



# **Report on Institutional Copyright Policies in the Netherlands & UK**

Lessons learnt, good practice and  
guidelines

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# Executive summary

## Background

Regarding the developments in scholarly communication as well as technological and legal developments a need was identified to readdress the copyright policies of universities. Therefore this short study was commissioned by SURF and the JISC. This study investigates how universities in the Netherlands and the United Kingdom deal with copyright in terms of their policies and practices especially with respect to the ownership of scholarly works. It is written for managers in HEIs (Higher Education Institutions) and is part of a wider set of work packages and cooperation between the SURF and the JISC on copyright.<sup>1</sup> The primary focus of the study is on journal articles within the context of scholarly communication in relation to the growth of electronic publishing and ideas on open access or open content. Both scholarship and publishing are international and it is interesting to compare two different countries to see how their institutions manage copyright in this area. The main outputs of the study are a commentary on current practice and good practice with a set of guidelines to encourage best practice.

## Approach taken

A scan of a sample of UK HEI copyright policies based on material available on their publicly accessible websites was conducted alongside a similar survey of Dutch universities based on their policy documents.

In looking at the policies current practices the focused was on a number of key areas:

- Location and type of documentation;
- Legislative background;
- Treatment of scholarly works, in particular the question of who owns the copyright and how it is managed;
- Good practice in terms of copyright policies and the information available to staff.

The lessons learnt were summarised and a series of guidelines were drawn up. Also the report gives recommendations for Higher Education institutions.

## Main findings

### Legislative background

The legislation, both in the United Kingdom and the Netherlands, appears to be unambiguous but the custom and practice found indicates otherwise.

### Location

The location of and type of documentation on copyright policy found in HEIs varied.

### Policies and practices

Universities comply with and make known the legislation on copying third party materials but few institutions formally deal with the issue of ownership of copyright in scholarly works produced by their staff.

There is often a fragmented pattern of responsibility for copyright matters within institutions and no clear internal coordination.

More through custom and practice than formal policies, most universities waive their rights to copyright in scholarly works.

There is now an increasingly complex environment including:

- Retention of rights or granting back of rights to works for scholarly use;
- Establishment of institutional repositories and electronic publishing;

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<sup>1</sup> [http://www.jisc.ac.uk/index.cfm?name=programme\\_jiscsurfipr](http://www.jisc.ac.uk/index.cfm?name=programme_jiscsurfipr) (Replace with SURF/project site when goes live)

- Requirements for open access to the results of funded research.

### **Good practice**

This study found some examples of good practice which, when gathered together in this report, are the basis of **Guidelines** for informed institutional policy making.

## **Recommendations**

SURF and the JISC strongly recommend all institutions should:

- Approach copyright as seriously as any other form of IPR. Review existing customs and practices with regard to copyright and in particular scholarly works;
- Develop a clear, official policy on copyright and ensure all employees are aware of this. Proactively work to disseminate this policy and supporting information;
- Have a clear strategy on the ownership and management of copyright, taking into account developments in electronic publishing, institutional/digital repositories and the requirements of funding bodies;
- Take a clear line on the assignment or licensing of copyright to publishers by authors of scholarly works in their employ and the implications for re-use and future use of them by the author, his/her colleagues, the institution as well as the academic community at large. At the same time uphold academics freedom to publish;
- Support and uphold the rights stemming from copyright law of your authors, including moral rights, as far as possible;
- Provide appropriate support, guidance and information on copyright for all staff, written in lay terms rather than legal language;
- Ensure there is a person of sufficient seniority to implement policy on copyright and coordinate action on copyright issues;
- A copyright policy should not be developed in isolation but be part of the approach to copyright in teaching and administrative materials, software and databases and the whole IPR portfolio of an institution.

## **Conclusions**

The study has met its main objective of highlighting current practice with regard to institutional copyright policies and has found some good practice. With respect to scholarly works and copyright in both countries only in rare cases was the relationship between academics and publishers addressed or the implications for institutions. The same also goes for the author and institution relationship. The developments in scholarly publishing and Information Technology mean that policies and procedures may need revision and more guidance provided for academic and related staff. Some universities do not separate copyright from other more general IPR matters.

Finally this study has found that universities in the UK and the Netherlands both treat copyright similarly in matters of policy despite some differences in legislation.

# 1 Introduction to the report

## 1.1 Background, purpose and structure to the study

This report is part of a wider cooperation on copyright by SURF & JISC.<sup>2</sup> The two organisations regard the issues in this area as international just as journals and scholarship are international. Whilst this comparative study focuses on two particular states, there is an equal if not greater interest elsewhere. This report helps to take forward the work of the Zwolle Group and the Zwolle Principles.<sup>3</sup> Whilst the intention was to focus on the Institution and Author relationship, in fact the Author and Publisher relationship is equally important.<sup>4</sup>

The primary focus of the study is on journal articles within the context of scholarly communication in relation to the growth of electronic publishing and ideas on open access or open content. The content is from the Netherlands and the United Kingdom. The main purpose is to **support** and **assist** institutions in rethinking their copyright policies according to their particular needs and priorities. The report is structured such that it can be read in whole or in part. It has been organised such that the 'front end' consists of the executive summary, introduction and main findings. The second half contains the lessons learnt and guidelines. In addition the guidelines are listed in order in part three, Appendix 1 without the intervening text for ease of reference.

## 1.2 Approach

The overall approach of this study has been to first survey a sample of institutions in both countries for their copyright policies and arrangements and then to look for examples of best practice. This then informs a set of practical guidelines suitable for HE in the Netherlands and the United Kingdom.

The work done for the 3<sup>rd</sup> Zwolle conference on the copyright policies of institutions in the USA served as one starting point for the work.<sup>5</sup> Another is the JISC funded work on 'Policy Approaches to Copyright in HEIs' completed in 2000.<sup>6</sup> The current study is timely coming five years since the JISC study since which there have been significant developments in the Open Access movement. We looked in particular at the issue of ownership of copyright in scholarly works as this has implications for how copyright is managed at institutions.

