholarly authors can conclude with a publisher in which certain agreements are made concerning the use of the material by the university. This model is a logical follow-up to the policy formulated.

### **Copyright policy**

There is an important misconception in relation to copyright policy that I certainly want to mention, because this misconception continually obscures the debate over university copyright. I am referring to the misconception that universities want to have all rights to the materials produced by their staff. The universities expressly deny this claim. The universities only want to be able to continue performing their statutory tasks: to teach, to conduct research and to transfer knowledge for the benefit of society. It is also important to emphasise that reallocation of rights will only involve the licensing of reproduction and reader rights and the re-use of digital carriers and electronic distribution techniques.

First of all, the copyright policy needs to provide an understanding of and clarity regarding the copyrights of universities and their staff. The policy answers questions concerning ownership, licensing and distribution of works produced by staff employed by universities. This does not only apply to works produced by research assistants but also to works created by the other staff of the institution.

Secondly, this policy regulates the way in which and under what conditions the university can make use of the material produced by its staff in the course of or in connection with their employment. It governs the cases in which the university owns the copyright on the basis of Article 7 of the Copyright Act and the cases in which it has to request the author's permission for use. Account is taken of the interests of the authors and the university, and a workable and fair balance is created between them.

The policy is also intended to strengthen the university's position in the information chain. If copyrights can be prevented from being assigned to publishers in their most complete form, the process of providing academic information will have a different image. Academic institutions will be able to unlock the material they produce in, for example, a digital library and make it available to staff and students without using the publishers as an intermediary. This will cause the material to be distributed more widely, to become more accessible and cheaper.

The copyright policy applies to all university staff and to university students who write their dissertations according to another's design and under that person's guidance and supervision. The basis of all this is that the university must be able to have the powers under the copyright which it considers necessary in order to perform its tasks. A second basic assumption is that the research assistant owns the copyright on the literary, scientific or artistic works he or she has produced, except for works falling within the scope of Article 7 of the Copyright Act. These are works produced by university staff in the context of policy, management and organisation. Examples of these works are policy documents, study guides and study aids. The moral rights in these works are vested in the university.

Furthermore, the university is the owner by operation of law of the commercial exploitation rights to certain types of works which its researchers were appointed to produce and which are created in the course of these researchers' work. The moral rights in these works are vested in the authors of the works. These works include publications produced and used for educational purposes, whose authors also have the task of providing instruction in the relevant field. Through the applicability of employer's

copyright to educational publications, the universities will obtain the rights for publication and reproduction on paper as well as by electronic means. The researchers' letters of appointment include the fields in which the researchers must provide instruction. Finally, the university is the owner of the commercial exploitation and moral rights in computer programs, the preparatory material and accompanying documentation that the author has produced in the course of employment with the university.

For publication in print of a research assistant's work with respect to which he or she owns the copyrights, the research assistant may conclude a publishing contract with a publisher. In order to prevent the assignment of all rights, the university is prepared to advise on the conclusion of contracts between the research assistant and publisher. A standard contract for a scientific or educational publication is available for this purpose, with explanatory notes. For the use of their work, research assistants conclude licensing agreements with the university stipulating that the research assistant gives the university permission to store works within the meaning of Article 10 of the Copyright Act 1912 or Article 2 of the Neighbouring Rights Act wholly or partially in an electronic data file, and to make them available, whether or not together with other works, on paper, or by means of digital information carriers or electronic distribution techniques, to students and lecturers of Dutch universities and the scientific institutes of the Royal Netherlands Academy of Sciences and Letters and the NWO. The agreement also stipulates that the author will refrain from making any claims for payment on the basis of the Reproduction Regulation and Reader Agreement. The licensing agreement concerns non-exclusive, non-transferable permission for the university to publish all or part of the work produced by the employee and reproduce it in order to carry out the institution's tasks.

The licensing agreement will be set out in writing in an instrument to be agreed upon appointment of the individual researcher. This written agreement can stipulate in detail the purpose for which the university wishes to obtain permission for use. Further agreements will also be made in the licensing agreement if the work has largely been created with the use of financial, material and/or human resources of the university. It will also be clearly set out that the university may never interfere with the contents of the scholarly work on the basis of the copyright.

### **Commercial exploitation**

A balanced interest between the employer and employee is a major consideration in the commercial exploitation of material protected by copyright. The university will only proceed with commercial exploitation after consulting with and obtaining permission from the author, and only to the extent that the author's interests, possibly in relation to his or her publisher, are not damaged.

If the university does not exploit software developed by a staff member, on which the university has the copyright by operation of law, the staff member will notify the university of this in writing. The staff member will then be entitled to exploit the aforementioned computer program at his or her own expense and risk.

The author will be fully entitled to the proceeds from the use of scholarly publications other than by the university, unless additional arrangements have been made by the university. In the event of commercial exploitation, the employer will receive a reasonable share of the proceeds. Consideration will be given to the extent to which the use of institutional resources has contributed to the creation of the copyright. If costs are incurred in the exploitation of works protected by copyright, these costs are included in determining the reasonable share to which the staff member is entitled.

### **Other agreements**

In connection with external contracts, it may be necessary for the university to have the copyright on the protected work which was created on the basis of the external contract. In that case, the staff member will assign the copyright in writing to the university upon receiving a request from the Executive Board.

If a dispute should arise between the university and the staff member over the implementation of this copyright policy, the parties will submit their dispute to the competent court.

In conclusion, I would like to say a few words about the follow-up. Last November, an awareness meeting was held for the academic world. Not only the staff of universities and university research institutions participated in the meeting, but also members of trade unions, publishers and officials from the Ministries of Justice and Education. The Netherlands Publishers Association recently stated that it was prepared to consult with the university employers' associations about the desirability and possibility of a model contract for scholarly authors. A working group will be started soon in which the additional starting points for a model contract will be set out.

IWI realises that the proposed policy only concerns a small language area. Many publications come from foreign publishers. In order to enable foreign sister universities to join similar or other types of initiatives, a discussion list was recently started: EDUCOPY. This closed list is intended to function as an international discussion forum for the further regulation of the ownership and use of university publications, in order to create a new balance in the future between the employee, employer and publisher.