



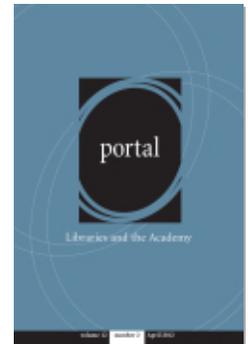
PROJECT MUSE®

Copyright and Publication Status of Pre-1978 Dissertations: A Content Analysis Approach

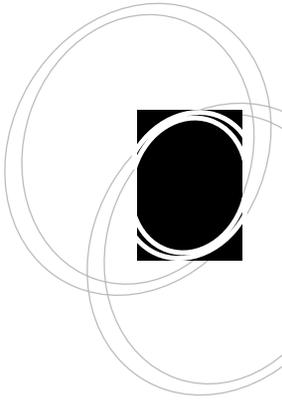
Gail Clement
Melissa Levine

portal: Libraries and the Academy, Volume 11, Number 3, July 2011,
pp. 813-829 (Article)

Published by The Johns Hopkins University Press
DOI: 10.1353/pla.2011.0031



➔ For additional information about this article
<http://muse.jhu.edu/journals/pla/summary/v011/11.3.clement.html>



Copyright and Publication Status of Pre-1978 Dissertations: A Content Analysis Approach

Gail Clement and Melissa Levine

abstract: We investigated whether American dissertations that were deposited in university libraries or disseminated on microfilm prior to 1978 were “published” for copyright purposes. This question has direct bearing on the copyright status of these works today. In the absence of a directly relevant legal decision to clarify the matter, the authors examined how the former community of practice interpreted the law in the context of dissertation dissemination. A content analysis of written communications by members of this community indicates that both forms of dissertation dissemination were considered to be legal publication under the 1909 Copyright Act.

Introduction

In this study, we examine the publication and copyright status of American dissertations produced before 1978. Our particular focus is the subset of dissertations that were not distributed through formal channels such as books and journals. Rather, their only means of public access was as typescript copies shelved in the library or as microfilm reproductions available from a third-party distributor. We are interested in this particular set of dissertations because of its potential to yield public domain works, not subject to copyright restrictions and thus suitable for digital access and other scholarly uses. With an estimated 520,000 works in this category, the possibility that some portion could be made available for free public access with relative administrative ease would be a significant boon for digital library development and scholarship across the disciplines.¹

Why would some mid-20th century dissertations be in the public domain? The answer comes from an understanding of earlier copyright law enacted in 1909 and



ultimately superseded in 1978. The US 1909 Copyright Act differed substantially from the law that we follow today (1976 Copyright Act, enacted on January 1, 1978). The 1909

Why would some mid-20th century dissertations be in the public domain?

process for securing this protection was, essentially, an 'opt-in' system with stringent requirements for compliance. Authors had to: (1) publish the work, in the technical sense intended by the law; (2) affix copyright notice to the published work and any copies made thereof; and (3) deposit two copies of the work with the US Copyright Office. Under the 1909 law, publication of the dissertation without notice, whether by intention or error, had severe consequences: the work fell into the public domain, where the opportunity for copyright protection was lost forever.

Conversely, the 1909 Act denied federal copyright protection to unpublished literary works.³ Instead, the literary property, or right of first publication, in such works was safeguarded by common law. Referred to as "common law copyright," this form of state protection lasted in perpetuity or until the work was published. Common law protection was automatic and required no notice or other formalities.

The event of publication was the dividing line in this dual system of protection. Yet opinion varies on what event would have constituted "publication" in the eyes of pre-1978 copyright law. Certainly, formal publication in books, journals, or government monographs qualified as publication for copyright purposes. But what about other methods of dissemination, such as depositing the dissertation typescript in the university library, or microfilming the original and printing an abstract in *Dissertation Abstracts*? Were these "publications" in the copyright sense of the word? Or were these private distributions of some sort, intended only for the eyes of a few with a specific purpose in mind? These questions were never conclusively resolved in the courts, leaving practitioners to guess.

The unresolved question of publication status for pre-1978 dissertations has significance for today's collection managers because of its bearing on the present copyright status of these works. The challenges presented by legacy dissertation collections, including substantial shelf space requirements and the relative inaccessibility of these works for users, places pressure on libraries to digitize these works retrospectively and make them available for online access. If these works are protected by copyright, libraries would need to secure the permission of alumni authors in order to proceed with such retrospective digitization projects in a legally compliant manner.⁴ If, however, these legacy dissertations are in the public domain, permission of the copyright owner is not needed. Digital reformatting and distribution may proceed without the transaction costs of securing and managing permissions or the barriers to usage such as campus-only access.

It is well established that pre-1978 US works published without notice are in the public domain due to non-compliance with formalities of the 1909 Copyright Act.⁵ What is unclear is whether dissertations distributed by library deposit or disseminated through a microfilm distributor were "published" for copyright purposes. If these dissemination methods *did* constitute publication for copyright purposes, then a lack of copyright notice on the title page or verso of these volumes would clearly mark them as public domain

statute afforded differential treatment to literary works such as dissertations according to their publication status. Federal, or statutory, copyright was reserved for "published works."² The



works. If, however, the act of library deposit or microfilm dissemination did not constitute publication for copyright purposes under the 1909 Act, the lack of notice would not be significant. Unpublished works were protected by common law copyright without a requirement of copyright notice. With enactment of the 1976 Copyright Act, such unpublished works were brought under federal statutory copyright protection with terms calculated based on life of the author plus 50 or (since 1998) 70 years. Many of these never-published works are still protected by copyright today.