Ideally the way evidence was collected would have been the same for both jurisdictions, but the differences in scale of the respective HE sectors have necessitated a different approach. In the Netherlands all 14 universities were approached for their policies on copyright with particular reference to scholarly publications as well as an internet search. Information was found from eight of them although in four cases they may be out of date.<sup>7</sup> For all eight the documents were heterogeneous and the only real difference was that two of the more recent documents were also published on the web. In the United Kingdom a sample of forty two institutions were looked at, but in this case it was done by searching

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2 [http://www.jisc.ac.uk/index.cfm?name=programme\\_jiscsurfipr](http://www.jisc.ac.uk/index.cfm?name=programme_jiscsurfipr) (Replace with SURF/project site when goes live)

3 An overview of the two work packages of which this report forms a part can be found in the paper 'Publishing agreements, balancing rights, copyright policies and Institutional Repositories' (URL once on SURF/project website) See also <http://www.surf.nl/copyright/zwollegroup.php> and <http://www.surf.nl/copyright/keyissues/scholarlycommunication/principles.php>

4 See Work Package 1.

5 See the draft paper by Dr Kenneth D Crews and David Wong at <http://www.surf.nl/copyright/zwolle/2004feb/conferencepapers.php>.

6 Ralph Weedon, Policy Approaches to Copyright in HEIs, Centre for Educational Systems, University of Strathclyde, 2000. [http://www.jisc.ac.uk/index.cfm?name=project\\_policyapproaches](http://www.jisc.ac.uk/index.cfm?name=project_policyapproaches).

7 Use was also made of policy documents collected by Wilma Mossink for 'Auteursrechten op wetenschappelijke publicaties': Mossink, Wilma, Stichting SURF/IWI, 1999. (Copyright and academic publications)

their public websites for policy information and documentation.<sup>8</sup> It was what might be called 'a quick and dirty scan'.<sup>9</sup> The examples of institutional policies have been anonymised, partly because some material was supplied in confidence and partly because it is not the intention of this study to pick on specific universities or colleges but rather to give an overview.

The information from our survey was entered into a simple spreadsheet and against each institution, information, where it existed, was entered under a set of headings.<sup>10</sup> There are inevitable difficulties with this approach, it is not always possible to compare like with like. Where documentation on copyright policy was found, this may not be the only such source of information produced by that HEI nor will it necessarily be definitive. At the same time the different locations and types of document found may reflect the diverse ways in which institutions deal with copyright.

### 1.3 Costs & benefits

The scope of this study does not permit a detailed analysis of the costs and benefits of a particular policy, in outline though some of main points are given here. Where institutions have no formal policy on copyright and custom and practice reigns there could be said to be a benefit in that the burden of dealing with the issues falls on the individual academic with few costs to the university. However it is arguable that this may cause it greater costs in the long term. The university often has to pay licence fees for copies of works created by its own staff with the possibility that should subscription cease they might lose access altogether. They may not be easily able to secure the right to (re)use an article in teaching even by the author and the costs of clearance may be not inconsiderable in terms of time even where the publisher charges no fee.<sup>11</sup>

Given the pressures on modern academics, asking them to take on administration and management of copyright might be counter-productive and unrealistic. There is a risk that authors either through ignorance or pressure of time will ignore copyright issues or lay themselves and their institution open to conflict with rights holders. The growth of self-archiving, digital repositories, open access publishing and the ease with which scholarly works can be copied, stored and transmitted around the globe may cause additional problems where institutions rely on academics and custom and practice.

There is no doubt that if institutions took a more active interest in copyright matters then there will be costs. It is unclear, and this might repay greater study, how many institutions in either country have copyright officers and whether they are full time.<sup>12</sup>

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8 Due to the scale of the UK sector and the limited time and resources at our disposal, a full survey of all institutions was not possible.

9 See Appendix 4 for more details on the UK sample.

10 See Appendix 2.

11 See the SHERPA project at <http://www.sherpa.ac.uk/> and the SHERPA/RoMEO project 'Publisher copyright policies and self-archiving' at <http://www.sherpa.ac.uk/romeo.php>. (Also see Work package 3 or 4).

12 In the US there is evidence that more funding is put into such roles but even here the level of control and management of copyright varies and is rarely complete particularly where scholarly works are concerned. See the 'University perspective by Prof. Dr. David Shulenburg (University of Kansas), Presentation to the third Zwolle Conference at <http://www.surf.nl/copyright/zwolle/2004feb/program.php>.

## 2 Main findings

### 2.1 Issues

The debate in at least one major UK institution recently on copyright and IPR policy has shown this area can be a minefield but there are also examples of institutions who have overhauled their policies in consultation with representatives of their staff.<sup>13</sup> Policy on IPR ownership has implications for managing copyright in universities with respect to scholarly works. One of the principal findings of this study is that few institutions in either country have explicit, detailed policies on copyright and its management although some of them touch briefly in passing on the issue of ownership. They rarely have anything to say in terms of practical policy and guidance on how to deal with copyright in scholarly works at the level of the individual academic.

Where scholarly works are published externally, retention or granting back of rights may be lacking. Authors and their institutions often need to use their works for non commercial purposes, including teaching and research, without fear of infringement or the need to get permission from the publisher. At present authors frequently assign copyright in full to publishers. This is particularly relevant where works are published or used in digital form and deposited in Institutional Repositories and copyright policies rarely address this.<sup>14</sup>

Apart from the growing desire among academics to have their work publicly and widely accessible, there have been recent moves by UK funding organisations such as Research Councils UK (RCUK) and the Wellcome Trust to mandate deposit of publications arising from funded research in freely accessible locations such as repositories or open access journals.<sup>15</sup> This requires universities to ensure their policies are consistent with these developments. Universities should give hard pressed academics sufficient guidance and support on how to deal with their copyright. This report and guidance is needed, in the UK at least, because the RAE (Research Assessment Exercise) results in pressure to publish in peer reviewed journals. As a consequence new models of publication come in second place and uptake has been selective.<sup>16</sup>

### 2.2 University Documentation

In the Netherlands none of the policy documents appear recent and papers are not easily accessible. Individual institutions do not give a high priority to copyright possibly because it appears to have a low legal risk. The only areas where institutions claim copyright in scholarly works are where third parties are involved, contract research or where a report or paper is specifically commissioned. However there was one example of the use of university laboratory facilities being cited as a factor in establishing institutional ownership of copyright.

In the United Kingdom some policies and documentation are formalised; others very informal. In some cases there is a clear policy on copyright, in others it is only touched on as part of a wider IPR policy. In others there appeared to be no policy on the copyright issues we were interested in. Only in a few cases were there documents referring to specifically to copyright and scholarly works.

