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Legal Protocols and Practices for Managing Copyright in Electronic Theses

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Legal protocols and practices for managing copyright in electronic theses

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Abstract

At Queensland University of Technology (QUT) in Brisbane Australia, PhD and Masters by Research candidates are required to deposit both print and digital copies of their theses and dissertations. The full-text of these digital theses is then made freely available online via the Australian Digital Thesis (ADT) collection. Management of copyright issues has been a major headache and workload problem for the Library: there are many parties involved in the deposit process, and the lack of a common understanding about the rights and responsibilities of the various stakeholders has made the process very complex and time consuming. The response of some universities has been to limit access to just the metadata and abstract. At QUT this is not an option as the University is committed to freeing up access to publicly funded research and its outputs. QUT is also at the forefront of various open access initiatives, including the Open Access to Knowledge Law (OAK Law) Project that is working to develop legal protocols for managing copyright issues in an open access environment and investigate provision and implementation of a rights expression language for implementing such protocols. This paper discusses the aims of this project in relation to the QUT ETD experience, as well as how these fit in with the larger ETD open access environment.

Keywords Digital theses; Copyright, Legal protocols; OAK Law Project; Online; Open access; Publication; Fair use; Fair dealing; Library; Workflow;

1 INTRODUCTION

One of the main purposes of research is for the results to be applied and built upon, including that of students in academic institutions. There are also policy reasons for the work of government-aided research to be made available for the greater good. Various initiatives currently under way facilitate the wide dissemination of digital versions of theses and dissertations (ETDs). There are many technical and cultural challenges involved in the management and curation of digital theses. However, dealing with the copyright issues that arise when theses are made openly accessible poses a great challenge.

Although theses and dissertations can be described as previously inhabiting the ‘unpublished world’,¹ some were copied and distributed by microfilm or photocopies between university libraries. However, the technologies developed over the last two decades have enabled unprecedented dissemination facilities for theses and dissertations, whether to a purely academic community, or the public at large. As with other types of works, copyright laws have not evolved in ways that facilitate the transition. Although the relevant laws may vary in their detail between jurisdictions, this is a global problem that needs to be addressed by every institution that accepts submission of theses in digital format, or is digitising from traditional paper-based submissions.

This paper will discuss the OAK Law Project (Open Access to Knowledge) that is working to develop legal protocols for managing copyright issues in open access environments. One set of protocols currently

being developed by the team will specifically address the problem of managing copyrights in digital theses. The paper will describe a case study involving the Queensland University of Technology in Brisbane, Australia to provide contextual information about the nature and extent of the problem and to illustrate an environment in which the protocols can be communicated and implemented.

2 AUSTRALIAN PERSPECTIVE

In Australia, the Australasian Digital Thesis Program (ADT)² was initially developed by a group of seven Australian universities, and is based on the work of the Networked Digital Library of Theses and Dissertations (NDLTD) and the Virginia Polytechnic Institute. The ADT is a 'distributed' collection in that the digital theses are processed locally and stored on a server at the home institution. The metadata is later harvested from participating universities for inclusion in the OAI-compliant ADT database. The ADT website, <http://adt.caul.edu.au/>, provides a range of useful browse and search functions and, most importantly, it exposes the metadata to other search services (including Google). ADT summary records point back to the home institution for access to the full records and, when available, the files containing the full-text of the thesis (in PDF format).

At Queensland University of Technology (QUT), in Brisbane Australia, Masters by Research and PhD candidates are *required* to submit both a print and a digital copy of the final version of their thesis. This became mandatory at QUT at the beginning of 2003. Both copies are submitted to the Research Student Centre and later forwarded to the Library once the Office of Research is satisfied that all requirements have been met. QUT is faced with many copyright management issues in common with other Australian universities.

2.1 Paper theses to digital theses

Although all ETDs have copyright issues in common, where any paper thesis is converted to a digital thesis (p2ETD) extra issues may arise. For example, scanning the thesis without permission of the copyright owner, may breach copyright, and checking the thesis for third party materials is much harder to manage.³ Another issue is orphan works; the costs of finding the authors may exceed risk factor.⁴ Under the *Copyright Act 1968*⁵ (Cth) there is no inherent right to digitise paper-based theses without the permission of the copyright owner or the existence of a licence. Such digitisation of paper-based theses to electronic versions will most likely infringe the copyright owner's exclusive rights in the work, for example through reproduction or communication of the work.