The extent to which copyright uncertainty regarding legacy dissertations is curtailing decisions to digitize these works is evident from recurrent threads on the Electronic Theses and Dissertations discussion group (ETD-L). As early as 2002, ETD-L subscribers began questioning the copyright implications of digitizing earlier student works.⁶ More recently, a collection manager's question about putting scanned theses and dissertations online with no restrictions on access⁷ elicited numerous responses from US colleagues, most concurring with the response "We are interested in this too, but the permissions issue is holding us back from going forward on a large scale."⁸ Yet within this decade-long debate few commentators have recognized that some older dissertations might be in the public domain due to noncompliance with earlier formalities. As Dorothea Salo noted in her posting of October 27, 2010: "There is an outstanding legal question about the copyright status of pre-1978 theses authored in the US that do not have an explicit copyright statement on them; the question hinges on whether these are published or not..."⁹

The unexamined assumption that all legacy US dissertations are copyrighted, thus requiring permission from alumni authors to digitize, is further evident in the professional literature. Cathleen Martyniak, reporting in her published case study about University of Florida's dissertation scanning project, indicated that the university's counsel was uncomfortable with the proposal to scan alumni works without permission due to "copyright concerns." Counsel's suggestion to "obtain written permission from all 8,163 authors" introduced extra steps into the workflow, adding "immeasurably" to the complexity of the project.¹⁰ Similar assumptions about the copyrighted status of dissertations also appear in the digitization guidelines published by Peter Hirtle, Emily Hudson, and Andrew Kenyon in *Copyright and Cultural Institutions: Guidelines for U.S. Libraries, Archives, and Museums*. In the case study *Dissertations, Theses and Student Papers*, these authors advise readers that "it is safest to assume that in the absence of formal publication, most dissertations are unpublished."¹¹

What is unclear is whether dissertations distributed by library deposit or disseminated through a microfilm distributor were "published" for copyright purposes.

Uncertainty about the publication status of older dissertations stymies digital access and scholarly uses of these valuable works.



Uncertainty about the publication status of older dissertations stymies digital access and scholarly uses of these valuable works. Assumptions that digitization may only proceed legally with permission from authors, or that access to works digitized without permission be restricted to campus users only, add significant transaction costs for libraries and create access barriers for users. Concerned with the chilling effect that legal ambiguity has on digital access to dissertations, we searched for factual evidence to inform decision-making. Finding little conclusive information in the current literature, we turned to the pre-1978 documentary record to see how past commentators interpreted the law. What we found was extensive information about the legal assumptions, academic practices, and policy context relevant at the time the dissertations were created. By systematically compiling and analyzing this evidence through content analysis, we were able to document how our predecessors in dissertation publishing interpreted pre-1978 copyright law and its treatment of dissertations. Their practices and opinions reveal a clear and confident approach to the ambiguities in the 1909 Statute. Capturing this knowledge from the past and sharing it with modern-day decision makers was our central purpose in undertaking this study.

Background

How were pre-1978 dissertations published?

Since the establishment of American graduate education in the late 1800s, universities have required publication of the doctoral dissertation. This requirement ensured that the doctoral candidate's work would be a "first class piece of research"¹² that would offer "a distinct contribution, however modest, to the sum of knowledge."¹³ The publication requirement was clearly stated in graduate catalogs, as exemplified by the following excerpt from the University of Kentucky in 1953:

"It is expected that every doctoral dissertation will be worthy of publication either in its entirety in book form or as articles in the leading journals and periodicals of the field, and the candidate is urged to use every reasonable effort to obtain such publication for his own sake and for the interest of the Graduate School."¹⁴

Yet despite universities' long-held expectations of publication, most pre-1978 US dissertations did not find their way into formal channels such as books or journals.¹⁵ This circumstance led American graduate schools to pursue alternate methods of public dissemination such as private printing, microfilm distribution, and deposit in a library with provisions for public access and borrowing. Such modes of dissemination bypassed the editorial processes of selection, review, printing, and distribution that presses and publishers provided, but did accomplish academia's goal of making doctoral dissertations widely available at a reasonable cost within a reasonable period of time.¹⁶

At the dawn of the 20th century, self-publishing of dissertations took the form of private printing and binding of the candidate's final manuscript in quantities of 100 or more at student expense. The volumes were distributed through exchanges with other institutions. This self-publishing requirement proved difficult to enforce because of the financial burden it placed on young scholars, and it was gradually abandoned in favor



of less costly methods.¹⁷ In its place, universities began requiring deposit of one or more dissertation typescripts in the library. Once cataloged and shelved in the collection, the dissertations were made available for consultation and lending.

Library dissemination of dissertation typescripts proved easier on student purses, but met criticism because of its reliance on interlibrary loan “with its attendant problems of availability, excessive postage or Railway express charges, and the needed cooperation of the lending institution.”¹⁸ For that reason, universities were receptive to the promising new technology

of microphotography when it became commercially available just before World War II.