A number of groupings can be observed in the documentation found. In some cases documentation was found within what might be called 'Research Support'. In this case information on copyright was often part of wider, sometimes more detailed guidance on Intellectual Property Rights in general and patents in particular.

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13 Phil Batty, 'Cambridge to ballot on IP reforms', Times Higher Educational Supplement, October 28th 2005, page 6. One of the UK institutions visited as part of the 1999 JCALT study, see 7 above, successfully overhauled its copyright policy.

14 Although in the UK, a trial HE scanning license from the CLA may assist where authors wish to 'scan' part of their works. [http://www.cla.co.uk/news/press\\_releases/press111.html](http://www.cla.co.uk/news/press_releases/press111.html).

15 <http://www.rcuk.ac.uk/press/20050921rcuk.asp> & [http://www.wellcome.ac.uk/doc\\_WTD002766.html](http://www.wellcome.ac.uk/doc_WTD002766.html)

16 See the presentation on the 'Author perspective' by dr. Luca Consoli (University of Nijmegen) at <http://www.surf.nl/copyright/zwolle/2004feb/program.php> for the third Zwolle Conference, February 2004.

Regulations covering the Patenting and Commercial Exploitation of Research Results can sometimes be found in the University Calendars and under Governance. In other institutions information on copyright can be found in Staff Handbooks and related documentation. Libraries are often a source of information on copyright for staff, but focus on the copyright of third parties and the rules governing photocopying. However such documents may refer to 'Ownership of Copyright'. Some institutions have copyright websites; FAQs on copyright can also be found.

At one UK university there has been significant debate about revision of the university policy on intellectual property and in this case the documentation refers for comparison to the policies of three other UK institutions; before going on to look at two major US institutions.

Copyright is given specific treatment at a small number of UK HEIs. In one case a 'Checklist for Copyright Issues', an 'Example – How to Amend a Publisher's Request to Assign Copyright' and a section on 'Moral Rights' can be found. There is also an overview of the relevant legislation.

As part of the Zwolle Groups' work a template for the drafting of a university copyright policy has been developed.<sup>17</sup>

## 2.3 Legislation

The Dutch Copyright Act, in particular section 7, is often referred to in the copyright policies of HEIs in the Netherlands.<sup>18</sup> Contracts of employment also deal with copyright in Dutch institutions. However only in one case was a justification given for the policy and that was not legislative but a reference to 'reducing costs'. In the Netherlands, section 7 of the Dutch Copyright Act can be translated as that "If the labour performed in the service of another person entails making specific literary, scientific or artistic works, the person in whose service the works were made is considered to be the author of these works, unless the parties have agreed otherwise."<sup>19</sup>

However the prevailing opinion is that Dutch case law restricts the applicability of section 7 as far as it concerns academic staff. In general employees are free to decide which research they carry out and how they will publish the results. They are not obliged to deliver a specified, concrete scientific product and their scholarly publications will not fall under section 7.<sup>20</sup> The autonomous preparatory research for a doctoral dissertation has also been excluded from section 7.<sup>21</sup>

Where the employer does have direct control over the academic's work however, then the situation would be reversed. If employees produce work under explicit instructions from the university and within the context of their duties, for example where they have been explicitly appointed to conduct a particular programme of scientific research and to publish the results, then the university will own the copyright. Where a third party funded the research and its publication this will still apply. In general however universities have insufficient supervision over the work of academics for section 7 to apply.

The rights and obligations of academics are regulated by a Collective Labour Agreement (CAO) for Dutch universities.<sup>22</sup> Under this an employee is obliged to notify his employer that he has written a publication which qualifies for the protection of copyright. The university has the option of requesting the transfer of copyright (the economic rights) but moral rights are excluded from this.<sup>23</sup> However as far as can be discerned, the CAO is not in practice applied in this way.

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17 See Kenny's Zwolle paper.

18 The Dutch Copyright Act (Auteurswet 1912)

19 [http://www.justitie.nl/images/copyright%20act\\_tcm74-38518.doc](http://www.justitie.nl/images/copyright%20act_tcm74-38518.doc)

20 J.M.B. Seignette, *Challenges to the Creator Doctrine*, Deventer/Boston 1994, p. 145-146; Rooijakkers v. Rijksuniversiteit Leiden.

21 RLU v. De Kruif, judgment of April 8, 1993, Rb. Arnhem; BIE 1994/74.

22 The current one runs out on December 31st 2005.

23 [http://www.vsnu.nl/web/p?DOWNLOAD.huidige\\_cao&id=58183](http://www.vsnu.nl/web/p?DOWNLOAD.huidige_cao&id=58183) ; section 1.21 and section 1.22.

The documentation studied for the United Kingdom often refers to the UK Copyright, Designs and Patents Act 1988 but many also referred to the Patents Act 1977 depending on their focus. Other legal references include: Common Law and Contract Law. In a few cases whilst 'the law' is referred to, no specific legislation is mentioned. In one case the reference is to WIPO guidelines on Intellectual Property.<sup>24</sup> In some cases the reference to legislation is used to justify or explain the basis of the institutions policy. In other cases the justification is based on Contracts of Employment and Terms and Conditions whilst another referred to 'Government Policy'.

In the United Kingdom the formal legal position under the 1988 Copyright, Designs and Patents Act is that whilst the ownership of copyright in a literary, dramatic, musical or artistic work lies first with the author, where the work is created by an employee during the course of his or her employment, the copyright in it belongs to the employer.<sup>25</sup>

As Crews and Wong note in the United States context (2004)<sup>26</sup> "Copyright laws alone are often inadequate to deal with the complex issues surrounding the management of intellectual works created at universities." They stress the need for formal copyright policies to assist in the management of such works and this certainly applies to scholarly works and we feel this applies equally in the Netherlands and the United Kingdom.

## 2.4 Scholarly works

This survey focuses on how institutional policies deal specifically with scholarly works; journal articles in particular. The issue of ownership of the copyright in scholarly works created by academic staff in Higher Education has been debated elsewhere.<sup>27</sup> It is sometimes linked to the concept of 'freedom of speech' in academia and also 'freedom to publish'.

