published articles has tended to put alternative models of rights management into the shadows, which involves a lesser ceding of control by the author (e.g., through a partial transfer of copyright or merely granting the publisher a licence to publish). If the participants in the discussion were to shift their focus, they would find that the increased emphasis on open access has been accompanied by a shift away from the dominant model in favour of one in which copyright is retained by the author, the publisher is granted a licence to publish, and the author retains rights over further reuse of the material.

The range of models of copyright management in the author-publisher relationship, can be seen along a continuum of control, with maximum control by the author at one extremity and maximum control by the publisher at the other. At the one end of the spectrum the author retains copyright (and thereby maximum control) and merely licenses the publisher to publish the article, on an exclusive, sole, or non-exclusive basis. At the other end of the spectrum, the publisher obtains a full assignment of copyright from the author (and thereby maximum control) and does not permit the author to self-archive the article (either in its draft pre-print form or the published post-print form) or further distribute it (although the author may purchase hard copy reprints). In retaining copyright the author has control of further distribution of the article (including the right to self-publish, self-archive, or deposit it in a repository).

Points along the continuum from maximum author control to maximum publisher control can be identified, in broad terms, as follows:

(i) Author retains copyright and controls distribution (which may include self-publishing, self-archiving, or depositing the output in a repository).

(ii) Author retains copyright and grants a licence (exclusive, sole, or non-exclusive) to the publisher to publish the article.

Ultimately in developing any licensing model for managing the author-publisher relationship, the scope of the rights granted to the publisher will be determined by how the licence deals with a range of issues, including:

- whether the licence granted is exclusive, sole, or non-exclusive;
- the period of time for which the licence is granted;
- the territory covered by the licence;
- whether any restrictions are imposed on the commercial use of the material (or whether it can be used only for non-commercial purposes); and
- the conditions applying to any further distribution of the material.

(i) Author assigns copyright partially to publisher, retaining (reserving) ownership of part of the copyright.

(ii) Author assigns copyright to publisher but obtains an express licence back from publisher to further reproduce and distribute on terms determined by the publisher.

(iii) Author assigns copyright entirely to the publisher, with an implied licence to self-archive or deposit the article into an institutional or disciplinary repository.

(iv) Author assigns copyright entirely to the publisher.

Recent surveys of authors have clearly indicated a preference for a copyright model under which the author retains copyright and continues to be able to exercise rights over reuse of the material for educational, academic, or commercial purposes. In The Institutional Repository, Jones, Andrew and MacColl comment that they have "noted that the major difficulties with clearing permission arise when dealing with materials that are not owned by the submitting author (and) advocate that [generally speaking] authors should retain as much of their rights as possible." 111

111. See Maurice van der Graaf & Esther Hoom, "Towards Good Practice of Copyright in Open Access Journals" (Amsterdam: Pilea Management Consultancy, 2005), the first output of the JISC-SURF partnering on copyright project, online: www.lib.hawaii.edu/departments/ulibraries/research/papers/jisc-surf-report.html; see also Anthony Austin, Mane Heffernan, & Nikita David, "Academic Authorship, Publishing Agreements & Open Access Survey Results" OAK Law Project (May 2008) online: http://oaklaw.pitt.edu/1365/.


113. See online: http://sciencecommons.org/resources/readingroom/.
vidually with the journals in which they publish, to retain ownership of copyright, and to retain the right to deposit their material in open access repositories. The program has developed the following resources to promote open access in legal publishing, including:

- The Open Access Law (OAL) Journal Principles: The OAL program encourages law journals to commit to a set of OAL journal principles. These principles require that a journal: (i) take only a limited term licence, (ii) provide a citable copy of the final version of the article, and (iii) provide public access to the journal’s standard publishing contract. In return, the author promises to attribute first publication to the journal.

- The Open Access Law Author Pledge: For authors wishing to commit publicly to open access ideals, OAL has established the OAL author pledge. This pledge commits authors to only publish law review articles in journals that adhere to a minimum OAL commitment.

- The Open Access Model Publishing Agreement: The OAL program also provides a model agreement that embodies the OAL journal principles in a fair and neutral contract that is easy for both authors and law reviews to adopt. It also provides for an easy mechanism for authors and journals to adopt Creative Commons (CC) licenses to make their work more easily available.

bb) Author assigns copyright partially to publisher, retaining (reserving) ownership of part of the copyright

Under this model, based on the splitting of copyright interests among the parties, the author assigns copyright partially to the publisher but retains (or "reserves") certain key rights required to enable them to control certain uses of the article (e.g., to enable the author to self-archive the article or to deposit it in a digital repository).

