

CAIRSS and Copyright: A good practice guide

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Copyright is a type of intellectual property founded on a person's creative skill and labour. It allows the copyright owner to control certain acts (such as copying) and to prevent others from using protected material without permission, unless an exception applies. In Australia, the Copyright Act 1968 (Cth) is the main legislation governing copyright.¹

In order to operate an institutional repository an organisation will need to exercise some of the acts protected by copyright law, such as copying and communication to the public (which includes making material available online) so it is important to understand when and how copyright law affects how a repository is designed and operates.²

This guide provides a brief introduction to copyright as it is relevant for institutional repositories and information on key issues for the development and operation of repositories where the ownership and management of copyright are important considerations. If you have any further queries about copyright or its impact on your CAIRSS activities please contact:

CAIRSS Copyright Service.

Ph: 03 9214 4669 / 8333

Email: cairss-copyright@caul.edu.au

How to print this document.

1 Disclaimer

This guide is a work in progress. It will be further revised during 2010 in light of comments received from the CAIRSS Community and further work undertaken by the Copyright Service. If there are any issues you would like covered in a future version of the guide or there are examples of processes or documentation you would like included please email cairss-copyright@caul.edu.au. The editorial policy adopted for the guide allows for the representation of a range of points of view. **The information contained in this guide is not legal advice and should not be relied upon as such. Repository managers seeking legal advice should contact their institution's Copyright Officer.**

2 Brief overview of copyright law

2.1 What is copyright?

Copyright law grants creators monopoly rights in their creations for a limited time which enables

¹ OAK Law Project Report No. 1, http://eprints.qut.edu.au/6099/1/Printed_Oak_Law_Project_Report.pdf p.21.

² A great deal of information on copyright is available in the OAK Law publications available at <http://www.oaklaw.qut.edu.au/reports>. General information about copyright law in Australia is also available from the A/G's Dept. web site at <http://www.ag.gov.au/www/agd/agd.nsf/Page/Copyright>

them to receive payment for the exercise of these rights. The law aims to provide a balance between the exclusive rights granted to creators and the public interest in enabling access to information for purposes such as research and study and educational use.³

Copyright only lasts for a limited period, but it is a long time. For the majority of material protected by copyright law in Australia this is for 70 years after the end of the year in which the author died. After copyright protection ends, there is no further restriction on how the material can be used.

2.2 How does it work?

The Copyright Act 1968 (Cth) (“the Act”) governs the use of copyright material in Australia. The type of material protected by copyright law includes:

- literary material such as books, magazines, newspapers, journals and poems (and includes computer programs)
- dramatic works such as plays and screenplays
- musical scores
- artistic works such as paintings, photographs and cartoons
- films
- sound recordings
- television broadcasts
- published editions (the lay-out of printed works)

Some more complex media such as films and multi-media work may include more than one layer of copyright protection (i.e. a film itself has copyright protection, but it may also contain a screenplay and sound recordings of music that are also protected separately). A more detailed list of material covered by copyright can be found in the [OAK Law Report No. 1](#) pp 24 – 26.

The Act gives the owner of copyright in these types of material exclusive rights to undertake certain acts with that material. This means that no-one else can undertake those acts in relation to a substantial part of a work without obtaining permission from the copyright owner. These rights include the right to:

- reproduce (i.e. to copy – which includes digitisation)
- publish (i.e. to make copies available to the public)
- perform in public (or cause a film or sound recording to be seen/heard in public)
- communicate to the public (i.e. electronic transmission – which includes making something available online)
- make an adaptation (which includes a translation)
- (for some material) control rental

It is an infringement of copyright law for someone other than the owner of copyright to exercise these rights in relation to a substantial part of the work without the permission of the copyright owner. It is also an infringement for someone to authorise someone else to undertake an infringing act. The issue of authorisation is an important one that institutions setting up repositories will need to take into account.

³ Some of the text used and summarised in this section is drawn from the OakLaw Project Report No. 1, chapter 2 Overview of Copyright Law, pp 21-54 http://eprints.qut.edu.au/6099/1/Printed_Oak_Law_Project_Report.pdf

More information on the exclusive rights provided to copyright owners and copyright infringement can be found in the [OAK Law Report No. 1](#) pp 32 – 37.

2.3 Who owns copyright?

Usually the creator of a literary, dramatic, musical or artistic work is the first owner of copyright. The creator of a film or sound recording is the ‘maker’ which in practice is usually the production company or record company.