According to legislative provisions Dutch HEIs own the copyright in the scholarly publications of their staff. In practice this is not the case with the exception of commissioned works where a third party is funding a specific research report. Otherwise Dutch universities do not claim the copyright to which they are entitled. This is essentially because of academic freedom and because copyright in scholarly works is considered a delicate subject but also because it has been argued that this arrangement favours the production of good research.

Some Dutch institutions do however follow good practice in ensuring that their staff licence them the rights to use scholarly works within the university and in some case at other Dutch institutions.<sup>28</sup>

The position in UK Higher Education is that copyright in scholarly works generally lies with the employees, the authors. In point of fact it is possible that if you surveyed UK academic staff, many would assume they owned the copyright in their work outright.<sup>29</sup> There is no example amongst the sample considered here of a UK institution which does not 'waive' or give ownership to authors of copyright in scholarly works, whatever gloss it may put on it.

The one exception is where institutions commission a piece of work specifically from a member of staff (a history of the institution perhaps) or it is funded by an external organisation. Here, copyright might be assigned to the institution or the funding organisation as part of the agreement or contract to undertake the work.

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24 WIPO is the World Intellectual Property Organisation, a United Nations organisation.

25 Copyright, Designs and Patents Act, 1988.

[http://www.opsi.gov.uk/acts/acts1988/Ukpga\\_19880048\\_en\\_1.htm](http://www.opsi.gov.uk/acts/acts1988/Ukpga_19880048_en_1.htm)

26 See the draft paper by Dr Kenneth D Crews and David Wong at <http://www.surf.nl/copyright/zwolle/2004feb/conferencepapers.php>. p.2.

27 See D.G. Law, R.L.Weedon & M.R.Sheen, Universities and article copyright, *Learned Publishing* (2000) 13, 141-150.

28 See Appendix 4.

29 At one UK university, guidance on copyright noted the 'surprise' staff may feel at finding IPR was owned by University.

## 2.5 Institutional Repositories

Institutional Repositories are still in the early stages of development in the United Kingdom though in the Netherlands they are a bit further developed but university copyright policies don't deal with them and they need to be revised to reflect this. The situation in both cases is that it is not solely the institution that is involved. The author/publisher relationship is just as important here. If academic and other research active staff assign their copyright in full to a publisher, they may have no right to deposit an article, or at least the published version of it, in an institutional repository without getting permission for each article.

For this reason both in the Netherlands and the United Kingdom, HEIs ought to give their staff sufficient support and guidance on copyright and retaining or acquiring the required rights. This may mean negotiating with their publishers. Without this, repositories may be difficult to fill and contain mainly grey literature, pre-prints or sometimes authors' versions. Anecdotal experience from a number of UK digital repositories suggests a great deal of work is going into checking the copyright status of works before deposit to ensure that they do not break any publisher agreements or copyright law.<sup>30</sup>

This leads to the recommendation that where an institutional repository is created and/or staff deposit their works in other forms of digital repository, that the institution revises its copyright policy and procedures to cover this. If they do not have any formal procedures in place and are relying on custom and practice, we would strongly urge them to develop them and include repositories in both policy and procedures.

## 2.6 Conclusions

The study has met its main objective of highlighting current practice with regard to institutional copyright policies and through its survey has found some good practice. It is also timely given the developments in scholarly communication as well as technological and legal developments. This report aims to assist institutions in learning from each other.

Much of what was found in the course of this study was not unexpected. It was found that whilst the law might state that copyright in scholarly works was owned by universities as employers, in practice it was generally owned and managed by individual staff. The way in which policy documents expressed this and dealt with it showed considerable variation. In most cases institutions waived their copyright or to put it another way, recognised long held custom and practice. In the Netherlands it is more common to waive copyright in scholarly works to academics, though in some cases with a requirement to licence back some rights to the university, so material can be used by the university as a whole. It is felt that the reality of author ownership of copyright in scholarly works is good practice though this often requires to be made more explicit.<sup>31</sup>

It has been argued that Dutch universities are not willing to interfere with academic freedom and further that research is favoured by allowing academics to publish where they wish. Although it is legally possible for employers to claim copyright it can be argued that it is academics that win research funding and arrange publication of their results, so they should own the right to assign copyright. In the Netherlands the key relationship therefore with respect to institutional repositories is that between authors and publishers not authors and universities.<sup>32</sup>

Despite the recent attention to copyright including the open access model and Creative Commons, this does not appear to be reflected in university policy documents yet, in either country.<sup>33</sup> There are exceptions but often copyright receives little if any attention

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30 See the Daedalus Project, University of Glasgow, <http://www.ariadne.ac.uk/issue39/mackie/>

31 It does not follow that we would recommend institutions to allow individual creator ownership of teaching materials, software, databases and similar materials. These areas are outwith the scope of the current study.

32 See: Elizabeth Gadd, Charles Oppenheim & Steve Proberts, *RoMEO Studies 1: The impact of copyright ownership on academic author self-archiving*, *Journal of Documentation*, 59(3), (243-277) paragraph 4.1; also available via

<http://www.lboro.ac.uk/departments/ls/disresearch/romeo/RoMEO%20Studies%201/pdf>.

33 See the House of Commons committee on Science and Technology – 10th Report at:

<http://www.publications.parliament.uk/pa/cm200304/cmselect/cmsselect/cmsctech/399/39902.htm> and for Creative Commons see: <http://creativecommons.org/>.

compared to other forms of intellectual property. Copyright in relation to scholarly works, the relationship between author and publisher, the use of these works within the institution and deposit in institutional repositories is largely absent. Though this study is not as comprehensive as the JISC study of 2000 and the SURF/IWI study of 1999, progress in dealing with copyright in some areas appears to have been painfully slow.

Copyright policies and procedures need to be updated to meet the demands of 21<sup>st</sup> century scholarly publishing whatever the model used. On-line journals are here to stay and the number of digital repositories is likely to grow irrespective of the fate of the RAE. University staff need support and guidance on copyright, if only to ensure they can safely use their own works for teaching and research to the benefit of their institution, the sector and the wider world.

The approach best suited to the Netherlands and the United Kingdom at present based on this small study is:

- Institutions recognise custom and practice and do not seek practical ownership and day to day management of copyright in scholarly works, upholding academic freedom;
- At the same time they proactively encourage, support and guide their staff to take copyright seriously and for them to retain or seek the rights they need for the modern world of scholarly communication for themselves and their colleagues and their institutions on a global scale.