The main problem with retroactively distributing electronic versions of p2ETDs is the difficulty in getting the permission of the author. This permission seeking would be prohibitively expensive. One mooted option is to take a risk of copyright infringement actions, which are indeed unlikely, and engage in the digitisation and digital archiving process anyhow.

2.2 Born digital

The most pressing issue for the ETD is dealing with copyright in the submitted thesis that may be held by third parties. It is common that materials from other sources will be included to varying degrees in a thesis. This is very discipline dependant: the law PhD will typically have parts of legislation, cases and other commentary quoted (but usually small parts falling into the 'not a substantial part of the original' category, and thus not a copyright issue); a fine arts thesis may replicate a number of complete original art works (thus requiring different treatment to deal with copyright). In addition to the simple copyright right under the Australian legislation, there have been recent changes in the law that raise more difficult issues.

2.2.1 The communication right⁶ and ETDs

Amendments to the copyright legislation by the *Copyright Amendment (Digital Agenda) Act 2000* have created a new right, the communication right, that can impact ETD repositories. These amendments were

directed at implementing Article 8 *World Intellectual Property Organisation Copyright Treaty* [WCT]⁷, that states:

Article 8 Right of Communication to the Public

Without prejudice to the provisions of Articles 11(1)(ii), 11bis(1)(i) and (ii), 11ter(1)(ii), 14(1)(ii) and 14bis(1) of the Berne Convention, authors of literary and artistic works shall enjoy the exclusive right of authorizing any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them. {Agreed statements concerning Article 8 : It is understood that the mere provision of physical facilities for enabling or making a communication does not in itself amount to communication within the meaning of this Treaty or the Berne Convention. It is further understood that nothing in Article 8 precludes a Contracting Party from applying Article 11bis(2).}

This provision of the *WCT* has been interpreted in various ways in different jurisdictions. The Australian legislation now gives an exclusive right “to communicate the work to the public”⁸ to the copyright owner.

Communicate is defined in s.10:

"communicate" means make available online or electronically transmit (whether over a path, or a combination of paths, provided by a material substance or otherwise) a work or other subject-matter, including a performance or live performance within the meaning of this Act.

s.22(6) provides that

For the purposes of this Act, a communication other than a broadcast is taken to have been made by the person responsible for determining the content of the communication.

This envisages two types of communication, the ‘making available’ of a work, and the ‘electronic transmission’ of a work.

This may have particular repercussions for repositories, raising some questions:

- Is putting the ETD in a repository – that is that can be accessed by the public, within or outside Australia – a communication of the work for the purposes of the Act?
- Is the repository the party making the work available by hosting on a server?
- Is it liable for either the making available or the electronic transmission, ie any breaches in either student or third party exclusive rights to communicate?
- Can the repository claim that it is not the ‘person responsible for determining the content of the communication’

Section 39B of the *Copyright Act 1968* (Cth) provides that

A person (including a carrier or carriage service provider) who provides facilities for making, or facilitating the making of, a communication is not taken to have authorised any infringement of copyright in a work merely because another person uses the facilities so provided to do something the right to do which is included in the copyright.’

Many repositories, such as those affiliated with ADT, could be seen in much the same light as an ISP had they kept to a simple ‘candidate deposits-repository distributes’ and taken a completely ‘hands off’ approach. However, the reality is that most repositories are much more active in constraints on the material deposited, let alone mentioning the role of the institution that is ‘mentoring’ the thesis. This means that authorisation of a breach is possible.

New Right suggests that the ‘uploader’ is responsible for determining the content of the communication (without defining ‘uploader’, but context suggests the ‘server’ side). But in the case of a repository, it would be the repository that is responsible for the content of the communication. The repository is responsible for the electronic transmission when the work is downloaded.