After endorsement by the Association of Research Libraries (ARL) in 1952,¹⁹ the practice of microfilming dissertations and printing extended abstracts in *Dissertation Abstracts* became

an established method for dis-

seminating dissertation research. It remained popular until the end of the 20th century, when the powerful technologies of the digital age emerged to take its place.

After endorsement by the Association of Research Libraries (ARL) in 1952,¹⁹ the practice of microfilming dissertations and printing extended abstracts in *Dissertation Abstracts* became an established method for disseminating dissertation research.

Were dissertations “published” for copyright purposes?

The act of publication was of paramount importance under prior copyright law because it had the power to convert a work from private ownership to a kind of public property. Much was at stake, and thus authors were likely to be keenly aware of the implications. It was essential for authors and publishers of the day to clearly understand what activities constituted publication in the eyes of the law. Yet attaining this understanding was thorny because the 1909 statute did not actually define “publication.” As a result, the courts were left to interpret what constituted “copyright publication” on a case-by-case basis.²⁰ In doing so, they unwittingly added to the confusion about the meaning of the term by differentiating between two categories of publication: “general” and “limited.” “General publication” was used to distinguish publication for federal copyright purposes. This form of publication divested a once-private work of all common law rights. The owner of a “general publication” had to secure statutory protection or see the work fall into the public domain.

By contrast, “limited publication” – an unfortunate and confusing misnomer – was not considered publication at all for copyright purposes. Rather, the courts viewed limited publication as a restricted sharing of an author’s private property “without the right of diffusion, reproduction, distribution, or sale.” They specified that “the circulation must be restricted both as to persons and purpose, or it can not be called a private or limited publication.”²¹

The pre-1978 courts had occasion to distinguish between general and limited publication in cases involving manuscript materials, but they never ruled on a specific case involving a graduate thesis or dissertation. This fact left the dissertation publishing



community to guess which category applied to dissertations deposited in the university library or disseminated on microfilm. One might conclude that, given American universities' concerted efforts to disseminate doctoral research as widely as possible, it was obvious that these distribution methods fit the specifications for general, not limited, publication. Yet the possibility that the courts would have deemed library deposit or microfilm to be limited publication may not be dismissed without investigation. How past practitioners interpreted the doctrines of general and limited publication became a key question in our investigation. We saw the need to provide conclusive evidence that dissertations were considered to be general publications under prior copyright law in order for today's decision makers to make confident digitization choices.

Exploratory research

We began our examination of the publication status for pre-1978 dissertations with an exploratory review of documentation from the past community of practice. Recognizing that today's "dissertation publishing community" comprises a loosely affiliated collective of graduate school administrators and staff, library administrators and practitioners, faculty advisers, scholars, publishers, legal experts, government officials, and graduate students, we reasoned that a similarly broad group of stakeholders formed a comparable community in the past. We presumed that organizations engaged in scholarly publishing, such as the Association of American Universities (AAU) and the Association of Research Libraries (ARL), as well as the dissertation distributor University Microfilms, played key leadership roles in the community. We also assumed that the members of the historic community, in a fashion similar to their contemporary counterparts, exchanged information and ideas through a variety of channels, including meetings, conferences, journals, newsletters, and other media of exchange. Finally, we expected that community members brought critical issues of common concern – such as copyright law – into a national arena for discussion, dialogue, and debate.

An exploratory examination of historical records from likely sources demonstrated that the above-mentioned assumptions were well founded. Both AAU and ARL records contained relevant discussions about the copyright and publication status of dissertations. Of particular significance was the legal briefing "Doctoral Dissertations and Law of Copyright," printed in the minutes of both organizations. This 1956 document, representing "competent legal opinion" from the University of Michigan Law School, stated:

1. The filing of a dissertation in a library almost certainly constitutes publication.
2. The publishing of an abstract of a dissertation in "Dissertation Abstracts" and the offering for sale of film copies of the dissertation unquestionably constitutes publication."²² (see Appendix I for an excerpt of this document)

Our research also identified published articles from the literature of higher education, librarianship, scholarly publishing, and law. The earliest of these were authored by UMI founder Eugene Power and touted the merits of his company's new dissertation microfilming service.²³ Power apparently saw the need to assuage concerns that microfilming dissertations would introduce copyright problems. He assured readers that "although such publication is quite different from the usual method, it accomplishes essentially



the same result. This is recognized by the copyright office [*sic*], which has ruled that manuscripts thus published are eligible for copyright."²⁴ Similar articles by other authors appeared in the literature of the early fifties and sixties, evidently written in the wake of ARL's 1952 endorsement of microfilm technology for disseminating dissertations. These works echoed Power's earlier assurances that microfilmed dissertations were eligible for copyright. The most oft-cited of these was Vernon Tate's 1953 article "Defrosting a Frozen Asset: The Publication of Doctoral Dissertations," that appeared in *College and Research Libraries*.²⁵ Tate served as Director of the MIT Libraries and chaired ARL's Committee on Dissertation Publishing. Tate's counterparts from the higher education community published similar articles in a variety of academic and scholarly outlets.²⁶

Based on the findings from this exploratory review, we prepared for a more thorough research investigation. We hypothesized that the historic community of practice considered library deposit and microfilm dissemination to constitute general publication under pre-1978 copyright law. We selected content analysis as the most effective research methodology to test this hypothesis. As Klaus Krippendorff explains, "Content analysis is a research technique for making replicable and valid inferences from texts (or other meaningful matter) to the context of their use." This method "entails a systematic reading of a body of texts" and the coding of messages within those texts using criteria established a priori.²⁷ Content analysis of pre-1978 sources would permit us to directly examine the beliefs and practices of an historic community that no longer exists, governed by a legal framework that is no longer operative. We regarded content analysis, in effect, as a proxy for polling the past community about their opinions and practices. We devised a search strategy that would yield the largest, most representative set of sources for analysis, ensuring that we would "hear" the voices of the full spectrum of past stakeholders.