This study has its limitations and is in part impressionistic but it does suggest institutions should consider whether policies and procedures on copyright need to be reviewed. For the UK in particular, further research on what actually happens on the ground in institutions, irrespective of formal policy, is required.

## 3 Good practice, lessons learnt and guidelines

### 3.1 Introduction

This study highlights the 'lessons learnt', good practice and offers some guidelines. It fully accepts institutional autonomy and that differences between universities will require different solutions. In looking for good practice guidelines there were a number of criteria including procedures that assist access to scholarly works, reduced costs to institutions, uphold academic freedom and minimise the burden on academic authors.<sup>34</sup> The findings of the study have been translated into guidelines which are intended to help raise awareness and assist institutions when they revisit their copyright policies. All guidelines are listed in numerical order in Appendix 1.

### 3.2 University Policy

Research in the United Kingdom suggests that in some cases a policy exists but only in paper form; procedures are under headings that are not intuitive, at least to an outsider. However in some cases it seems that copyright has not been a priority for an institution and policies and procedures have not been developed or exist in the form of 'custom and practice'. This is particularly likely with scholarly works such as articles, where copyright matters may have been left to the individual academic.

HEIs should have a clear, official policy on copyright covering scholarly works. It should outline what copyright is and what it applies to and define terms used. The policy need not be confined to scholarly works but could cover teaching materials, software and multi-media. The policy should cover works whether in paper or digital form whatever the media used to disseminate them.

Institutions should not rely wholly if at all on 'custom & practice'. This policy should be followed through in relevant formal documentation such as Calendar's, Regulations, Ordinances and Staff Handbooks.<sup>35</sup>

It may be that institutions would not want a public debate on their copyright policies but some kind of consultation should be carried out if a formal policy is to be introduced where none previously existed or an existing one is to be revised, particularly if it changes existing 'custom and practice'. It is perhaps the fear of stirring up concerns about academic freedom and conflict with staff representative organisations that may have lead to some institutions deciding to 'let sleeping dogs lie'.

It is clear, that where the issues are debated, copyright can be a controversial topic. Any revision or change to the existing procedures (or lack of them) should be approached carefully and contracts of employment and terms and conditions may need to be revised. Some form of consultation with academic staff and other authors of scholarly works and their professional bodies should take place. The positive advantages to authors, their colleagues and the scholarly community at large, in dealing more proactively with copyright, should be stressed along with the supportive role the institution can play. The responsibility for dealing with copyright in scholarly works should not be left to fall solely on the shoulders of authors, even if they own copyright and will receive any revenues from publication or other exploitation of their work. There should be sufficient support and guidance from the institution.

### 3.3 Copyright and scholarly works

Whilst some IPR web pages do refer to copyright, it is often in passing and there is often no guidance on how it should be dealt with, for example in terms of assigning copyright to

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<sup>34</sup> The situation in the US suggests that "the sheer quantity of variations among the policies suggests no single 'model' policy that every University should adopt ... Rather each University must assess its needs when adopting a copyright policy." See Crews & Wong, 2002, Outline of issues for University Policies, op.cit. p.2.

<sup>35</sup> See Crews & Wong, 2002, op.cit.

publishers (or not), on what terms and on depositing materials in institutional repositories.<sup>36</sup> One UK university has a very useful check list of considerations for authors to use when dealing with publishers, this is good practice.

There should be guidance for staff on how copyright in scholarly works ought to be handled in relation to scholarly publishing. The possibility of licensing copyright to publishers, retaining certain rights (especially digital rights) or receiving back certain rights should always be considered. This does presuppose some level of institutional support for staff, since they are bound to have questions and queries, for example a model licence of which there are several.<sup>37</sup>

If the HEI has an institutional repository, then its governing policy and procedures must cover copyright and the relationship with publishers, but it should also cover a deposit and user licence. Depositors should warrant that they own the copyright to the work and/or have got permission for inclusion of any third party material.<sup>38</sup> In dealing with a publisher the author should ensure they have the right to deposit a version of the work to the repository.<sup>39</sup> The same applies to the deposit of scholarly works in centrally organised or other forms of non-commercial repository particularly those which are publicly accessible.

At one Dutch university its policy on copyright, whilst stating that this was owned by academics in scholarly works, required them to give a licence to the university for the use of such materials to avoid 'unnecessary payments to publishers.' At another Dutch institution staff could negotiate with publishers individually over any royalties but they had to ensure all their Dutch colleagues could freely use their work. Both these approaches are good practice though the latter will be harder to achieve, particularly in the United Kingdom where there is little tradition of such practices. The former can be found in the United Kingdom too, one university whilst stating that copyright in scholarly works rests with the employee requires 'the university shall be granted by the university employee a non-exclusive indefinite licence to use, copy, adapt, improve, collate, publish or otherwise use any such materials for the purposes of instruction or in support of research and consultancy, by or on behalf of the university.' It is good practice to ensure this 'grant' is indefinite and non-exclusive.

Staff should be asked to ensure when assigning or licensing copyright to a publisher that the HEI will have the permanent right to use the material within the institution and that this persists after the author leaves the institution.<sup>40</sup> This should be the minimum position.

### 3.4 Moral rights

Moral rights are less clear from a legal point of view in the United Kingdom; as if copyright formally belongs to the university then technically employees may not hold any moral rights in a legal sense. Whether this changes if copyright is 'waived' by the institution or in some other way is transferred effectively to employees is unclear.<sup>41</sup> In the Netherlands there is some case law which suggests university authors do possess their moral rights.

Institutions should undertake to, as far as they are able, uphold employees moral rights and encourage them to ensure they assert these rights when publishing their work. For the paternity right this assertion is essential in the United Kingdom.<sup>42</sup>

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36 See Work Package I. In the US at Indiana University "Creators are ... encouraged to seek from publishers and other persons to whom Creators assign rights in their intellectual property, a non-exclusive, royalty free license for their own on-commercial research and teaching and, where possible for anyone within the University." Crews & Wong, 2004, op.cit., p.10. Columbia University has a similar policy. Ibid., p.14 There are others too listed in Crews and Wong's work.

37 Ibid. It is explicit that relevant parts of the University assist 'creators' in obtaining such licenses. See Work Package One which deals in some detail with Publishing Agreements.