This is clearly a serious problem for ETDs, and also for p2ETDs (paper to electronic theses and dissertations):

- Make sure that communication right is also licensed with reproduction rights when deposit made
- Potential infringement when the work is made available (i.e. even before downloaded)
- The need of a license for right to communicate from 3rd party may be required
- The exemptions for fair dealing, and the insubstantiality defence should be considered

2.3 Third party content

It should also be noted that issues regarding third party content may arise when considering the communication right and electronic and theses and dissertations. In particular where there has been an unauthorised use of third party content, it is possible that potential infringement to the communication right will occur at the time when the work is made available. This infringement will occur where one of the copyright owner's exclusive rights has been infringed, for example through reproduction, performance, publication, communication or adaptation of the work. It should also be noted that the act of communication will occur even before the electronic theses or dissertation is downloaded by the user. It is therefore essential that the third party gives the copyright holder of the electronic theses or dissertation permission or a licence to communicate their work.

The following options are available in relation to third party materials:

- encourage the candidate to give to the repository the license to 'publish' (as with QUT) at outset (such as before signing up for the programme)
- encourage the candidate to self censor for 3rd party materials that are not authorised for digital distribution

However, this would require that candidates be given an introductory session on the process in their induction into the programme – i.e. not only information that they must 'cite' or it is plagiarism, but they must also 'cite + permissions' *as required*. This is a hard problem: it is often difficult, even for an expert in the copyright field, to judge whether permission is required: a paragraph from an article, probably not, a 'crucial' photo from a work, probably yes, but there are many grey areas.

The input into the ETD, in some disciplines, may also include material that has copyright held by the university (for example, perhaps a technician takes a photograph of a gel in a molecular biology laboratory as part of employment as normal laboratory work), or of other student (for example, one contributes some code that forms part of the final work).

3 ONE APPROACH

In an attempt to ensure that the higher degree students at QUT were sufficiently informed on this matter, the Research Student Centre, in collaboration with the university Library and the QUT Copyright Officer, incorporated information about copyright into their advice for students and supervisors on their "Thesis Examinations" web page.⁹

In the QUT nine page booklet on "Requirements for Presenting Theses", there is included the following information on copyright permissions:

"Copyright materials incorporated in theses can only be reproduced in the ADT database with proof of written permission from the copyright holder (author or publisher as relevant to the work). It is acknowledged that in the case of thesis by publication, it may not be possible to reproduce the published works in ADT. The student is responsible for seeking and obtaining signed and dated written proof of permission from copyright holders to digitally reproduce copyright material on the ADT database. Students should use the 'Permission to reproduce copyright material' on the ADT' form that can be found at: http://www.research.qut.edu.au/downloads/ADT_copyright_owner_request.doc

Additionally, the booklet informs the student that the electronic copy deposited with the Research Students Centre should include written proof of copyright permission if required.

Where no written proof of permission is provided, the Library will remove the copyright material leaving reference to the copyright source before loading the thesis on the ADT database.¹⁰

As this booklet also contains detailed formatting requirements, it was assumed that all students would read the booklet during the early stages of writing up their thesis and would, therefore, have plenty of time to gather any necessary copyright permissions.

Once the thesis has been examined, a “Request for Submission of the Final Thesis” form must be completed and signed by the candidate and then signed off by the candidate’s supervisors and the Director of the Research Centre or the Faculty Research Committee Chair. Two statements about copyright materials are included in this form (see figure 1).

<p>8. The thesis contains copyright materials Yes <input type="checkbox"/> No <input type="checkbox"/> Comment</p> <p>9. The thesis does contain copyright materials and the mandatory relevant documentary evidence for approval from the copyright owner is attached using the ADT Copyright owner request form downloaded from either http://www.library.qut.edu.au/adt/deposit/ or http://www.research.qut.edu.au/downloads/ADT_copyright_owner_request.doc Yes <input type="checkbox"/> No <input type="checkbox"/> Comment</p>
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Figure 1. Copyright questions from the existing “Request for Submission of the Final Thesis” form

Unfortunately, it appears that many candidates have not taken onboard the advice about copyright in the “Requirements for Presenting Theses” booklet and, consequently, they may not understand this section of the form. It could also be that the wording of the form is ambiguous and needs revision. Currently, quite a few theses are found to contain copyright materials even though the signed forms attached to the theses indicate that they do not. In other cases, the form indicates that the thesis contains copyright materials but no permissions are attached and no comments or details are provided. In a small number of cases, the whole section is just left blank.