This model underlies the so-called SPARC author addendum, or simply, SPARC addendum, developed by Professor Michael Carroll for the Scholarly Publishing and Academic Resources Coalition (SPARC). The SPARC Addendum is a set of clauses intended for inclusion by an author

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115 Ibid.
116 Ibid.
117 Version 3.0 of the SPARC Author Addendum, online: www.acl.org/sparc/author/addendum.htm.
118 See online: www.acl.org/sparc.

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... in a standard publication agreement in which copyright is assigned to the publisher, in order to limit what would otherwise be a general transfer of copyright, by excluding from the transfer certain distribution rights that are reserved to the author. In particular, the SPARC Addendum reserves to authors certain key rights; in particular, the right to post their articles in digital repositories.

cc) Author assigns copyright to the publisher but obtains an express licence back from the publisher to further reproduce and distribute, on terms determined by publisher

The prevalence of the copyright assignment model is apparent from the survey of publishers conducted by the UK SHERPA (Securing a Hybrid Environment for Research Preservation and Access) project. The information about publishers’ practices on the SHERPA website shows that the majority obtained a transfer of copyright from the author. The SHERPA website provides a useful overview of publishers’ practices, with a primary focus on whether or not they permit authors to self-archive or further distribute pre-prints and post-prints.

In formulating the SHERPA categorization (green/blue/yellow/white), much emphasis was placed on the policies issued by publishers. Such policies reflect the public at large the publisher’s practices. In some cases, for example, where the publisher’s policy states that authors are permitted to self-archive, or make the published article available in an institutional or disciplinary repository, the publisher may be going beyond what has been expressly stated in their standard, written publishing agreements which provide for assignment of copyright by the author but are silent as to any rights the author may have to further use or distribute the published article. In this case, the question arises as to whether the general statement of policy can be regarded as unilaterally varying the express terms of the existing publishing agreements with authors. The more likely situation is that the publishers’ policy statements are merely a representation which, if relied on by authors, cannot be disavowed by publishers (doctrine of estoppel). Essentially, the publisher is indicating that it will not enforce its rights as copyright owner if the author makes use of the published article in the manner described by the publisher in its policy statement.

120 See online: www.sherpa.ac.uk.
While the publishers' policy statements have retrospective effect in relation to existing contracts, it would be expected that new contracts would be drafted to expressly reflect the published policy.

dd) Author assigns copyright entirely to the publisher, with an implied licence to self-archive or deposit the article into an institutional or disciplinary repository.

Many publishers require the author to assign copyright, and, while the question of the author's rights to self-archive or deposit the article (in pre- or post-print version) is not expressly addressed in the publishing agreement, the circumstances may give rise to an implied licence to the author to use the article in this way. While there may be circumstances that can be relied upon to support the existence of an implied licence, there will inevitably be uncertainty about the terms and extent of any such licence.

ee) Author assigns copyright entirely to the publisher.

Under the traditional model of academic publishing, the author assigns the whole copyright to the publisher in exchange for having the article or work published. Few, if any rights are licensed back to the author.

In the content of pursuit of open access objectives, this option is the least suitable. It minimizes the author's control over the published article, while maximizing the publisher's ability to prohibit or impose restrictions on further distribution and educational uses of the published work without consulting the author.

d) Author-digital repository (repository deposit licence).

The relationship between the author (or another party who owns copyright in the work, such as the author's employer or the publisher to which copyright has been assigned) and the digital repository in which a copy of the article is deposited is governed by the terms of the repository deposit licence between the parties.

The repository deposit licence will be entered into by the administrator of the digital repository and the author, the author's employer, or the publisher.


112 The RoMEO study is referred to in Gareth Knights, *Report on a Deposit Licence for E-Prints*, online: http://libd.ubs.ac.uk/about/press/romeo REPORT.htm.

113 Ibid.
extent of rights granted to digital repository, for example, to reproduce and distribute the deposited material (including the abstract) worldwide in print and electronic format in any medium.