38 Link to N&TD material

39 This may be a pre-print, post-print or final version, see Work Package One.

40 Work Package 1, Needs and model licence.

41 Again at Indiana University their policy states that "The Creator shall have the right to be identified, or to refuse to be identified, as the Creator by the University and by subsequent licensees and assignees, except as required by law." Crews & Wong, op.cit. p12 However US law does not recognise Moral Rights as such.

42 UK Copyright, Designs and Patents Act 1988, see chapter IV, in particular section 78 of this Act.

### **3.5 Copyright and Intellectual Property**

Information on other forms of intellectual property, such as patents, can be found easily enough on a good number of institutional websites. In a significant number of cases such policies are linked to revenue sharing agreements. Some have procedures for the notification of intellectual property to the relevant university office and guidelines on disclosure. It is hard to resist the conclusion this is because it is thought these forms of intellectual property may hold commercial value. These lessons have yet to be learnt for copyright.

Copyright should be treated as seriously as other forms of intellectual property, irrespective of any immediate commercial value. Whilst being aware of the tightness of resources, there should be someone or some office that holds responsibility for copyright at an institutional level. Preferably the responsibility for copyright should be based within the same unit that handles Patents, Trade Marks and Design Right. If that is not the case it should be clear where that responsibility lies. It should be clear to staff who handles copyright and where they are located.

Since the library may be the place where staff look for information on copyright, it should be able to direct enquirers to the relevant documentation, information and personnel.

### **3.6 Terms & Conditions – Staff Handbooks**

There are a number of institutions in our sample that clearly cover copyright in their Terms and Conditions for staff and/or Staff Handbooks which is good practice. One UK university states that 'for the avoidance of doubt' it did not assert ownership of copyright in scholarly works except those commissioned by the university. It is good practice to make it clear what the institutions policy is in this area.

HEIs terms and conditions of employment and Staff Handbooks should deal with the issues around ownership of copyright in scholarly work. They should point to what guidance might be available to staff on matters such as licensing or assigning copyright to publishers, pre prints and post prints and deposit in repositories, institutional or otherwise.

As noted some institutions do cover copyright matters to some degree in documents such as Research Handbooks and given the link with scholarly publication this is good practice.

### **3.7 Guidance & support**

Documentation should deal with how copyright in scholarly works and commissioned materials are to be managed at the institution, who owns it and what support and guidance staff can call on. They should also cover the scenario where the 'funders' of research have a particular policy on ownership and management of copyright in works that arise from it. This should be in a supportive context and seek to avoid additional hurdles.

FAQs on copyright can be very instructive for staff and it is not difficult to see the value of this method of guidance. Guidance on the issues around publishing agreements is also good practice, for example as a check list. A recommendation is to provide a checklist to deal specifically with publishing issues. A short list of questions and answers should be seriously considered as part of the guidance on copyright issues regarding scholarly works made available to staff.

Universities should educate staff to be aware of the differences between publishers where they have a choice as to where to submit. Given the pressures to publish and the sensitivity over freedom to publish they should not however try and dictate as a matter of policy that staff only publish in certain journals.

### **3.8 Ownership and Policy**

As the main findings of this study show, institutions use a range of factors to justify what their policy on copyright is, particularly in terms of ownership. It is good practice to word such justifications carefully but this should not veil the intentions of the policy. It is recognised there is merit in explaining to staff the basis for a policy hence it is suggested policy is presented in a positive light, emphasising the benefits for staff. For example uphold the

'freedom to publish' while noting that staff should read the provisions of publishing agreements to ensure they retain or are given/licensed back rights they may need, if only to avoid having to ask permission later to use their own material.

The issue of ownership does need to be clarified in HEI copyright policies. The policy should be clear which items the institution does lay claim to the copyright in, software perhaps and which it does not, scholarly articles in almost all cases.<sup>43</sup> Management of copyright is perhaps as, if not more, important than ownership.

Irrespective of who 'owns' the copyright in scholarly material, there should be clear procedures for ensuring the institution has the right to use the materials produced by its staff for educational, instructional and research purposes.

As noted above guidance for staff on copyright and scholarly works should not be treated in isolation. For example an academic may wish to use an article in teaching as part of their wider broader duties. It is good practice that information and policies for staff on copyright should seek to take a broad approach.

### **3.9 Location**

Information on copyright and policy in its regard is not always easy to find on institutional websites. The high profile recently in the UK of other areas of law such as Freedom of Information and Data Protection means websites often contain clear links to information on these areas', sometimes from the home page. This is rarely if ever the case with copyright in terms of scholarly works produced by staff, yet many institutional websites' do have copyright statements protecting the contents of the site itself. It is good practice to have a visible policy on copyright and easy access to information on copyright. A fine example of good practice is one UK university which has a set of web-pages on copyright in a suite of pages devoted to legal issues such as data protection.

It would be useful, even if restricted to the version of the website aimed at staff, if there was a clear link to information on copyright, if not from the home page, from a page staff would intuitively go to for such information. In any index of institutional policies, policy on copyright in general and scholarly works in particular should be clearly marked such that it can be found easily using the internal search engine.

### **3.10 Awareness**

The problem is that HEIs policies and procedures may not be brought to the attention of staff. A greater level of 'education' or awareness among staff of copyright and indeed other IPR issues is necessary, in part via induction, is good practice.

HEIs should proactively seek to bring copyright issues and the guidance available to the attention of all staff. In particular new staff should be made aware of the institutions policy and information available.

### **3.11 Commercial Value**

We have referred earlier in our survey of policies to commercial value and Intellectual property and the influence this may have had on policies in this area. This is not the place to get into discussion over how far copyright works have a commercial value, but it is good practice that institutions make clear to staff what their stance is on this. Ultimately the issue of 'value' is of concern to institutions if they have to buy back the work of their staff in the form of journal subscriptions and get permission to use it, possibly even for a fee, in teaching.

HEIs should make clear what materials it thinks could have commercial value and the procedures for dealing with them and those that likely may not. In the case of the former, copyright works might be covered by revenue sharing agreements (for example with software).<sup>44</sup> In the case of scholarly works, any commercial value in the work itself may be a

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43 Note that for Open Source Software the copyright situation is different. <http://www.oss-watch.ac.uk/>.