Copyright comes into existence automatically as soon as the creators’ idea is rendered into material form (i.e. written down or recorded digitally). Copyright does not protect ideas; rather it protects the expression of an idea or the product of the creator’s intellectual efforts. It must be original, however in Australia the requirement for originality has been fairly low. A simple collection of facts that involved labour and expense to create had been considered sufficiently original.⁴ However; two recent cases have suggested that in the future Australian courts may require a higher level of originality before copyright protection is provided.⁵

Where a work is made by a creator in accordance with the terms of their employment, then the employer is the owner of copyright in the work unless there is an agreement to the contrary. This is relevant for universities who generally have Intellectual Property policies and/or employment agreements which will govern copyright ownership for material created by their employees.

Because copyright can be traded, the first owner of copyright will not necessarily remain the owner for the full period of copyright. Many academic authors transfer their copyright to an academic publisher who then publishes their work in a journal or other publication. Therefore it cannot be assumed that the creator of a copyright work will still own the copyright.

Another important point about copyright ownership is that the owner of a physical object such as a painting or a CD or a film will not necessarily own copyright in the material contained on that physical object (in fact they are more likely not to). An art gallery may own a painting, but the artist will probably retain copyright ownership and will need to provide permission for the gallery to make a reproduction of the work (such as by taking a photograph).

More information on copyright ownership can be found in the [OAK Law Report No. 1](#) pp 26 – 32 or in the Australian Copyright Council Information Sheet [Ownership of Copyright](#).

2.4 When do you need to get permission?

There are a number of exceptions provided in the Copyright Act that allow certain uses to be undertaken without obtaining permission from the copyright owner. These have been included to ensure that copyright material can be used for certain socially useful purposes. In the Australian legislation these include the Educational Statutory Licences for the use of print and graphic material and broadcasts⁶ and provisions allowing Fair Dealing for certain specified purposes.⁷

In addition it is not an infringement of copyright to exercise one of the exclusive rights of a copyright owner in relation to a part of a copyright work that is less than ‘a substantial part’. However; there are no clear rules about what constitutes a ‘substantial part’. A part is considered substantial if it is ‘an important, essential or distinctive’ part. The quality is more important than the quantity used. A part could be substantial even if it is

4 Desktop Marketing Systems Pty Ltd v Telstra Corporation Ltd (2002) 119 FCR 491

5 IceTV Pty Ltd v Nine Network Australia Pty Ltd [2009] HCA 14 [IceTV Pty Ltd v Nine Network Australia Pty Ltd \[2009\] HCA 14](#) and Telstra Corporation Limited v Phone Directories Company Pty Ltd [2010] FCA 44 <http://www.austlii.edu.au/au/cases/cth/FCA/2010/44.html>

6 Copyright Act 1968 (Cth) Parts VA and VB.

7 Copyright Act 1968 (Cth) ss. 40 - 43, 103A - 104A.

only a small proportion of the whole work and this will need to be determined separately in each case.⁸

Unless a copyright exception applies, or you are dealing with less than a substantial part of the work, a user will need to have permission from the copyright owner to exercise any of the rights covered by copyright law. This means that before a repository can make a digital copy of an item or make that copy available online (exercising the right of communication to the public), in most cases they will need to obtain and/or have a record of permission from the copyright owner.

As mentioned above, in many cases the copyright owner will not be the original creator. The copyright owner will often be a commercial organisation (such as a publisher). If the copyright owner provides permission for the repository to undertake certain uses of the material this is referred to as a licence to use the copyright material in question in the manner permitted and the repository can only use the material as permitted under the licence agreement.

2.5 Why is copyright important for repositories?

Digital technologies have made it technically very easy to provide access to information. However the commercial structures underlying the industries that produce and distribute various forms of media rely heavily on the operation of copyright law to support their business activities. This means that although it may be technically possible for repositories to provide worldwide access to a range of media items, they also need to ensure that their activities comply with copyright law. If they do not do so, they may risk damaging the commercial activities of copyright owners and could potentially place their institution at risk of legal action.

In order to establish and operate effective institutional repositories it will be necessary to establish policies and workflows that take into account copyright issues such as:

- which material is covered by copyright
- who owns copyright in the material
- when and how the repository will obtain permission to use the material
- what type of material is to be included and access is to be provided
- who are the anticipated users and how is the material likely to be used in the future
- how will the repository manage any risk of copyright infringement

It is important that consideration of all these copyright issues is built into the operational policies and procedures for a repository to ensure its on-going effectiveness.