When the proposal for a policy mandating submission of a digital version of each thesis for inclusion in the ADT was discussed by the QUT Research Degrees Committee, it was suggested that candidates should be given a second chance to furnish the required permissions before any material was removed from a digital thesis. It was also recognised that it was necessary to have the candidate authorise the removal of any material. Consequently, both of these issues are addressed in the “Request for Submission of the Final Thesis Form” (see Figure 2).

I, the candidate, am aware that the University will undertake to write to me at my last known address to advise of any additional copyright materials identified in my thesis. This will provide me with another opportunity to obtain/provide documentary evidence of approval from the copyright owner to include materials. Where I do not provide such evidence I authorise copyright materials to be removed from the electronic thesis leaving reference to the original source on the copy of my thesis available via the ADT.

Figure 2. Authorisation to remove copyright material from a thesis.

The inclusion of an authorisation to remove copyright materials is absolutely necessary. However, the Library may need to reconsider the undertaking that they will check for copyright materials and write to candidates to give them a second chance to obtain the necessary permissions. This undertaking has created a number of serious problems for the Library.

Firstly, the undertaking infers that the Library staff processing the digital theses for inclusion in the ADT will scrutinise every page of every deposited thesis to identify any third party copyright materials that have been overlooked by the candidates. Consequently, this is exactly what is currently done at QUT. Secondly, if a candidate knows that the Library will be checking their thesis for third party copyright material, they may form the impression that they do not need to address the questions on the submission form about copyright material in their thesis.

Checking each page of every thesis is exceedingly time-consuming and creates a backlog of theses waiting to be processed. It also creates a stressful situation for the para-professional Library staff who are required to judge whether each figure or table was created by the candidate or a third party. The only people who should be making these judgements are the authors (or in the extreme, a court).

Currently, if any copyright infringing material is found to have been included without permission of the copyright owner, a letter is sent to the candidate's last known address to inform them that they have sixty days to provide the necessary permissions or the material, as described in the letter, will be removed from the digital version of the thesis. By this stage, the candidate has often left the University and, in some cases, can no longer be contacted at the last known address. For various reasons, some letters remain unanswered yet the Library must wait sixty days before finishing the processing of the thesis for ADT. In other cases, the student advises the Library that they will send the "Permission to reproduce copyright material" letters immediately, even though they have already had at least three years to do so. Double-handling of the digital thesis is unavoidable in either case, thus contributing to the backlog.

Dealing with such problems is not trivial. The response of some universities is to provide online access to only the metadata and abstracts of their theses. However, QUT is committed to freeing up access to the full text of publicly funded research outputs so this option is not acceptable.

3.1 Revised Approach

A revised approach is currently being considered by QUT Library. Under the revised model, all research students at the University would be well informed about the relevant copyright issues, at various times throughout their studies and via various channels. Given sufficient information and support, it should be possible to rely upon the PhD and Masters by Research candidates to supply information that is both accurate and sufficiently detailed. It should also be reasonable for the Library to accept and act on the basis of the information supplied by the candidate. The current practice of page-by-page checking of every thesis could then be replaced by random or selective checking.

We believe that this approach makes sense for two reasons. Firstly, only the candidate knows which part of their thesis, if any, is the work of another person. Secondly, this approach allows the candidate to control exactly what is removed from the version of their thesis that is most likely to be accessed and

read. However, reaching this stage will take time and a great deal of effort. To simply shift all the responsibility, immediately, to the candidates would be unfair. They really need to understand what they are being asked to sign, why it matters and how they can comply. There are many steps that need to be taken to make this a reality.

- During the orientation process for research students, there needs to be a session on intellectual property and copyright as it relates to research and theses so that all students understand their rights, and the rights of others.
- Any training program for research supervisors needs to include a similar session so that they can better advise their students on these issues, or at least refer them to relevant sources of expertise within the university.
- Information literacy training programs aimed at research students need to include, in their objectives, the development of relevant copyright knowledge and skills. Avoiding breaches of copyright needs to be incorporated alongside discussions on correct referencing and avoiding plagiarism.
- There needs to be a guidebook (online but printable) on requirements for presenting theses that includes detailed information about the copyright issues relating to the digital version of the thesis plus clear instructions on how to send permission requests. The guidebook also needs to provide information about the thesis submission stage explaining the role, the importance and the implications of the questions on copyright material in their thesis.
- Librarians who liaise with research students need to be well informed so that they are able to help or advise students how to track down copyright owners to seek the permissions they require.
- The procedures and forms for thesis submission need to be designed in such a way that all necessary information MUST be provided before the thesis can be signed-off.

