

# Out of the Shadows – A New Approach to Copyright for Digital Theses and Dissertations

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## **ABSTRACT**

The fostering of knowledge through the flow of ideas and information is a fundamental rationale underlying the makeup of modern copyright laws. Rapid developments in digital technology offer unparalleled opportunities to share and build upon the enormous research output contained in academic theses, but the ability to make full use of these opportunities is impeded by the uncertainty associated with application of copyright exceptions permitting third-party material to be reproduced by an author in their work. The availability of means of global distribution of theses has made the confident application of 'fair dealing' and 'fair use'-like exceptions more difficult and authors are increasingly forced to rely upon the arduous task of obtaining individual permissions, or otherwise amending their theses to remove third-party material. Both are undesirable outcomes. While wanting to maintain the flexibility inherent in fair dealing and fair use principles, their application to reproductions that occur within an academic dissertation, in particular where it is made available electronically, should be given greater certainty and/or protection.

## **1. INTRODUCTION**

While rapid technological developments have created unprecedented opportunities within the educational sector to access and disseminate information and to collaborate in ways never previously conceived, copyright law remains an impediment to those wishing to apply those technologies to theses and dissertations. These valuable research outputs traditionally inhabited the 'unpublished' world and while technology now permits their publication to a worldwide academic community, copyright laws have not evolved in ways that make this transition straightforward.

Contributing to the problem is the fact that the copyright debate in the digital age has largely focused on 'entertainment copyright' – e.g. music, films and games - and the legislative and judicial responses to set new boundaries in the relationship between copyright owners and users. Those legal developments have seen extensions to copyright terms and the recognition of technological and other means to put the brakes on the unfettered potential of the new technologies in the hands of users.

Freeing up the research output contained in theses and dissertations by amending copyright laws to allow easier publication and collaboration is not a matter which has policymakers' attention. Indeed, there appears to be little recognition of the potential social and economic rewards that could flow from the free dissemination of such material on a global scale.

## **2. IN THE SHADOWS**

Knowledge simply doesn't spring anew, created independently and without any reference to or building upon what has gone before. Theses, by their nature, routinely include text and other materials copied from third-party sources. Their inclusion is not only useful but indeed essential in drawing together prior research and commentary that may form the basis of the further research contained in the thesis, or in creating the context in which the later research is undertaken.

There have always been limits on the scope of this type of copying within a thesis, but traditionally the research output containing copied third-party material has had a fundamental characteristic which made the copying relatively unproblematic: the thesis has been reproduced in very small quantities in bound paper form and knowledge of its existence and contents was restricted to those able to search the relevant paper-based academic abstracts, and who then went to the trouble and expense of obtaining a hardcopy from the relevant academic institution.

The relative ease of inclusion of third-party material under fair dealing and fair use provisions had less to do with the efficacy of such rules as it did with the overwhelmingly restricted circulation of the research output.

## **3. DIGITAL DILEMMA**

The enormity of the changes wrought to copyright by digital technology is unquestioned, but it is the responses to those changes, especially in relation to the unlawful digital copying and dissemination of 'entertainment' commodities such as music, films and games, that has created an increasingly fractious copyright environment where the application of long-standing "exceptions" to copyright owners' rights – e.g. through fair use- and fair dealing-like exceptions – has become more difficult.

The level of perceived risk is arguably greater in a world where the use of third-party copyright materials is truly 'visible' on a global scale and this can make authors of theses have a heightened sense of vulnerability to any mistake. This is despite the fact that copyright litigation almost invariably involves commercial content, whether digital or hardcopy, and not theses and dissertations. The litigation costs alone ensure that this is and will remain the case.

Nonetheless, for authors wishing to take advantage of new technology to disseminate their theses, the certainty and 'correctness' of their copyright choices will be very important.

If they make full use of available technology – benefiting both themselves and other researchers – and make their entire thesis available online through an institutional repository or other means, then they must ensure that third-party material

incorporated into their thesis is able to be reproduced within their thesis in that manner.

By contrast with the digital world, the use of third-party materials in theses in the paper world, largely 'hidden' as such uses are, is generally benign. From a purely 'risk management' point of view, the limited circulation, non-publication nature of the vast majority of hardcopy thesis output makes the application of fair use- and fair dealing-like exceptions more straightforward, and where errors and oversights in their application do occur these are far less likely to come to the notice of the copyright owner.

This is not to suggest, of course, that authors of hardcopy theses have ignored copyright restrictions, but more a recognition that the transition of the traditional higher-degree dissertation to the world of mass digital distribution has materially changed the character of the thesis in important copyright ways.