2.6 A few useful points

Dealing with the copyright in published academic material can be very complicated. It is useful to remember that there is a difference between the rules of copyright law and the rules imposed by a contract (also called an agreement or licence) between an author and a publisher. A contract between an author and a publisher can contain any terms that the parties want, so often a publisher will place specific restrictions on what authors can do, or will permit an author to undertake certain acts. These contractual terms operate in addition to copyright law and often will have the largest effect on the activities of a repository.

While a publisher may allow an author to use their own final draft or a pre-print copy of their work in certain ways (under the contract) this does not mean that there is a different 'copyright' in these versions of the

⁸ Australian Copyright Council Information Sheet Quotes and extracts: copyright obligations available from <http://www.copyright.org.au/publications/infosheets.htm#Q>

work. It is just that the publisher (who usually requires the author to transfer copyright to them) has agreed to allow certain uses of the copyright material while they will not permit others – such as putting a copy of the final published version into a repository. Understanding this distinction between ‘ownership’ of copyright and a contractual ‘permission’ to undertake certain acts is important for repository managers.

3 Copyright issues for repositories

3.1 Obtaining permission from copyright owners

Staff managing repositories will need to have a clear understanding of who owns copyright in the material they plan to include and what form of permission is available or can be obtained from the copyright owner for the repository’s intended use.

In the case of academic articles or book chapters in most cases copyright will be owned by one of; the original author, the author’s employing institution or a publisher to which the author has transferred copyright or licensed certain uses. As noted above, the ownership of copyright in material produced by members of staff employed by an Australian university will be governed by the terms of that university’s Intellectual Property policy. Many university IP policies specify that an academic author will retain copyright ownership in scholarly works produced for publication. However other universities retain copyright ownership themselves. A summary list of [IP policies for Australian universities](#) is provided as an attachment to this guide.

3.2 Publisher agreements

Because an academic author (or their employing university) is the first owner of copyright, a publisher cannot publish the author’s work without obtaining their permission. To obtain this permission in most cases a publisher will ask the academic author to sign an agreement which either transfers full copyright ownership to the publisher (an assignment) or allows the publisher to exercise certain rights to use the copyright material (a licence). This agreement governs who is allowed to exercise which of the copyright rights for the work in question. There is no standard for what terms are included in publishing agreements.

There are nearly as many publishing agreements as there are publishers.⁹

Some publisher agreements contain terms that allow authors to retain certain limited rights to deal with the material. This may include permission to include a copy in a repository under certain terms (such as imposing an embargo period).

Therefore the terms of the publisher agreement will govern whether the material can be included in a repository and how it can be used. To find the terms of a publisher agreement you can either consult the original agreement signed by the author (if they still have a copy) or search for information about the standard terms of agreements used by different publishers which is available on the [SHERPA/RoMEOlist](#) or the [OAKList](#).

The [SHERPA/RoMEO](#) list was put together by a consortium of research-led universities in the UK involved in establishing open access institutional repositories to help repositories find information on the terms of many of the different publisher agreements. It provides information on the policies of a large number of

⁹ JISC Surf Foundation Copyright Toolbox <http://copyrighttoolbox.surf.nl/copyrighttoolbox/authors/licence/> (accessed 15 January 2010)

international publishers and can be searched to determine the terms under which various publishers will permit their journal articles to be included in open access repositories (the information does not relate to permission for the use of other material such as book chapters). In Australia the [OAKList database](#) has been established by QUT and provides similar information on the publishing policies of a number of Australian publishers.

These lists can be searched using either the journal title or the print or online ISSN for the publication in question. If the publisher is not listed through these services it may be possible to find the publisher agreement on the publisher's web site (often within the section on "Guidelines/instructions for authors/contributors"). It should also be noted that these lists do not cover everything that is published (they focus mostly on journals) and there is no guarantee that the information held on SHERPA/RoMEO or the OAKList will be up-to-date or correct at all times, so the best practice would involve checking the publishers' policies directly.

Repository operators will need to interpret the terms of each agreement or publisher's policy to decide whether the use planned by the repository (such as open access) can be exercised by either the author or the institution managing the repository and if there are any restrictions (such as only uploading pre-prints or imposing an embargo period) that the repository can comply with them. The repository must then ensure that it has policies and procedures in place that will ensure that the terms of use for that item are met.

3.3 Interpreting publishers' agreements

Publisher agreements will vary in how prepared they are to allow material from their publications to be reproduced and communicated by an institutional repository.

