

Free US ETDs (FUSE)

Promoting Open Access to American graduate research

We (C)an Do Better 2

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On Resolving Controversies over ETD Copyright Ownership

The June posting to *Free US ETDs* was originally planned to address concerns about inaccurate copyright information found in university guidance documents to ETD authors, as raised in the May posting. To that end, a follow-on posting was drafted with highlights from various excellent sources of campus copyright education. It was hoped that these examples would offer models of accurate and well-worded copyright guidance for other universities to borrow and adapt.

But plans for W©DB 2 were redrawn over the past week in response to a new copyright controversy arising at an unnamed university here in the US. When the controversial case came to my office for review and response, it easily registered a 7.0 on the seismic scale of campus copyright concerns. With further investigation and inquiry into the case and others like it, that number has continued to creep upwards. The outcome of this controversial case could have earth-shaking implications for ETD authors' rights; for ETD adviser responsibilities; for ETD submission workflows and licenses; for ETD dissemination and preservation; and for library management of current and legacy thesis and dissertation collections.

The essence of the case at Unnamed U. is that campus administration is now questioning student ownership of copyright in the Ph.D. dissertation. The trigger for the controversy is an acrimonious conflict over the handling of a dissertation where relations have soured between a doctoral student and faculty adviser. At issue are:

1. the ownership of the dissertation, given the allegedly significant amount of resources contributed to its production by the faculty; and
2. the fate of subsequent derivative works based on the dissertation.

As the conflict has escalated to higher levels of the institution, a wider net of campus constituencies are being looped into the discussion.

A campus copyright controversy can have some positive outcomes, such as raising awareness of author rights among a broader constituency of ETD stakeholders, and even impelling decision makers to review and revise less-than-clear institutional policies. But it also can create regrettable angst and tension among graduate students and their faculty advisers. Both eventualities offer copyright educators knowledgeable about ETD authorship the chance to serve their campuses well. By providing accurate, reliable, and objective information about topics such as authors' rights; the works-for-hire provisions of copyright law; and community standards for professional and ethical treatment of ETD authorship, we can help resolve the controversy and facilitate a reasoned and balanced discussion.

Making sure to stay current and crisp on copyright issues is an important starting point. Admittedly, many of us involved in campus copyright education have grown complacent about student ownership of copyright in the ETD, resting comfortably in the commonly-held understanding expressed by copyright expert Dr. Kenneth Crews from Columbia University Library's Copyright Advisory Office [1]:

"In general, the copyright in a new work belongs initially to the person who created it, so the student who wrote the dissertation holds the copyright, except in highly unusual situations"

Many of us probably gloss over that last phrase in the above sentence referencing "highly unusual situations". And we may blithely ignore the subsequent sentence in Dr. Crew's document, which elaborates on the "highly unusual"[2]:

"For instance, an employer supporting the student's studies or an outside funding source may lay claim to whatever intellectual property is created."

My guess is that many of us would also regard the case of a Graduate Research Assistant afforded a modest stipend for tuition and minimal living expenses to be the very opposite of "highly unusual". It sure seems like the norm where I work. After all, in this day and age of spiraling higher education costs, how many graduate students could manage to pursue a multi-year post-graduate program of study without financial support?

Furthermore, we might argue that the funded research assistantship is as beneficial to the University as it is to the student. The tuition funds go right back to the bursar's office. The minimal living allowance induces the student not to seek outside employment to keep afloat, thereby giving 100% attention to completing the graduate program in a timely fashion. Satisfied alum and future donor + improved graduation rates for the institution = happy university all the way around.

And one more thing. At least in the case of Ph.D and equivalent research dissertations, it just seems like plain common sense that student authors would own 100% of the copyright in works that **by definition** must be independent and “constitute an original contribution to knowledge in the field” [3]. Any dissertation that falls short of that definition would not earn the student a doctoral degree, right?

It seems that the Council of Graduate Schools (CGS) agrees. As “the only national organization in the United States that is dedicated solely to the advancement of graduate education and research” [4], their view on copyright ownership of the dissertation might carry some weight. In their 2005 report, *The Doctor of Philosophy Degree: A Policy Statement*, CGS avers that “Within the increasingly collaborative environment of doctoral education... intellectual property issues are very complex.” Yet on page 30 of this report CGS states unequivocally:

“The doctoral candidate retains copyright over the dissertation.”

It should also be noted that the CGS statement does indicate that “The university typically retains ownership of any research products described within the dissertation or otherwise produced during candidacy that result from the student’s use of university resources.” So in the CGS view, any rights in the underlying research data, or a related patentable discovery, would be owned by the University, not the student.

In spite of such clarity from the Council of Graduate Schools, however, the copyright ownership in the dissertation of a funded graduate student remains in doubt on some U.S. campuses. A literature search reveals that disputes over IP ownership in dissertations and theses are a normal component of the legal relationship between student and university. For example, J.D. Melissa Astala, writing in “Wronged By a Professor? Breach of Fiduciary Duty As a Remedy In Intellectual Property Infringement Cases” [5] highlights a number of legal cases concerning student complaints about university or faculty misappropriation of their patentable inventions and copyrighted creations.