44 Though as noted above Open Source Software may need to be treated differently.

matter for the individual academic and their publisher. The HEI should ensure that it has the permanent right to use these works in teaching and research.

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***Conrad van Laer, University of Maastricht***  
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**January 2006**

## 4 Appendices

### Appendix 1 – Numerical list of guidelines

For ease of reference, all the recommendations are listed in order.

#### University policies

1. HEIs should have a clear, official policy on copyright covering scholarly works. It should outline what copyright is and what it applies to and define terms used. The policy need not be confined to scholarly works but could cover teaching materials, software and multi-media. The policy should cover works whether in paper or digital form whatever the media used to disseminate them.
2. This policy should be followed through in relevant formal documentation such as Calendar's, Regulations, Ordinances and Staff Handbooks.
3. Any revision or change to the existing procedures (or lack of them) should be approached carefully and contracts of employment and terms and conditions may need to be revised. Some form of consultation with academic staff and other authors of scholarly works and their professional bodies should take place. The positive advantages to authors, their colleagues and the scholarly community at large, in dealing more proactively with copyright, should be stressed along with the supportive role the institution can play.

#### Copyright and scholarly works

4. There should be guidance for staff on how copyright in scholarly works ought to be handled in relation to scholarly publishing. The possibility of licensing copyright, retaining certain rights (especially digital rights) or receiving back certain rights should always be considered.
5. If the HEI has an institutional repository, then its governing policy and procedures must cover copyright and the relationship with publishers, but it should also cover a deposit and user licence.
6. Staff should be asked to ensure when assigning or licensing copyright to a publisher that the HEI will have the permanent right to use the material within the institution and that this persists after the author leaves the institution. This should be the minimum position.

#### Moral rights

7. Institutions should undertake to, as far as they are able, uphold employees' moral rights and encourage them to ensure they assert these rights when publishing their work.

#### Copyright and intellectual property

8. Copyright should be treated as seriously as other forms of intellectual property, irrespective of any immediate commercial value.
9. There should be someone or some office that holds responsibility for copyright at an institutional level. Preferably the responsibility for copyright should be based within the same unit that handles Patents, Trade Marks and Design Right.
10. It should be clear to staff who handles copyright and where they are located.

#### Terms and Conditions – Staff Handbooks

11. HEIs terms and conditions of employment and Staff Handbooks should deal with the issues around ownership of copyright in scholarly work. They should point to what guidance might be available to staff on matters such as licensing or assigning copyright to publishers, pre prints and post prints and deposit in repositories, institutional or otherwise.

#### Guidance and support

12. Documentation should deal with how copyright in scholarly works and commissioned materials are to be managed at the institution, who owns it and what support and guidance staff can call on. They should also cover the scenario where the 'fundings' of research have a particular policy on ownership and management of copyright in works that arise from it. This should be in a supportive context and seek to avoid additional hurdles.
13. A recommendation is to provide a checklist to deal specifically with publishing issues. A short list of questions and answers should be seriously considered as part of the guidance on copyright issues regarding scholarly works made available to staff.
14. Universities should educate staff to be aware of the differences between publishers where they have a choice as to where to submit. Given the pressures to publish and the sensitivity over freedom to publish they should not however try and dictate as a matter of policy that staff only publish in certain journals.

#### Ownership and policy

15. The issue of ownership does need to be clarified in HEI copyright policies.
16. The policy should be clear which items the institution does lay claim to the copyright in.
17. Irrespective of who owns the copyright in scholarly material, there should be clear procedures for ensuring the institution has the right to use the materials produced by its staff for educational, instructional and research purposes.

#### Location

18. There is a clear link to information on copyright, if not from the home page, from a page staff would intuitively go to for such information.

#### Awareness

19. HEIs should proactively seek to bring copyright issues and the guidance available to the attention of all staff. In particular new staff should be made aware of the institutions policy and information available.

#### Commercial value

20. HEIs should make clear what materials it thinks could have commercial value and the procedures for dealing with them and those that likely may not.

## **Appendix 2 – Column headings for spreadsheet**

- Institution
- Source & URL for documentation
- Copyright legislation referred to? Y/N
- Types of IPR referred to? Y/N
- Copyright referred to? Y/N
- Waiver for scholarly works? Y/N
- Justification for policy on copyright &/or IPR
- Ownership of copyright &/or IPR
- Reference to contracts of employment? Y/N
- Reference to procedures for copyright &/or IPR? Y/N
- Revenue Sharing agreement? Y/N
- Reference to students and copyright &/or IPR?
- Notes

## Appendix 3- Methodology

For the Netherlands a quick search on the Internet was conducted and a request to all university lawyers was sent to get official information on the copyright policies implemented by the Dutch universities. In addition, the policy documents that Wilma Mossink has used for her Dutch study 'Copyright and academic publications'<sup>45</sup> has been reassessed. This approach resulted in eight documents for the thirteen Dutch institutions concerned. Of these eight documents, four sources, stemming from the archive of Wilma Mossink, are probably out of date. The more recent documents added after the quick search on the Internet and the request to all university lawyers are as heterogeneous as the four sources that had been found by Wilma Mossink. The only remarkable difference is that two of the four more recent documents have been published on the internet.

The UK institutions were chosen partly on the basis of those HEIs that had submitted policies and/or information to a previous JISC funded project in this area.<sup>46</sup> This yielded 31 institutions but in addition the list created by Elizabeth Gadd at Loughborough was also consulted and this yielded information on a further 11 institutions, so 42 in all.<sup>47</sup> Of these, in four cases it appeared that the information was on the closed part of the HEIs website and was not accessible to the public. In three cases there appeared to be nothing on the website that was relevant but this may reflect the limited number of terms put into their search engines. In one case the institution had merged and ceased to exist. In another a recent merger meant there were documents on a legacy site of one HEI and some on the new site for the merged institutions. In all then there were 34 HEIs in the UK for which there was some relevant information on copyright.

The UK sample is reasonably representative in terms of geography and in terms of the four major constituent parts of this state but less so in terms of the type of institution represented. In part this reflects the original sample of policies from the 1999 study.<sup>48</sup> In short there are probably more 'Russell Group' type institutions and fewer 'new' universities than the ideal.<sup>49</sup> In addition the sample did not seek to cover non university HEIs although one such University College was looked at from the Loughborough list. The Open University was part of the original sample (as its equivalent was in the Netherlands) but it was decided to omit them from the analysis as they are both very different in history and mission from the rest.