Content analysis of pre-1978 sources would permit us to directly examine the beliefs and practices of an historic community that no longer exists, governed by a legal framework that is no longer operative.

Methodology

Sampling units

The unit of sampling used in the content analysis was the written message, defined as a complete statement or series of statements with a distinct start and end. All messages selected for the study had to cover the United States and fall within the time period governed by prior copyright law: 1909 through 1977. Additionally, all messages were required to contain three semantic concepts: doctoral dissertations, dissemination to the public, and copyright.

To strengthen the reliability of findings, a set of search strategies was devised to identify sources from a representative range of genres, disciplines, and publication dates. To maximize authoritativeness, all selected sources were formally published under some form of editorial control or were distributed as official communications from established



organizations. To minimize potential bias in the data, materials determined to be from a purely commercial source, such as advertisements or product literature, were specifically avoided. To ensure data integrity, messages that met the above-referenced criteria were verified in appropriate bibliographic tools and acquired. The categories of sources included in the dataset, along with the tools and strategies for finding them, are summarized in Appendix 2.

An exploratory search in Google Books confirmed the suitability of the approach described above. A series of advanced queries using variants of the terms “copyright,” “publication,” and “dissertation,” limited to English language and publication dates 1909–1977, retrieved hundreds of seemingly relevant snippets representing diverse genres, disciplines, and dates. In a surprising result, the Google Book searches yielded testimonies from congressional hearings related to the copyright law revision process that spanned the 1950’s through mid-seventies. Because of this finding, we expanded the list of target genres to include Congressional documents from the relevant time period.

The initial round of searches identified a starting set of 262 unique sources. After bibliographic verification, the remaining documents with complete citations were obtained in full-text and cursorily checked for relevance. An additional set of sources dropped out because they covered unrelated topics such as the preparation of dissertations, formal publication of dissertations, fair-use of third party materials in dissertations, or dissertation publishing outside the United States. The remaining 121 relevant sources were transformed into text-searchable PDF documents using Adobe Acrobat and searched for the three semantic concepts required for relevancy. Those texts determined to be relevant served as an additional source of prospective sources via their reference lists. We checked all cited references for possible relevance, repeating this process of “snowball sampling” until no new references were identified. The resulting final dataset for content analysis contained 67 unique sources.²⁸

Recording Units

Each source in the sample set contained at least one explicit assertion regarding the publication status of dissertations made available in a university library or through a microfilm distributor. These assertions took a variety of forms, from a single clause within a sentence, to a full paragraph, and even to an extensive argument extending over multiple pages. Examples of assertions analyzed in the dataset include:

“...the act of depositing a thesis in a public library is “publication” in the legal sense...”²⁹

“...if the dissertation is published by microfilm without reservation of copyright, the author may not subsequently copyright the dissertation or any part of it, for the materials has, by publication, entered the public domain and the author’s right to its exclusive use has lapsed.”³⁰

Classification and Coding

Insights gained from the exploratory review helped us construct categories and coding rules for the content analysis. We established a category for “Dissemination Type” because library deposit and microfilming were discussed separately in some of the sources. Ad-



ditionally, the realization that some sources relating to library deposit conditioned their assertions upon the existence or absence of access restrictions prompted us to capture information about “Restrictions.” The final design for the coding process comprised three categories for analysis, as shown in Table 1 below:

Coding instructions listed available values for each category, with one or more examples of possible language that would be appropriate for each category. This was important for the category “Publication Status” because of the variant ways in which this semantic concept was expressed in the source documents.

Results

We entered values selected from the coding process into Excel spreadsheets and analyzed the data using straight percentages. The results are presented in Table 3.

Data According to Type of Dissemination

Data from the first category, “Dissemination Type,” indicated that:

- Fifty (75 percent) of the source documents addressed the question of publication status with respect to microfilm dissemination of the dissertation manuscript.
- Thirty-five (52 percent) addressed the question with respect to library dissemination of the dissertation manuscript.
- Eighteen of these sources covered both forms of dissemination.

Data According to Publication Status

Data from the second category, “Publication Status,” indicated that the overwhelming majority of sources in the dataset (63, or 94 percent) considered that distribution of dissertations by library deposit or microfilm dissemination constituted general publication for copyright purposes. A closer look at the data for each “Dissemination Type” presents an interesting picture. For the set with “Dissemination Type” equal to microfilm, all sources (50, or 100 percent) expressed the view that this method constituted general publication. The unanimity of these results was clear: there were no sources in this subset containing opposing assertions or that in any way considered the matter unsettled.