- retention by author of rights to make use of the current and future (revised) versions of the deposited work.
- rights granted to digital repository to translate the deposited work (without changing the content) to any medium or format for the purpose of preservation.
- the requirement for citation to the published version to be included and clearly visible.
- author's rights to provide updated versions of the work.
- conditions under which the repository administrators can remove the deposited work.
- rights granted to digital repository to copy the deposited works for purposes of security, back-up, and preservation.
- access to work by other parties.
- basis on which work is to be made available to other users and institutions.
- rights of other parties to access, use and further distribute the work.
- representations and warranties by the author (or copyright owner) to repository administrators.
- representation by the author of authority to enter into the repository deposit licence.
- representation by the author of the right to grant the rights to the digital repository as stated in the repository deposit licence.
- where the deposited work has been sponsored or supported by another organization, a representation by the author that obligations required by the agreement with such sponsor regarding use of the work have been fulfilled.
- warranty by the author that the work is original, and, to the best of his knowledge, does not infringe any other party's copyright.
- representation that, where the deposited work contains material for which the author does not hold copyright, the author has obtained the unrestricted permission of the copyright owner to grant the digital repository administrator the rights required by the repository deposit licence and that any third-party-owned material is clearly identified and acknowledged within the text or content of the deposited work.
- responsibility for enforcement of intellectual property.

whether the administrators of the digital repository have any obligations to take legal action on behalf of the author (or copyright holder) in the event of breach of intellectual property rights in the deposited work.

d) Digital repository–end users

The repository distribution (end user) agreement grants rights to end users, to access and reuse deposited material, that are consistent with (and do not extend beyond) the licence granted to the repository by the author (or publisher) under the repository deposit licence.

End users may be individual members of the public or members of a specific academic community with defined access rights. The terms and conditions governing access to and use of material in the repository should be clearly displayed on the repository website and brought to the attention of end users so they understand that their use of the repository and materials therein is subject to those terms and conditions. In particular, any limits on the rights of end users to copy and further distribute the material in the repository should be stated.

Where it is essential to obtain assent by end users to comply with restrictions on access and use, the click-wrap format should be used for the repository distribution (end user) agreement.124 A click-wrap website agreement involves end users first viewing the terms and conditions governing access to and use of the materials in the repository, and clicking an "I accept" or "I agree" button or icon to indicate that they assent to those conditions before they are able to obtain access to and use articles in the repository. Where restrictions apply and the repository will not permit access unless end users have agreed to be bound by the terms and conditions of access and use, end users who do not accept the terms and conditions should be given the opportunity of declining (by clicking a "I decline" or "I do not agree/accept" button), in which case they will not be permitted to continue to access the repository or download material from it.

In cases where few, if any, restrictions are imposed on access to and use of the materials in the repository, it will suffice if the repository distribution (end user) agreement is in browse-wrap form or if the terms and conditions

124 See further, Pappalardo & Anne Fitzgerald, above note 121, sample repository deposit licence.

125 A similar approach to that described in this paragraph is advocated by Richard Jones, Theo Andrew, & John MacColl, The Institutional Repository (Oxford: Chandos, 2006) at 91-56.
are available by clicking on hypertext links at the bottom of the repository website pages. In the browse-wrap form of agreement, the end user is required to view the terms and conditions but is not required to click on a button to indicate assent.

f) **Author/publisher-end users**

Where the article is distributed by the author or publisher (or another copyright holder), the rights of end users are governed by the terms of the distribution agreement. If the author has assigned copyright to a publisher, the rights of end users will be determined by the terms of the licence granted to end users by the publisher. However, in cases where the author has retained copyright wholly or partially, it may be the author who directly authorizes end users to use the article (author distribution agreement).

An example of an author-end user agreement is the SCRIPT-ed Open License,126 used by the SCRIPT-ed online law journal, which takes the form of a non-exclusive licence granted by the author to users.127 Users are given the right to disseminate the original and unmodified work, provided it is not done for commercial purposes.128

**g) Copyright collecting society—digital repository and end users**

In establishing a system to enable access to academic and research materials in online repositories, it is necessary to consider how such materials will be treated under the statutory licence for reproduction and communication of works in electronic form under Division 2A of Part VB of the **Copyright Act**.

The question is whether the obligation to pay remuneration to a collecting society for the use of the copyright work still remains when a licence to use the work is granted expressly or impliedly by the copyright owner. If the obligation to pay remuneration continues in force unless expressly excluded by the terms of the licence to archive the material, this will have implications for the drafting of publication agreements.


127 "User" is defined as "the person who reads, copies, issues copies of the work, translates, displays, performs or broadcasts the Work" in "Definitions," Clause 1 of the SCRIPT-ed Open License (SOL), ibid.