How are such conflicts resolved? Data on that question seems rather mixed. According to J.D. Sean Seymore, author of the law review article “How Does My Work Become Our Work” [6]: “Universities and courts disagree on whether graduate students are employees.” In footnotes, Seymore explains that courts have looked to various factors in assessing the student’s employee status, such as [7]:

- “Did the teaching/research primarily benefit the student or the employer?”;
- “Would employment continue after graduation?”; and
- “Was the purpose of the employment to earn a living or to receive an education?”

Given the answers to these questions in the case of academic dissertations and theses, it seems implausible that funded ETD authors would be expected to cede copyright ownership

to someone else as a work-for-hire. Yet Seymore also acknowledges that, in some legal contexts, decision makers have rejected “the contention that graduate students are precluded from employee status because they are ‘predominantly students’” [8].

Another interesting legal perspective on conflicts over ownership of student works comes from Alexander and Alexander, writing in “Contractual Relationship Between Student and University” [9]. These authors introduce the concept of “Fiduciary Duty” as a reasonable legal argument against the appropriation of ETDs by academic advisors. My not-a-lawyer understanding of fiduciary duties is that the unequal balance of knowledge and power in a faculty-student relationship obligates advisers to serve the best interests of their students. As Alexander and Alexander explain, fiduciary duty would prohibit the adviser, as the dominant party, from taking advantage of the student for the purposes of “aggrandizement, preference, or advantage” “to the exclusion or detriment” of the graduate student [10].

The importance of fiduciary responsibility in the student-adviser relationship is also recognized by Astala [11], who points out that graduate students have

“placed themselves and their educations in a role subservient to their supervising professors, entrusting those professors with their future careers. Moreover, they depended on the professors for guidance and were forced to share their ideas and work with the professors as a result of that dependent relationship.”

Further legal discussion of “Fiduciary Duty” in university-student relationships is far beyond the ken of this author and the scope of this blog. But the principle that advisers to ETD authors hold significant responsibilities for guiding and nurturing graduate students and must be careful to avoid misappropriation of student work are important ones in any discussion of copyright ownership in graduate works. In those “highly unusual” situations where the scholarly output of a funded graduate student does in fact constitute a work-for-hire (and copyright belongs to the employer or funding agency), it is incumbent upon universities to make that policy clearly manifest for students. Terms of employment and conditions of copyright ownership need to be spelled out in black and white in university policy documents, in the graduate catalog, and in any employment agreement. The fact that students may not own copyright in their scholarship needs to be clearly conveyed on all of the forms students must sign as part of ETD submission. It also needs to be reflected in the licenses that the students are required to sign allowing ETD dissemination in the Institutional Repository; in third party online sites; and by publishers promising to formally publish the student’s scholarship via journal article or book. Without these various disclosures and provisions in place, the student is at risk of entering into contracts without being provided the terms of the deal.

The outcome of current controversies surrounding copyright ownership in the ETD is difficult to predict. But to minimize the chances that a similar conflict could cloud the educational climate of our own campuses, we need to take some concrete actions. WE CAN DO

BETTER. We need to be well-informed about campus policies and documentation that address the issue of IP ownership in theses and dissertations. If we find contradictions in these authoritative sources for graduate students, we can offer to help ensure they are clarified. It seems to me that all ETD stakeholders, whether in the academic departments, the Graduate School, the Library, or in the University Administrative Offices, serve as trusted and knowledgeable advisors for our students. Our ETD authors have every right to expect that we remain well informed about copyright and firmly committed to acting in their best interests.

[1] Copyright Q&A: Do I Own My Dissertation?

<http://copyright.columbia.edu/copyright/2011/04/14/copyright-qa-do-i-own-my-dissertation/>

[2] Ibid.

[3] Quote taken from Council of Graduate Schools' 2005 report *The Doctor of Philosophy Degree: A Policy Statement*, page 26.

[4] About CGS", <http://www.cgsnet.org/about-cgs>

[5] *Houston Business and Tax Law Journal*, Vol. 3, 2003,
http://papers.ssm.com/sol3/papers.cfm?abstract_id=434761

[6] *12 Rich. J.L. & Tech* 11, 2006, <http://jolt.richmond.edu/v12i3/article11.pdf>

[7] Ibid, Page 12, Footnote 58.

[8] Ibid., Page 12 including footnote 59.

[9] Alexander, Klinton W., and Alexander, Kern, 2011. *Higher Education Law: Policy and Perspectives*. New York: Routledge, p. 155- 177: Limited preview online via Google Books but the uri is too long and complex to include here!

[10] Ibid, page 156.

[11] See [5], Page 35.



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