For the set with “Dissemination Type” equal to library deposit, the majority of sources (25, or 71 percent) expressed the view that this method constituted general publication. A minority (7, or 20 percent) expressed the view that library deposit was a limited publication. Three sources (9 percent) indicated the matter was unsettled. These results may not be meaningful, however, because they do not reflect that some sources (11, or 31 percent) conditioned their assertions on the presence or absence of access restrictions on the deposited typescript.

With the additional category of “Conditions” applied to the library deposit subset, data about “Publication Status” falls into five distinct groups, as shown in Figure 1. The majority of sources (20, or 57 percent) expressed the view that library dissemination constituted general publication, or publication for copyright purposes, without regard to restrictions. The next largest category of sources (6, or 17 percent) expressed the view



Table 1

Coding Design for Content Analysis

CATEGORY	POSSIBLE VALUES
Dissemination Type	Microfilm Library Both
Publication Status	General Publication Limited Publication Unsettled
Conditions of Library deposit (Applied only to Dissemination Type=Library)	Unrestricted access Restricted Access None expressed

Table 2

Coding Instructions for the Category “Publication Status”

General publication	Limited publication
<ul style="list-style-type: none"> • published for copyright purposes • legal publication • copyright publication • eligible for statutory copyright • divestitive publication • lost common law literary property • public domain (if published without notice) 	<ul style="list-style-type: none"> • retained common law copyright • retained author’s literary property • private distribution • any negation of the statements equivalent to general publication

that library deposit *with access restrictions* constituted limited publication (meaning it was not “published” for copyright purposes). An almost equal number of sources (5, or 14 percent) expressed the contrapositive view that library deposit *without access restrictions* constituted general publication. Taken together, the data in these two categories (11 sources, or 31 percent) reflect the single view that (a) library deposit with access restrictions constituted limited publication and (b) library deposit without restrictions constituted general publication.



Table 3

Results from Content Analysis of 67 Sources

Dissemination Type	Publication Status		
	General Publication	Limited Publication	Matter is unsettled
	(Published for copyright purposes)	(Not published for copyright purposes)	
Microfilmed with abstract printed in Dissertation Abstracts	50 sources	--	--
Library Deposit with no conditions expressed	20 sources	1 source	3 sources
Library Deposit with restricted access	--	6 sources	--
Library Deposit without restricted access	5 sources	--	

Analysis & Discussion

Findings regarding microfilm publication

The results of this study substantiate our hypothesis that microfilm distribution of pre-1978 dissertations was considered publication for copyright purposes at the time of their creation. The community of practice was unanimous in this view.

Why was this view so consistent across the dataset? We infer from the writings of Eugene Power, founder of University Microfilms, that the provision for copyrighting microfilmed dissertations was established as part of his company's new dissertation microfilming service.³¹ This supposition is evident from Power's statement:

"The Bureau of Copyrights has stated that they will consider as publication this method of production and distribution, and therefore will accept two film copies of the manuscript as fulfilling the requirements for copyright should the author wish this protection."³²

We infer from this quote that Power made arrangements with the US Copyright Office to register microfilmed dissertations for copyright and to accept microfilmed copies as the best editions of the work. Therefore, the matter of the publication status for these dissertations was well established and non-controversial.