In some cases it may be difficult to interpret the terms of a publisher's agreement. There are a number of specific terms used in publisher agreements which an institutional repository will need to interpret correctly. For an explanation of a number of terms used in publisher agreements that are relevant to repositories such as 'preprint' 'postprint' or 'retained rights' see the OAKList Brief Guide to [Understanding Publishing Agreements and Publishing Policies](#).

Some publishers will place no, or very few, restrictions on how material can be re-used. One such example is the Public Library of Science <http://www.plos.org/journals/license.html> which publishes material under the Creative Commons Attribution Licence which allows re-use without any further need to seek permission.

Other publishers will allow re-use of the material only in limited ways or if certain requirements are complied with. Examples of this approach include IEEE <http://www.ieee.org/web/publications/rights/policies.html> which requires the author to place certain copyright notices on any preprint materials made available online and then to replace the preprint version with the IEEE-published version following publication. The publisher Taylor & Francis <http://www.tandf.co.uk/journals/pdf/copyright-author-rights.pdf> will allow authors to make postprint version available online via their own or their institution's web site but not to post the PDF version of the article prepared by the publisher.

Some publishers place extremely restrictive terms on the use of their copyright material and will not allow re-use without specific permission. The American Chemical Society http://pubs.acs.org/userimages/ContentEditor/1218205118705/interactive_copyright.pdf requires the author to transfer copyright to the organisation and states that it will not allow any form of re-use without the external party seeking individual permission.

3.4 Using SHERPA/RoMEO and OAKList

The [SHERPA/RoMEO](#) and [OAKList](#) websites can be used to check a publisher's default policy on self-

archiving and institutional repositories. Remember that information from these lists should not be relied upon because publishers can update or change their policies at any time.

Information from these lists will assist repository managers with answering the following key questions:

- Is the author allowed to self-archive in an institutional repository?

Most journals permit authors to self-archive their articles, but often with restrictions. Restrictions can include: specific versions, embargo periods, linking to the published version, specific copyright statements and acknowledgement of the source.

Institutional repositories can also be known as: the employer's website, not for profit website/servers, university website, institutional website, employer's server, etc.

It is preferable to check for the individual journal's copyright policies first. If this is not available, check for the publisher's overall policy. This is advisable because individual journals published by the same company may still have very different policies. Wiley-Blackwell is a good example of this.

- Which version of the paper are you allowed to use?

Preprint (i.e. the article pre-refereeing)

Restrictions often apply to the use of Preprints.

Post-print (i.e. final draft post-refereeing)

Most journals will allow the post print, also known as the 'author's final draft' or 'accepted manuscript' to be self-archived.

Publisher's version/PDF (i.e. final published version)

SHERPA lists publishers that allow authors to self-archive the published version. See <http://www.sherpa.ac.uk/romeo/PDFandIR.html>. However, it is recommended that you check the publisher's policy for restrictions, errors and omissions.

- Is there an embargo period?

Publishers may impose an embargo period which restricts authors from self-archiving their work in an open access repository, usually for 12 to 18 months following publication. Authors and repositories must abide by these conditions.

For example, Taylor & Francis will often impose a 12 or 18 month embargo on release of the author's final draft. A 12 month embargo for STM (science, technology and medicine) journals and an 18 month embargo for SSH (social science, arts and humanities) journals. See <http://www.tandf.co.uk/journals/pdf/copyright-author-rights.pdf> For society Journals see <http://www.tandf.co.uk/journals/pdf/copyright-author-rights-society.pdf>

- Do you need to request permission directly from the publisher?

It may not be necessary to request permission directly from the publisher if an explicit re-use licence is provided or the policy is available and does not require you to request permission. It is not necessary to request permission if the journal is published as Open Access or articles are published under a Creative Commons Licence and the planned use will comply with the terms of the specific policy or licence attached in each case.

It will only be necessary to request permission directly from the publisher if the publisher requests direct notification or if the copyright policy is unclear or not freely available to view.

3.5 Interpreting publishers' copyright policies

It is recommended that you check SHERPA/RoMEO's records directly against the publisher's policy as the policy will contain the most up to date information and may even contain further restrictions. There is often a link to a sample copyright policy document or agreement from the SHERPA record. This is an example only, so be careful, it may not relate to the same journal you searched on initially.

Publisher's policies can also be found on the publisher's website. Look for links such as: For Authors; Information for Authors; Copyright and Permissions; Author's Rights; Journal Information; Contributors Guideline, etc.

Remember that the information listed on the publisher's website can vary from the SHERPA/RoMEO record as well as from the licence signed by the author.