128 Ibid. Clause 4 deals with modifications and Clause 3 deals with adaptations.

H. **COPYRIGHT MANAGEMENT ISSUES FOR ELECTRONIC THESES AND DISSERTATIONS**

The electronic distribution of theses also raises many copyright issues.

**i) Ownership Principles—The Legal Status of Theses**

a) **Copyright**

Theses and dissertations will automatically be protected by copyright as a literary work, with the rights vesting in the author who has created them. It should also be noted that a thesis may consist of more than literary work or dramatic, musical, or artistic work.129 For example, sound recordings and cinematograph films are now common in theses in some disciplines and these materials may also contain more than one layer of copyright. For example, the underlying rights in the script or any sound recording may co-exist alongside the copyright in the film.

b) **Ownership of copyright in theses**

Subject to any express agreement to the contrary (such as an agreement assigning copyright to the university or a third party), Ph.D. students will own copyright in the original expressions in their theses.

Where a student is receiving a scholarship or there has been a significant investment made towards the student's thesis, the investor may seek to obtain ownership of copyright in the thesis.130

c) **Performers and moral rights**

Performers' rights may be relevant for theses and dissertations, in particular theses in the area of creative industries and performing arts. In addition to having the personal right to present the making, copying, or public performance of an unauthorized recording or communication of a live performance (as outlined in "Overview of the Principles of Copyright Law," above in Section C), performers also have new economic rights to the extent that the performer and the person who, at the time of the recording, owned the record (being the person who owned the master recording on which the record was made) are now co-owners of the copyright in equal shares in the sound recording of the live performance.131 These rights are relatively new.

129 Copyright Act, above note 4, s. 52.

130 Memorandum & Rickerson, above note 99, c. 7.

131 Copyright Act, above note 4, s. 97(4). See also ss. 100AA–100AH.
following amendments to the Copyright Act arising out of the Australia-United States Free Trade Agreement. Performers may assign their share of the copyright to the original copyright owner in the sound recording or to a third party. The normal employment provisions under the Copyright Act will also apply—for example, copyright in a performance done in the course of employment will be owned by the employer.

Ph.D. students and researchers could also have moral rights in their theses, including the right to be attributed cited as the author of a work in third-party papers and publications reproducing parts of their theses. In addition, the moral right of integrity may be relevant for theses in the creative industries, such as film-making or sound production, where the remixing and reuse of aspects of a work (such as in a pastiche or multimedia work) could potentially subject the work to derogatory treatment in a way that demeans the creator’s reputation if done without the consent of the creator—thereby infringing their moral right of integrity.

2) A History of the Distribution of Theses

a) The pre-digitization of theses

Prior to the digitization of theses, the thesis service that libraries could provide was necessarily limited. Theses were predominantly distributed in hard-copy form, usually a bound copy, which would then be deposited in the library of the degree-awarding institution, and perhaps that of the external assessor's institution. The core problem prior to digitization of theses was that, in the majority of cases, theses were not published on a commercial basis. This made it extremely difficult to locate and access theses in many cases, as they were held at the library of the institution where the degree was awarded, with access limited to personal inspection of the hard copy within the library.

In some cases, copies of theses and dissertations are also held in the various state libraries and the National Library of Australia (NLA). However, as the NLA currently does not receive a copy of every thesis awarded by an Australian university it recommends that the relevant institution where the thesis was completed be consulted in order to obtain access to the required theses or dissertations.

In contrast to Australia, the British Library provides a thesis service, which is known as the British Thesis Service, comprising:

- Full text access to over 170,000 doctoral theses dating from the 1970s to today, with most UK universities making their students’ theses available on the service.
- This collection of theses is held in either paper bound copies or on microfilm. The service also makes available for sale the majority of theses in the collection, through either microfilm copies or bound paper copies.

b) The digitization of theses

With the growth of computer usage over the last twenty years we have seen the gradual development of the notion of submitting a thesis or dissertation in digital form onto an electronic or digital repository.

For example, the Australasian Digital Theses Program (ADT Program) was established in order to improve access to, and enhance the transfer of, research data contained in theses through the provision of full text theses available on the Internet. It establishes a distributed database of digital versions of theses produced by postgraduate students at all Australian universities, which is made available on the Internet. The aim behind the ADT Program is to provide access to, and to promote, Australian research to the international community through the reproduction of theses on the ADT database.

Given that it is the responsibility of each individual institution to maintain an archived copy of the theses, every member of the ADT Program is required to host their own theses on a server located within the university. However, every member uses an identical database configuration, standards, and metadata, ensuring compatibility with all electronic theses contained in the ADT Program.