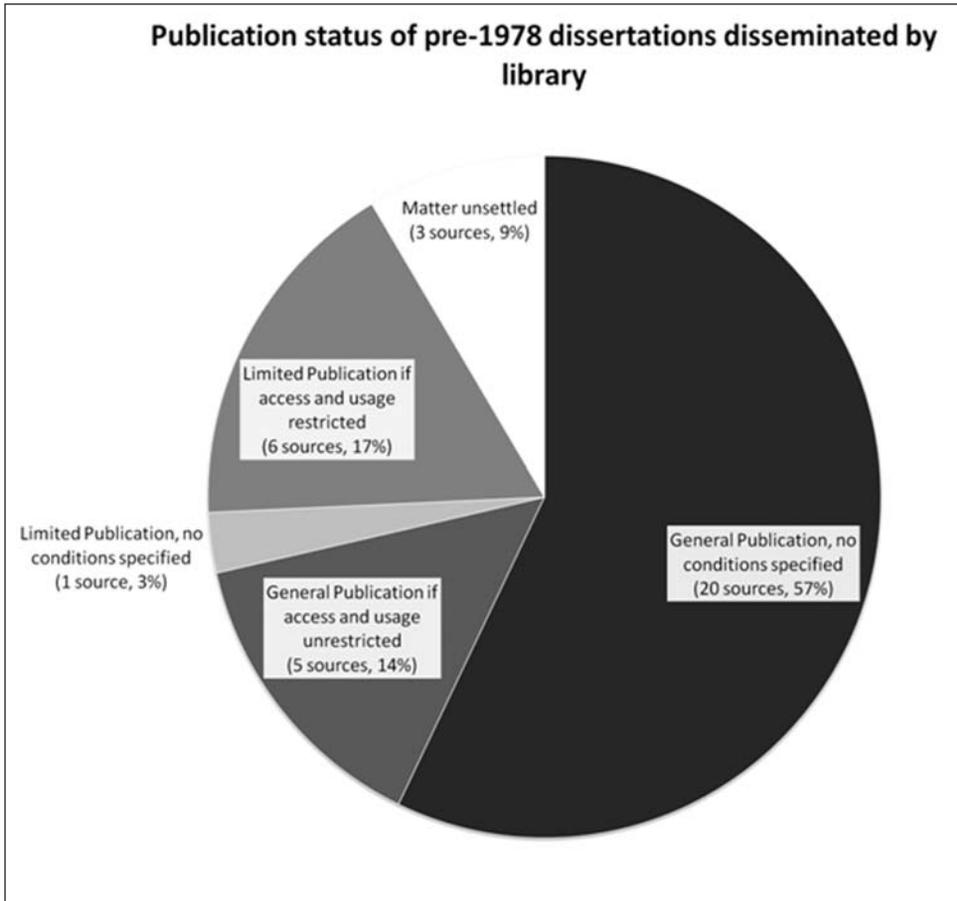


Figure 1. Results showing how analyzed sources regarded the publication status of dissertations deposited in the library

Finding Regarding University Library Deposits

The results from sources covering library deposit also substantiate our hypothesis that library deposit of the dissertation was considered publication for copyright purposes. It is important to recognize, however, that a minority of the community believed that the doctrine of limited publication applied to dissertation typescripts deposited in the library. Some members of the community believed that access restrictions safeguarded the private status of dissertations once deposited in the library. An example of this view is reflected in the American Library Association's 1970 *Interlibrary Loan Procedure Manual*:

"To protect manuscripts under common-law copyright, some universities that lend theses and dissertations require the user to sign a statement of use of the manuscript. The borrowing librarian is responsible for seeing that this is done."³³

The matter of restrictions on dissertations deposited in the library also arose in a discussion among ARL members. As reflected in meeting minutes from 1955, "Mr. Stan-



ford asked if it were customary to secure author's permission to loan theses. Most ARL members do not do so, interpreting the act of deposit (if without condition) as placing the thesis in the public domain."³⁴

The effectiveness of restrictions on the publication status of older dissertations is also defended in the legal literature. In the law review article "The Student Author and the Law of Copyright," Robert Carpenter cautioned that

"the student author should be made aware of the fact that under certain circumstances, deposit of his work in a library may constitute divestitive publication. Where the library is 'public' as opposed to purely private, and where access to the work is not limited to a special class of persons, the student would be well advised to submit the work for deposit with notice of statutory copyright."³⁵

Yet some members of the dissertation publishing community held the view that restrictions were not effective *in any case*. For example, Ralph Shaw argued against the legal standing of library-imposed restrictions in his treatise *Literary Property in the United States*:

"The complex and varied 'house rules' laid down by scholarly institutions would appear to have no standing in common law or statute. The only means by which the author of a thesis may be certain that his literary property will be protected is by compliance with the simple requirements of the statute."³⁶

Resolving the question of legal standing for library-imposed restrictions is beyond the scope of this study. However, we believe the question has dubious significance for decision makers today. Even if restrictions were proven legally effective in preserving a dissertation's status as a limited publication, the protection would have been of temporary duration. Once the restrictions were lifted (or lapsed due to lack of enforcement), the dissertation would have been "published" for copyright purposes. This point is exemplified by Harvard's restrictions policy in effect at mid-century. Under this policy, the university reserved the right to make available to the public any thesis "still unpublished five years after the date of its acceptance."³⁷

Conclusion

We conclude from this study that pre-1978 American dissertations were considered published for copyright purposes by virtue of their deposit in a university library or their dissemination by

a microfilm distributor. For copyright purposes, these were acts of publication with the same legal effect as dissemination through presses, publishers, and societies. The

That pre-1978 American dissertations were considered published for copyright purposes by virtue of their deposit in a university library or their dissemination by a microfilm distributor.

question then is only whether a dissertation met the formalities required for copyright protection of notice and registration.

The results from this study provide evidence that today's collection managers can draw on to assess the copyright status of pre-1978 dissertations. By examining the title



page and verso (or page immediately following the title page) for copyright notice, they can determine whether or not a dissertation was copyrighted at the time of publication. This circumstance applies to pre-1978 dissertations regardless of their distribution as printed typescripts or as microfilmed copies. In the case of the latter, dissertation authors had to place notice on the manuscript copy prior to microfilming in order to secure copyright protection.³⁸

The extent to which pre-1978 American dissertations entered the public domain due to lack of copyright notice was not addressed in this investigation, but some of the sources analyzed suggest that the number could be substantial. For example, the 1965 study *Practices of Graduate Schools in the United States Regarding Theses, Dissertations, and Official Publications* reported that the majority of American institutions did not require copyrighting of their graduate works.³⁹ Assessing the quantity of pre-1978 American dissertations without copyright notice could help today's collection managers more accurately forecast the volume of uncopyrighted legacy dissertations available for digital republishing. We are looking at this question as part of an ongoing study.

Why doctoral students allowed their works to enter the public domain, or whether they understood the implications of omitting copyright notice on their works, is another interesting question raised in this study. Some commentators of the time expressed concern that doctoral students needed copyright guidance in order to make the best choices for dissertation publishing.⁴⁰ It is not known, however, whether their concerns are representative of the dissertation publishing community as a whole. Some of the guides analyzed in the study do contain advice to student authors regarding copyright issues but others do not address the topic at all. The question of student awareness and understanding of copyright issues in their dissertations is also under investigation by the authors in a separate study.