The most reliable source of information is on the actual agreement that the author would have been required to sign. Often, this agreement form will be available online. It can be referred to by different terms, some of the most common of which include:

Exclusive Licence Form (example: http://www.jipb.net/jipb_elf.pdf)

Transfer of Copyright Agreement (example: http://www.cmb.org.pl/author_stuff/transfer_of_copyright_agreement.pdf)

Copyright Form (example: http://www.ieee.org/portal/cms_docs_iportals/iportals/publications/rights/downloads/IEEECFORM121302pdf.pdf)

3.6 Requesting permission from a publisher

If the terms of the agreement cannot be located by any of the above methods or the publisher's agreement or policy does not appear to permit the type of use the repository wishes to exercise, it will be necessary to write directly to the publisher requesting permission to use the material in the way the repository wishes. The permission letter will need to provide clear details about the repository's intended use of the item and to request permission for all intended current and future use of the material.

A request for permission should ideally include:

- details of the institution requesting permission and whether it is acting on behalf of the author
- full citation details for the work in question and the version of the work you intend to use
- information about the repository and how it operates
- the type of permission being requested and the period for which it is required
- details of how the work will be acknowledged

There are standard templates for requests to publishers available on the [SHERPA/RoMEO](#) web site.

Repositories may wish to develop their own permission letter. The following provides another example of some simple wording that could be used to request permission from a publisher.

The information contained within square brackets can be completed, included or deleted as required by a repository for a specific situation. This wording is only included as an example. If a repository requires legal advice regarding the terms of an appropriate permission letter, they should contact their Copyright Officer

To whom it may concern,

[Institution] would like to request permission, [on behalf of the author]¹⁰, to reproduce the following [work] and make it available online for public access:

[CITATION]

The author would like to make the [work] available on [repository] [URL]. [Institution] has developed this institutional research repository to showcase the work of academics at the university and to facilitate research collaboration. The repository is open access and no charge is made for the use of any of the material deposited there.

[Institution] seeks a [royalty-free, permanent, worldwide, non-exclusive – delete or include other terms as appropriate] licence, [on behalf of [author]]¹¹, to allow deposit to [repository] of either the published version or the author's final draft.

The [repository] will include a full acknowledgement of the original publication, a copyright statement and a permanent link to your web site.

Thank you for considering this request.

Kind regards

3.7 Author deposit agreements

As well as obtaining permission from a publisher/copyright owner to deposit material in the repository, a repository should establish a formal relationship between the institution operating the repository and the author. This will clarify the legal relationship between the institution and the author, including what the repository can and can't do in relation to the work, the legal position of the author and the rights they are providing to the institution. Such an agreement is referred to by OAK Law as a Repository Deposit Licence. See OAK Law '[A guide to developing open access through your digital repository](#)' pp. 43 – 46 and 94 - 101

If a repository intends to approach a publisher to request permission to use the author's work, they will need to tell the publisher that they are acting on behalf of the author. In that case it will be necessary to have an agreement in place providing this authority. This will also be relevant where a publisher permits an author to self-archive.

An author deposit agreement should establish as a minimum:

- that the author owns copyright in the material and/or has the authority to give the repository permission to include the material in the repository;
- that the material does not breach any other person's copyright;
- that the author gives the institution permission to include the material in the repository on a non-exclusive basis and also if necessary the authority to obtain permission on their behalf from other parties (such as publishers) to do so; and
- how the repository will deal with the material – such as making a digital copy, storing it and making it available online.

The OAK Law guide provides a list of terms and conditions ('[A guide to developing open access through your digital repository](#)' pp. 44 - 45) that should be considered for inclusion in such an agreement and two sample agreements ('[A guide to developing open access through your digital repository](#)' pp. 103 – 121) however each repository will need to determine what are the appropriate terms for the type of permission

¹⁰ Only if author has provided this authority to the institution.

¹¹ Only if author has provided this authority to the institution.

they require.

3.8 Authorising further use by end-users

Repository managers may also wish to allow end-users of the repository to make further use of material included in the repository beyond uses allowed under copyright legislation such as under the Fair Dealing provisions in Australian copyright law.¹² Additional uses that repositories may wish to make available to end-users could include uses such as; the ability to print copies for certain purposes or to allow end-users to undertake other acts such as sharing with others or making adaptations. If the repository does not grant end-users the right to make additional uses of the material, then users will only be able to access and view material under the general principles of copyright law.