In relation to the Australia Digital Theses (ADT) project, Lean and Young (2002) noted that, "if a student has, under the fair dealing provisions, included another's copyright material such as diagrams or photographs into the thesis, written permission from the copyright owner is required before the thesis can be made available on the ADT. There are also concerns about the thesis material being plagiarised because electronic publishing on ADT makes a thesis far more accessible than it was in its unpublished print form in the library's restricted stack where it was available for consultation or copying on interlibrary loan. This is another example of electronic access flushing out copyright concerns that were dormant or non-existent in the earlier print environment."

Authors of theses find themselves with the option of widespread dissemination of their work, but the need in authors' minds for a high degree of certainty that they will not fall foul of copyright law places them in a dilemma.

#### **4. COPYRIGHT EXCEPTIONS AND DIGITAL THESES**

While copyright laws obviously vary in both substance and detail across differing legal jurisdictions, a common thread running through nearly all is the provision of limited rights of reproduction of other copyright owners' material for research and study purposes. Examples are the fair use (U.S.) and fair dealing (Aust.) provisions.

Although the former is far more far-reaching in its overall scope, what they have in common is a similar set of criteria for evaluating the fairness of the use. The guiding principles taken into account in determining "fairness" can be summarised as:

- a. purpose of the use;
- b. what is being copied;
- c. amount copied;
- d. the effect of the copying on the potential market or value of what's copied.

Without entering into a detailed analysis of the law and application of these principles, in practical terms the criteria permit copying for non-commercial, non-publication purposes of the limited quantities of third-party research material that traditionally have found their way into a 'typical' thesis, but the application of these

exceptions becomes highly problematic where it is proposed that a thesis be made available, for example, through the internet.

In essence, the act of widespread dissemination of the thesis and the copied third-party material shifts the balance of the fairness equation to the point where all but the most insubstantial third-party copying may not have the protection of fair use- and fair dealing-like exceptions. From a practical point of view, reliance upon these exceptions – fairly ‘safe’ and tried and true in the hardcopy thesis world – becomes largely unsustainable.

The author of a digital thesis is then faced with a range of choices:

- a. remove third-party material after examination, but before making the thesis available online;
- b. ‘self-censor’ in advance of submitting for examination by drafting the thesis so as to exclude third-party material;
- c. retain all third-party material, but restrict access (e.g. place a copy of the abstract only online);
- d. seek permissions from third-party copyright owners before placing online, and edit the thesis so as to exclude material where permissions are not forthcoming.

Options a, b and c each undermine the central purpose of freely available online access to digital theses, so is option d the appropriate way forward?

## **5. PERMISSION OR PERISH**

It could be argued that authors in most other publishing endeavours will routinely be faced with the often long, frustrating and, sometimes, fruitless search for copyright permissions from copyright owners. And this, of course, applies not just to commercial and popular publishing, but also to the authors of articles in academic journals and the like.

Kenneth Crews (2000) offered this advice to students in the final stages of thesis preparation: “Writers are constantly plagued by silence from copyright owners. You make your best efforts to obtain permission, you send the proper letter, and you hear nothing. Begin sending your letter four months or more before filing the dissertation; send a reminder request each month until you have a response. Send your letters certified mail, requesting a return receipt, if you doubt they are being received.”

But in an age when technology permits global dissemination of digital theses, it is a matter of concern that copyright exceptions that have been a vital tool for authors of hardcopy theses are significantly undermined within the context of the modern electronic thesis which is not simply produced for examination and filing, but also with the clear intention of wide distribution.

## **6. CONCLUSION**

An examination needs to be made of how the fair use and fair dealing exceptions can be made to operate within the realities of the digital thesis world, and consideration should be given to strengthening the operation of the ‘research and study’ aspects of the exceptions, even where the thesis is given widespread electronic distribution.

Essentially, what is being suggested is a public policy decision which looks at the thesis as a 'special case', and that on balancing the rights and interests of the thesis author and the copyright owners of third-party materials reproduced in the thesis, and placing that analysis within the broader context of the costs and benefits at a societal level of encouraging the free exchange of knowledge and information, that providing such protection is a preferable alternative to requiring authors of theses to expend large amounts of time and effort in tracking down permissions. It is also a recognition that the activity being undertaken is one deserving of 'special' encouragement and that it is unlikely to unduly impair the rights of third-party copyright owners.

The scope of the protection would therefore need to be carefully tailored to the activity undertaken - i.e. the writing and non-commercial electronic dissemination of an academic thesis. That is, so long as the work retained its character as a 'formal' academic thesis, as opposed to derivative works by the author that were based on the thesis - e.g. a book, journal articles - then the copyright exceptions permitting inclusion of limited quantities of third-party material would continue to function.

Clearly, maintaining the existing flexibility of fair use- and fair dealing-like exceptions would remain paramount, but removing the 'negative' impact of electronic dissemination from the fairness balance would remove a real impediment to the goal of making full use of new technologies to expose the vast wealth of ideas and information contained within theses and dissertations to the digital light of day.

## **7. REFERENCES**

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