Finally, we feel it is important to point out that pre-1978 dissertations that do bear copyright notice may also be in the public domain under certain circumstances. Specifically, if the copyright holder did not renew the original 28-year copyright term for a second term of the same duration, the work lost its copyright protection. This fact does not apply exclusively to dissertations but to all published works copyrighted between 1909 and 1978.

Acknowledgements

Preliminary results of the exploratory phase of the authors' research were presented at the conference "ETD 2010: 13th International Symposium on Electronic Theses and Dissertations," Austin, Texas, June 17, 2010. We appreciate the efforts of the following colleagues who contributed valuable feedback and comments to the manuscript: Pixey Mosley, Kathy Jackson, Jim Ottaviani, and Bobby Glushko.

Gail Clement is Associate Professor and Librarian, Digital Services and Scholarly Communication, at Texas A&M University Libraries; e-mail: gcllement@tamu.edu.

Melissa Levine is Lead Copyright Officer, University of Michigan MPublishing; e-mail: mslevine@umich.edu.



Notes

1. This figure was calculated on the basis of two sources: National Research Council, *A Century of Doctorates: Data Analyses of Growth and Change: U.S. PhD's – Their Numbers, Origins, Characteristics, and the Institutions from Which They Come*. (Washington DC: National Academy of Sciences, 1978), 194, <http://www.eric.ed.gov/PDFS/ED156064.pdf> (accessed 11 April 2011). According to this document, there were 642,851 research doctorates granted in the United States between 1909 and 1977. Julie L. Moore, "Bibliographic Control of American Doctoral Dissertations: An Analysis, Part 2," *Special Libraries* 63, 7 (1972): 289. Based on the data provided in Table 4 of this article, 81 percent of American dissertations produced between 1934–1969 never saw publication as journal articles, books, or book chapters.
2. Library of Congress, Copyright Office, *Rules and Regulations for the Registration of Claims to Copyright* (Washington DC: Government Printing Office, 1913): 10
3. Copyright registration was available for a small subset of unpublished works intended for oral delivery, display, or performance. The Copyright Office applied this provision to lectures, sermons, addresses; dramatic and musical compositions; works of art and photography; and motion pictures. (Library of Congress, Copyright Office, *Rules and Regulations for the Registration of Claims to Copyright*.) However, US Copyright Office's *Compendium of Copyright Office Practices (as of July 1, 1970)* expressly excluded from this category any literary works not prepared primarily for oral delivery. This manual of practice specifically named dissertations among the types of works excluded.
4. Unless the Library could make the case that digitization was permissible under the provisions of Fair Use (US Code Title 17, Section 107) or library and archives exceptions (US Code Title 17, Section 108).
5. Peter Hirtle, "Copyright Term and the Public Domain in the United States" (January 1, 2011), <http://copyright.cornell.edu/resources/publicdomain.cfm> (accessed 11 April 2011).
6. Jim Robertson to ETD-L mailing list (July 26, 2002), <http://listserv.vt.edu/cgi-bin/wa?A2=ind0207&L=ETD-L&F=&S=&P=998> (accessed 11 April 2011).
7. Lora T. Brueck to ETD-L mailing list (Oct 27, 2010), <http://listserv.vt.edu/cgi-bin/wa?A2=ind1010&L=ETD-L&F=&S=&P=4805> (accessed 11 April 2011).
8. Rhonda Marker to ETD-L mailing list (Oct. 27, 2010), <http://listserv.vt.edu/cgi-bin/wa?A2=ind1010&L=ETD-L&D=0&P=5524> (accessed 11 April 2011).
9. Dorothea Salo to ETD-L mailing list (Oct 27, 2010), <http://listserv.vt.edu/cgi-bin/wa?A2=ind1010&L=ETD-L&F=&S=&P=9077> (accessed 11 April 2011).
10. Cathleen L. Martyniak, "Scanning Our Scholarship: The University of Florida Retrospective Dissertation Scanning Project," *Microform & Imaging Review* 37, 3 (2008): 122.
11. Peter B. Hirtle, Emily Hudson, and Andrew T. Kenyon, "Case Study 2: Dissertations, Theses, and Student Papers," in *Copyright and Cultural Institutions: Guidelines for U.S. Libraries, Archives, and Museums*, ed. Peter B. Hirtle, Emily Hudson, and Andrew T. Kenyon (Ithaca, NY: Cornell University Library, 2009), 227–241. Also available online at http://ecommons.cornell.edu/bitstream/1813/14142/2/Hirtle-Copyright_final_RGB_lowres-cover1.pdf (accessed on 11 April 2011).
12. Association of American Universities, "Ph.D. Research and Dissertation," *Journal of Proceedings and Addresses. The Association of American Universities* 55 (1955): 21.
13. Charles M. Bakewell, "The Administration, Financial Support, and Distribution of University Publications, Including Journals and Doctors' Dissertations," *Journal of Proceedings and Addresses. The Association of American Universities* 3 (1904): 46.
14. University of Kentucky, "Dissertation," *General Catalog. Bulletin of the University of Kentucky* (1953): 1.
15. Moore, "Bibliographic Control of American Doctoral Dissertations," 285–291; Watson Davis, "Accessibility of thesis literature of the United States," in *Report of Proceedings of the Sixteenth Conference, Association of Special Libraries and Information Bureaux* (Nottingham, U.K., 1939): 32.