If a repository manager wishes to grant further rights to end-users, they will need to have obtained permission to do this from the copyright owner (generally the publisher and/or the author).

OAK Law suggests that in an ideal situation repositories would seek permission from a copyright owner both to make the work available in the repository and to grant end-users certain rights to reuse the work.¹³ However the decision about what usage rights repositories wish to grant to end-users will depend upon the goals of each repository.

3.9 Use of Creative Commons licences / author addendums

Repositories with a commitment to open access may wish to attach Creative Commons licences¹⁴ or similar to material made available in their repository to allow end-users to make further use of the material. This cannot be done without the repository having the permission of the copyright owner to do so. This permission will need to be provided by the author and/or the publisher of the material depending on the copyright status of the material in question. Some repositories provide authors the option of allowing the repository to attach an end-user licence, such as a Creative Commons licence to their material in addition to the rights granted to the repository under the standard authors' deposit agreement for deposit into the repository.¹⁵ However to do so, the author will need to have retained the ability to do so when signing an agreement with a publisher.

To make the material available under a Creative Commons or other end-user licence authors will need to negotiate the ability to do so prior to entering an agreement with a publisher. Some authors do this by adding an addendum to the agreement with their publisher specifying that the author retains certain rights in their material, including the right to reuse the material and to post it in online repositories. One example of this is the Scholarly Publishing & Academic Resources Coalition (SPARC) addendum available at the [CC Science Commons web site](#). Some funding bodies also require the use of certain addendums for research they fund. Examples of these are available on the [JISC SURF Copyright Toolbox web site](#). If authors have retained the appropriate rights, they can then provide permission for the repository to attach an end-user licence to their material or can attach the licence themselves depending upon the operating requirements of the repository.

Repositories cannot attach a Creative Commons licence to material held in the repository without having

12 Australian Copyright Act 1968 (Cth) ss. 40 - 42.

13 OAK Law, A guide to developing open access through your digital repository p. 37
<http://eprints.qut.edu.au/9671/1/9671.pdf>

14 Creative Commons Australia <http://creativecommons.org.au/licences>

15 OAK Law, A guide to developing open access through your digital repository p. 55
<http://eprints.qut.edu.au/9671/1/9671.pdf>

specific permission to do so from the party who has authority to provide that permission (i.e. the author and/or the publisher). For more information about some of the implications of these issues see the [SPARC web site](#) and OAK Law 'A guide to developing open access through your digital repository' pp 53 - 55.

3.10 Mandatory or elective deposit policies

The decision about whether an institution should make the deposit of research material into their repository compulsory or allow academic staff the option of whether or not to place their material into the repository is a key policy choice. The decision will have an important influence on the workflows adopted for the repository and particularly on the type of author deposit agreements used.

If institutions make it mandatory for academic staff to deposit material then it will be imperative that all authors have provided the necessary authority for the institution to deal with the material on their behalf. This may need to be done through a mass agreement process applying to all staff such as through employment agreements and/or IP policies. It will also be necessary to clearly determine what type of deposit is mandatory and what type of material staff are required to deposit. This should be clearly reflected in policies and procedures and repository managers will need to ensure that the repository is able to comply with the responsibilities undertaken by the institution in these mass agreements. If authors are required to deposit material into an institutional repository, they may need to negotiate separate terms with publishers if this does not fit with the publishers' standard agreements.

If repositories do not have a mandatory deposit policy they may still wish to establish policies that encourage staff to deposit material as part of the institution's commitment to providing access to research outputs.

3.11 ERA requirements and 'dark' repositories

The Australian Research Council (ARC) representing the Commonwealth Government has authorised institutions participating in Excellence in Research for Australia (ERA) to place relevant copyright material in 'dark' repositories without obtaining permission from the copyright owner under s.183 of the Copyright Act. This will enable authorised institutions to make all uses of relevant material that are necessary or convenient to enable their participation in ERA without breaching copyright. Institutions must have received a letter of authorisation from the ARC to do so.

The authorisation provided only applies to acts necessary for ERA participation and does not extend to any other purposes. The requirement for material to be held in a 'dark' repository means that ERA material cannot be deposited in an open access repository in reliance on the protection provided to institutions under s.183. A 'dark' repository is one that contains material that can only be accessed by individuals whose access is necessary for the purposes of the ERA. It must have appropriate access restrictions, such as secure password access controls, placed on the material.