However, before this can happen, we need some detailed yet understandable information to communicate to the stakeholders and guide the development of new procedures. That is, we need protocols for handling digital theses and dissertations.

4 OAK LAW PROJECT

As part of the DEST funded project,¹¹ particular attention has been paid to the development of protocols that will aid the handling of ETDs for their legal problems to be minimised. Although in early stages, the key aspects addressed follow.

4.1 Licensing

When considering which license types should be used in relation to electronic theses and dissertations it is necessary to be aware of the following four types of licences:

Deposit licence

A deposit licence is required in order to give certainty to repositories, in terms of what rights they have to store, manage and organise the electronic theses and dissertations stored within the repository. Deposit licences are also a vital means for repositories in establishing a formal contract with the depositor, reassuring the depositor that the repository is not claiming rights in their work and most importantly reducing the repository liability if a thesis or dissertation is found to have infringed copyright.

End user licence

The end user, i.e. the person that downloads a thesis, should know what they can do with the license. Just read it on the screen? Print and read? Make copies and distribute in class? To answer these questions we suggest the adoption of a standard, though flexible, protocol for end user licensing. For example, it would

be straightforward for the ETD copyright holder to license end users with one of the Creative Commons licenses.

Creative Commons licences

The copyright owner of the electronic theses or dissertation may choose to licence end users of the theses with one of the Creative Commons licences. Importantly, licensing work under a Creative Commons licence does not mean giving up the copyright in the electronic theses or dissertation. Instead, it means offering some of the copyright owner's rights to users, but only under certain conditions.¹² Under this approach the copyright owner may select one or a combination of the following Creative Commons licence types.

- **Attribution** – The electronic theses or dissertation may be freely copied and redistributed, as long as credit is given to the creator of the work. You can also define certain conditions on other people's use of your work by mixing and matching from the optional terms below.
- **Non-commercial** – Users may copy, distribute, display and perform your work – and derivative works based upon it – but for non-commercial purposes only.
- **No derivative works** – The electronic theses and dissertation may be copied, distributed, displayed and performed, but only verbatim copies of it and not derivative works based upon it.
- **Share alike** – Users may distribute derivative works only under a licence identical to the licence that governs your work.

4.1.1 Third party licence

It is also necessary to consider third party licences where a third party has contributed work to the theses or dissertations. This licence is an important part of mitigating liability if the electronic thesis or dissertation is found to have infringed copyright of a third party. The licence between the publisher and the repository may be crucial where a PhD candidate has assigned the copyright of part of their theses, such as where they have had an article published prior to submitting the electronic theses and dissertation.

4.2 Protocols for the Handling of Theses

4.2.1 Student

- Students must receive training before embarking on their theses so that they are aware of legal issues and requirements.
- Ideally the student will gather permissions for use of a whole or substantial part of the copied parts of works.
- 3rd party copyright material to be identified by the student – a tag to enable automated handling would be useful, so that:
- Permission records can be harvested
- If any necessary permissions are not provided at the time of submission, the students should give permissions for this materials (which THEY have identified) to be removed. They have had at least 3 years to get the permissions.
- Mandatory inclusion of stable post-university contact route
- Adaptations acknowledged, as such in any figure captions
- Mandatory inclusion of keywords

4.2.2 Repository

- The repositories need clear guidelines as to the steps they need to take to minimise risk of action.
- The adoption of standard protocols and workflow can help to minimise such problems.

4.2.3 End user

- The end use of the ETD should be made aware of the license, as discussed above (eg a creative commons license) and the terms on which they are able to access theses.

5 CONCLUSIONS

Some great work has been done by ADT and other ETD projects on the implementation of access control to theses. More work on the management of the workflow is required with particular attention to the copyright and licensing issues. Development to allow for flexible and automated structures that meet the policy needs and satisfy copyright and other legal constraints is crucial. Our work has made some progress down this path.

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