16. Henry M. Silver, "Publishing of Doctoral Dissertations in the Humanities and Social Sciences," *American Council of Learned Societies Newsletter* 2, 2 (1951): 7.
17. Wilbur Lucius Cross, "Concerted Action Toward Full Support of Scholarly Publication," *Journal of Proceedings and Addresses of the ... Association of American Universities* 23 (1921): 29; Carl E. Seashore, "The Doctoral Dissertation as a Statement of a Series of Propositions Which the Candidate Proposes to Defend," *Journal of Proceedings and Addresses of the ... Association of American Universities* 34 (1932): 45–53.
18. Jack Plotkin, "Dissertations and Interlibrary Loan," *RQ* 4 (1965): 5.
19. Committee on the Publication and Recording of Dissertations, "Appendix III: The Program of the Association of Research Libraries for Publishing Doctoral Dissertations," *Minutes of the Forty-first Meeting of the Association of Research Libraries* (June 1953): 31–34.
20. Melville B. Nimmer, "Copyright Publication," *Columbia Law Review* 56, 2 (1956): 185–202.
21. The most oft-quoted formulation of the "limited publication" doctrine is found in *White v. Kimmel*, 1952 [193 F.2d 744 (9th Cir.)], cert. denied, 343 US 957, 72 S.Ct. 1052, 96 L.Ed. 1357 (1952), which states: a limited publication which communicates the contents of a manuscript to a definitely selected group and for a limited purpose, and without the right of diffusion, reproduction, distribution or sale, is considered a 'limited publication,' which does not result in loss of the author's common-law right to his manuscript; but that the circulation must be restricted both as to persons and purpose, or it can not be called a private or limited publication.
22. Ralph Sawyer, "Appendix VI: Doctoral Dissertations and the Law of Copyright," *Minutes of the Forty-sixth Meeting of the Association of Research Libraries, Chicago, Illinois* (January 1956): 26.
23. Eugene B. Power, "Microfilm and the Publication of Doctoral Dissertations," *Journal of Documentary Reproduction* 5, 1 (1942): 37–44.
24. *Ibid.*, 42.
25. Vernon D. Tate, "Defrosting a Frozen Asset: the Publication of Doctoral Dissertations," *College and Research Libraries* (January 1953): 38.
26. Vaughn D. Bornet, "Doctoral Dissertations and the Stream of Scholarship," *College and University* 28 (October 1952): 17–30; Ralph Ellsworth, "Toward Publishing Doctoral Dissertations," *The Journal of Higher Education* 23, 5 (1952): 241–244; William S. Livingston, "Law of Copyright and the Doctoral Dissertation," *Association of American Colleges Bulletin* 44 (December 1958): 636–641.
27. Klaus Krippendorff, *Content Analysis: An Introduction to Its Methodology* (Thousand Oaks, California: Sage Publications, 2004): 18, 3.
28. See Appendix 2 for a list of genres included in the dataset and the search techniques used to find the sources.
29. Ralph Ellsworth, R.A. Miller, and Donald Coney, "Appendix C: Report of the Committee on Dissertation Publication," *Minutes of the Thirty-seventh Meeting of the Association of Research Libraries, Chicago, July 6–7, 1951* (June 1951): 36.
30. Livingston, "Law of Copyright and the Doctoral Dissertation," 638.
31. Power, Eugene. "A Plan for Publication of Scholarly Material by Microfilm" [reprinted from 1938 original essay] in *Studies in Micropublishing 1853–1976 Documentary Sources*, Allen B. Veaner, ed., (Westport, CT: Microform Review, 1976), 321.
32. *Ibid.*
33. Sarah Katharine Thomson, *Interlibrary Loan Procedure Manual* (Chicago: Interlibrary Loan Committee, American Library Association, 1970): 40–41.
34. Ralph Ellsworth, "Publication and Recording of Dissertations," *Minutes of the Fortieth Meeting of the Association of Research Libraries, Evanston, Illinois, February 1, 1953* (February 1953): 10.
35. Robert B. Carpenter, "The Student Author and the Law of Copyright: A Consideration of Some Peculiar Problems," *Notre Dame Lawyer* 51, 4 (1976): 588.



36. Ralph R. Shaw, *Literary Property in the United States*, (Washington DC: Scarecrow Press, 1950), 145.
37. Clifford K. Shipton, "The Reference Use of Archives," in *University Archives: Papers Presented at an Institute Conducted by the University of Illinois Graduate School of Library Science, November 1-4, 1964*, Rolland Elwell Stevens, ed. (Urbana-Champaign: University of Illinois Graduate School of Library Science, 1965).
38. Vaughn D. Bornet, "Microfilm Publication of Doctoral Dissertations," *Bulletin of the American Association of University Professors* 39, 3 (Autumn 1953): 509.
39. Gwen Hunsaker Haws, *Practices of Graduate Schools in the United States Regarding Theses, Dissertations, and Official Publications* (Logan: Utah State University Press, 1965), 25.
40. Jack Peters, *The Graduate Thesis – A Copyright Problem* (Iowa City, IA: University of Iowa, 1955), 13; Carpenter, "The Student Author and the Law of Copyright," 574-599.