Any payment requested by copyright owners for the use of material for ERA will be dealt with by the Commonwealth Government and individual institutions should refer any queries about this to the ARC. The ARC has provided advice about this for copyright owners at <http://www.arc.gov.au/era/copyright.htm>

It is possible that some material being used for the purposes of the ERA may also be material for which copyright owners have provided permission for its inclusion in an open access repository. In such cases the repository must rely on its normal checking and permission processes to make the material available for open access. The protection against copyright infringement provided under s.183 for the ERA will not apply if material is placed in an open access repository.

3.12 Copyright and data sets

The definition of literary works in the Australian Copyright Act includes ‘a table, or compilation, expressed in words, figures or symbols’.¹⁶ These items will have copyright protection if they meet the requirement of ‘originality’ under Australian law. Copyright protection does not extend to ‘raw data, basic facts or items of information’ copyright only protects the ‘expression’ of the facts if there is sufficient originality in the way they have been arranged.

‘... where data, information and facts have been compiled to create a new work, it may be protected by copyright as a compilation if it meets the originality threshold.’¹⁷

It is fundamental to copyright law that ‘Copyright protection is ... given for the form in which an idea is clothed, but not for information itself’.¹⁸

‘Copyright applies not to the facts/information itself, but to the particular way the facts/information are presented in the dataset or database.’¹⁹

Copyright only subsists in an original creation; however the level of originality required in Australia had traditionally been fairly low. Australian law had previously determined that copyright could subsist in something as simple as the alphabetical arrangement of names, addresses and telephone numbers in a directory.²⁰ However, as discussed earlier, some more recent Australian cases²¹ have suggested that in the future copyright protection may not be provided simply to reward the effort of compiling data but instead will focus on the intellectual endeavour required to create the particular form of expression. This means that in Australia there is now likely to be more attention paid to the creativity or intellectual effort by a specific author that has gone into the form of expression to determine if a compilation of data has a sufficient level of originality for copyright to subsist.

Repositories may need to consider whether copyright exists in data or data sets that they wish to use and if it does, what type of permission will need to be sought from the owner for their intended use. The two types of data that are most relevant to institutional repositories are: metadata, being the citation or descriptive information for items held in the repository; and research data included in specific data sets made available for inclusion in a repository. Issues that are likely to arise for repositories include; whether copyright exists in certain types or compilations of data, if copyright does exist who owns copyright in the data set and what permission are necessary and/or available for the use of the data. Once these issues have been resolved, the repository or institution can put in place appropriate policies and practices to govern how various different types of data will be accessed, included and used in the repository.

The Australian National Data Service has developed [useful guides](#) to the use of research datasets in repositories. In particular the guide ‘[Copyright and Data](#)’ is a useful resource.

3.13 Ancillary and descriptive data

The type of metadata included in a repository such as data held in the basic Dublin Core fields may not have sufficient originality for copyright to subsist. However if data is held in a compilation the creation of which has involved sufficient intellectual endeavour, then the compilation may be protected by copyright. In

¹⁶ *Copyright Act 1968* (Cth) s. 10(1).

¹⁷ A Fitzgerald, K Pappalardo (2007) *Building the Infrastructure for Data Access and Reuse in Collaborative Research: An Analysis of the Legal Context*, 136.

¹⁸ J McKeough, A Stewart, P Griffith (2004) *Intellectual Property in Australia* (3rd ed.), 150.

¹⁹ Australian National Data Service *Copyright and Data* <http://ands.org.au/guides/copyright-and-data-awareness.html>

²⁰ *Desktop Marketing Systems Pty Ltd v Telstra Corp Ltd* (2002) 55 IPR 1.

²¹ *IceTV Pty Ltd v Nine Network Australia Pty Ltd* [2009] HCA 14 *IceTV Pty Ltd v Nine Network Australia Pty Ltd* [2009] HCA 14 and *Telstra Corporation Limited v Phone Directories Company Pty Ltd* [2010] FCA 44 <http://www.austlii.edu.au/au/cases/cth/FCA/2010/44.html>

addition, if there is material held in the metadata fields in which copyright can subsist in its own right, such as (potentially) abstracts, summaries or reviews of an article or image, sound or video files etc., then this material may itself have separate copyright protection.

When dealing with metadata, the copying of simple data elements such as time, title or name information from a compilation database may not infringe copyright if the expression, selection and arrangement of the material is unoriginal. However, many licensed databases also have contractual terms of use that may restrict or prohibit certain uses such as the systematic retrieval of information. Repositories should check the contractual terms and conditions of subscription databases for possible use restrictions if they wish to utilise metadata from these sources.