The survey would probably reveal different pictures if it looked at teaching materials or computer software though these are not unrelated to scholarly works. An academic may use articles he has written in his teaching and may create software to assist his teaching. If time had permitted greater focus, we might no doubt find differences between the treatment of articles as opposed to text books or monographs. There is also a class of materials that might be called 'administrative' that can be found in some University policies.

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45 Auteursrechten op wetenschappelijke publicaties; Mossink, Wilma; Stichting SURF/IWI, 1999.

46 Ralph Weedon, Policy Approaches to Copyright in HEIs, Centre for Educational Systems, University of Strathclyde, 2000. [http://www.jisc.ac.uk/index.cfm?name=project\\_policyapproaches](http://www.jisc.ac.uk/index.cfm?name=project_policyapproaches).

47 See <http://www.lboro.ac.uk/library/crightpages.html>.

48 Weedon, op.cit.

49 In the UK a number of 'old' Universities, (those founded before 1992 many pre 1939) have grouped themselves together as the 'Russell Group' of Research intensive institutions. The term 'new' university is often used in relation to the former Polytechnics which became universities after government legislation in 1992.

## Appendix 4 – Ownership of copyright as expressed in institutional policies

The policies of Dutch universities deal with ownership in different ways. It is interesting to note that Dutch universities are claiming copyright in a limited number of cases: university owns copyright if the work has a relationship to third parties (Z) or in case of contract research (X). Y university claims ownership for the institution if the employer has been hired to conduct a specific research project and he publishes about this project. W university claims the ownership if the employee is obliged to write a specified, scientific work like a report; or if the work is related to third parties that have concluded a contract with the university; or if facilities like laboratories have been most helpful to write the work. All these claims are in accordance to section 7 of the DCA implying that the employer is entitled to the copyright subsisting in the work if the employee in the course of fulfilling his employment duties has made that work.

V university states explicitly that academics own copyright in their articles but that employees must give a licence to the university for such materials to avoid 'unnecessary payments to publishers.' At U university initial ownership of 'educational works' is claimed by the institution and no licence back is required but this is limited to 'educational materials' and research papers not written on the initiative of the employee. Academic staff can negotiate with publishers over royalties providing all Dutch HEIs can use the work for free. Academics explicitly retain the right to make decisions on when and where to publish.

In just about all UK cases where the issue is dealt with, effective ownership of copyright lies with staff though as one might expect the way this is expressed varies. At the University of L the default position on all Intellectual Property is "Under English Law inventions and other intellectual property made in the course of a person's normal employment belong to the employing institution. Therefore in the absence of any agreements to the contrary, the university assumes ownership of all intellectual property generated by its employees." So the university asserts ownership based on legislation. Later in the same document in a section headed 'Academic Publications' however, it notes "For the avoidance of doubt, the university does not intend to assert ownership of copyright in books, articles, lectures and artistic works, other than those specifically commissioned by the university." These two pieces together could be interpreted as meaning that the university believes it does have or could claim ownership of copyright in scholarly works but chooses not to assert its ownership for a particular class of materials. In the same section it does add that it "does not relinquish ownership of copyright in computer software." The above situation is fairly typical in UK institutions.

There are subtle variations on this such as at the University of M. Here the university policy states that it is the first owner of "intellectual property and intellectual property rights generated by its employees." It then goes on to say that it "will not in normal circumstances seek to benefit from any rights it may have as employer in the academic publications of members of the academic staff." In this case there does not seem to be any relinquishing of ownership or rights nor waiver but simply a statement that it will not seek to benefit. It is assumed that in this case 'benefit' is to be interpreted in a commercial sense in the general use of that term. It might be said that there is form of joint ownership (though not perhaps in any legal sense) or perhaps it could be said that both parties own copyright. Neither perhaps will do. Alternatively it could be said the university owns the rights but effectively the academic staff can act as if they own the rights, or at least manage them, as they do if they assign copyright to a publisher in an article and the publisher accepts the author has the right to do this.

In some cases there may be conditions on ownership of copyright by staff in scholarly works. At G the default position is that ownership of intellectual property lies with the university, although in this case it explains that this is due to the terms and conditions of contracts of employment whereby ownership is assigned to the university by staff. The Copyright Act of 1988 is referred to in the section of the policy relating to literary and similar works but there is no specific reference to the clause on ownership and employees. The section does state that "nothing in this policy shall override the terms of an individual's contract of employment." However it goes on to say that "Where copyright in materials used in the course of normal university activity rests with the university employee whose

primary work relates to that activity, the university shall be granted by the university employee a non-exclusive indefinite license to use, copy, adapt, improve, collate, publish or otherwise use any such materials for the purposes of instruction or in the support of research and consultancy, but or on behalf of the university.”

It is not clear but effectively this seems to be either a waiver of standard contractual terms or an acceptance that for scholarly works the reality is that effective ownership belongs with the employee. Sensibly however the institution makes sure it can use the materials created by their staff, presumably this will outlive the individual's employment, they may move to a post elsewhere or retire etc.

At the University of N its Intellectual Property Rights policy states that ownership is 'vested' in the university based on legislation. It goes on to say that the university in most cases will seek to retain such rights "although for the most part copyright in written material will be regarded as the property of the author." Elsewhere it says that "The university does not normally assert its ownership of copyright in books, reports, articles, lectures or other written work." In many cases it could be said that the institution claims or asserts that it owns the copyright in scholarly works but that using varying terminology and in various ways this is effectively given to staff or they are allowed to assume it.

The question of why universities make an exception for scholarly works may be related to the fact that in the past such works were not seen as having any commercial value but there may be other reasons. There is also a long tradition of academics owning or at least controlling copyright in their scholarly works and both they and their professional organisations often resolutely defend this right or reality.<sup>50</sup> It may also be that the value of such works lies more in the enhanced reputation the university may hope to gain by association with the work of its staff and the more recent pressures of the RAE to publish.

All the above being the case, it is not surprising that in this small and possibly unrepresentative sample, clauses in institutional policies on copyright either explicitly or indirectly waive ownership in scholarly works produced by academic staff.

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50 The two main academic unions in UK HE, the AUT and NATFE are in the process of merging.