If the copyright owner of an article has provided permission to include the full-text of the article in a repository, then unless it is specifically excluded, the same permission is likely to extend to the use of an abstract which forms part of the article. However with summaries or reviews of an article or other related material, it is possible that copyright may be owned by another party and a separate permission may be required. The way that a repository deals with abstracts and other such supplementary material that may be subject to separate copyright or permissions will depend upon policy and workflow decisions made by the repository managers.

3.14 Policies, procedures and risk management

To ensure that copyright is managed correctly a repository will need to have appropriate policies and procedures in place to ensure that agreed workflows are followed at all times and that any risk of copyright infringement is contained at a level acceptable to the host institution. Open access repositories are operating within a relatively new concurrence of existing commercial, government and academic practices in relation to copyright law, so for many copyright questions there will not be one correct answer. Each repository will need to develop their own internal workflows and institutional policies and procedures and ensure they have been properly approved by the managing institution.

The following checklist identifies points in a standard repository workflow where copyright will have an impact on how decisions are made and when institutions will need to have made decisions about what level of risk of potentially infringing copyright is acceptable to the institution.

Risk management will need to be addressed as part of both the development and operational aspects of a repository.

Development questions will include: Mandatory or elective deposit? Open access or 'dark' repository? What terms will be included in author deposit agreements? Does the repository wish to make material available for additional use by end-users?

Operational questions will include: How much extra checking of publishers' terms will be done beyond SHERPA/RoMEO and the OAKList? What type of material will be included in metadata records and where will it be sourced from? When will permission requests be sent? What will be done if no reply is received in response to a permission request?

A repository should also put procedures in place to deal with a claim of copyright infringement if one should be received. University Australia provides universities with advice about establishing a formal take-down procedure. Repository managers should contact their university Copyright Officer for further information.

An institution's management may also wish to make a high level assessment of the potential risk flowing to the institution from the adoption of particular relationships with contributing authors and publishers.

4 Checklist for repository copyright process

Download the [printable version of this checklist](#).

CAIRSS Copyright Service		
Repository Copyright Process Checklist		
Action	Questions	Documentation
Type of item to be included in repository	Is it subject to ©?	
Is repository only for ERA and 'dark'?	No need to obtain permission – rely on s.183	Letter of authorisation from ARC (see 3.11)
Open access repository?	Who owns ©?	
Enter deposit agreement with author	Are there multiple owners? Do external parties (funders/partners) have any rights?	Author deposit agreement (see 3.7)
Have rights been transferred to a publisher?	Any rights retained by author? Can author grant end-user rights?	Publisher's agreement (see 3.2) CC licences/SPARC or other author addendums (see 3.9)
Does publisher's policy allow proposed use?	Unsure?	Search SHERPA/RoMEO or OAKList for policy (see 3.4) Interpretation? (see 3.3)
Locate publisher's agreement	What type of use permitted? – pre-print, postprint, embargo? Can repository comply?	Publisher's web site / agreement (see 3.5)
If unsure/can't find Request permission from publisher	Ask for – permission to use in repository / ability to grant end-user rights?	Permission request (see 3.6)
If no response?		Risk management procedure (see 3.14)
Upload item	Grant end-user re-use rights?	End-user agreement (click through?)/CC? (see 3.8 and 3.9)

Retain record of source of permissions		Hard copy Metadata field? (see 3.5 and 3.6)
Take-down notice received		Take-down procedure (see 3.14)

5 Further information

More information on Australian copyright law can be found at:

Australian Attorney-General's web site

<http://www.ag.gov.au/www/agd/agd.nsf/Page/Copyright>

Australian Copyright Council

<http://www.copyright.org.au/information>

Information on legal issues for digital repositories in Australian can be found in:

OAK Law 'A Guide to Developing Open Access through your Digital Repository'

<http://eprints.qut.edu.au/9671/1/9671.pdf>

OAKList Brief Guide to [Understanding Publishing Agreements and Publishing Policies](#)

The European organisations JISC <http://www.jisc.ac.uk> and SURF <http://www.surf.nl/en> have developed information for Digital Repositories operating in Europe. The following links provide useful information but they are not based on Australian copyright law:

The JISC Infokit for Digital Repositories has a section on Copyright at <http://www.jiscinfonet.ac.uk/infokits/repositories/management-framework/copyright>

JISC and SURF have developed a copyright toolbox to assist **authors** and **publishers** to achieve a balance between granting maximum access to a journal article and financial compensation for the publisher of the article. See <http://copyrighttoolbox.surf.nl/copyrighttoolbox/>