130 Ibid., s. 2(3)(A). See ss. 2(3)(B)-(C).
133 The British Library, "British Thesis Service.” online: www.bl.uk/britishthesis.
3) Copyright Management Issues for Electronic Theses and Dissertations

With the increasing trend towards the promulgation of research findings electronically, there has been a concomitant increase in the number of Australian academic institutions that have "put online" electronic versions of dissertations and theses. Accordingly, there is a need for comprehensive protocols for managing the copyright issues in providing access to Electronic Theses and Dissertations (ETDs).

To build protocols for managing the legal aspects involved in making ETD available online, it is necessary to consider the issues from the perspective of each of the following four distinct stakeholders:

(i) The student. As the contributor of original material, the submitting student will have intellectual property rights in most, if not all, of the content. This will include copyright, but may also have patent issues arising (for example, containment of pre-patent disclosure). 136

(ii) The supervisor. Depending on the discipline, there may be some content of the thesis that is directly or co-contributed by the student's supervisor. This may give intellectual property rights to the supervisor and/or the supervisor's employer (i.e., the relevant academic institution).

(iii) University, granting agency, and industrial partner. Universities, granting agencies, and industrial partners typically have intellectual property agreements and policies that may govern some of the ETD content.

(iv) ETD disseminating institution (Repository). Institutions that have a repository of ETD need clarification of intellectual property rights ownership. What is the status of the repository? (Is it a publisher?) What are the permissions required for cited materials and are there any exemptions available (such as fair dealing for research or study, or criticism or review)? There may also be serious issues arising in rare circumstances (such as defamation or passing off).

136 Publication prior to the filing of a patent will usually result in the inability to get the patent, as the invention would no longer be "novel." There are now some provisions for grace periods.

Adopting the perspective of each of these stakeholders, the management of intellectual property rights in ETD needs to be considered at a fine level of granularity. Taking this approach, numerous questions arise, including:

(i) How to manage licensing of distribution?
(ii) How is the whole work in the thesis and dissertation to be regarded (in other words, is it entirely an original work of the student or does it contain third party or other contributions)?
(iii) Is this discipline dependent?
(iv) How to manage cited materials?
(v) How to manage contributions by others? (for example, technical photos, cite charts etc.)
(vi) How to manage derivative works?
(vii) How to manage confidential information (for example, pre-patent materials)?
(viii) Liability and risk management?
(ix) What protocols should be adopted?

The key objective of copyright management in this context is to ensure that the ETD repository has appropriate authorization to be able to legally carry out all the acts involved in putting the ETD online. In other words, the ETD repository must be granted a licence (preferably in written form) by the copyright owner—usually by the author of the thesis—authorizing the ETD repository to reproduce and communicate or otherwise disseminate the thesis via the Internet. Where third-party copyright material is included in the ETD, it will be necessary to ensure that appropriate "clearances" (in other words, permissions) have been obtained to use that material in the ETD, unless permission is not required under law.

4) Status of the Repository: Is it a "Publisher"?

Copyright issues facing ETD repositories may include whether the repository is a publisher or a "re-publisher" of the thesis for the purposes of copyright, defamation, confidential information, (trade secrets) and privacy issues.

In terms of copyright, where a hard copy of a thesis in the form of a literary, dramatic, musical, or artistic work is digitized and made available online in an ETD repository where it can be accessed and downloaded by members of the academic and research community, it is arguable that it would be deemed to have been published on the basis of the operation of
section 39(1)(a) of the Copyright Act. However, the deemed publication provision has a much narrower scope of operation in relation to cinematograph films (section 39(1)(b)) than for "works." Publication is only deemed to occur if copies of the cinematograph film have been sold, hired, or offered or exposed for sale or hire to the public. While it is arguable that copies of film-based ETDs are supplied to the public when they are made available for access in an ETD repository, the absence of any commercial dealings in the way of sale or hire, for example, means that it is not possible to rely on the deemed publication provision. Since ETD consisting of moving images (and attracting copyright protection as cinematograph films) will not have the benefit of the deeming provision, it will be necessary to consider whether non-commercial distribution of film ETD from ETD repositories, where they can be accessed by members of the academic and research community, can amount to publication.

5) Converting Paper Theses to Digital Theses

Where any paper thesis is converted to a digital thesis a number of copyright issues may arise. These include scanning the thesis without permission of the copyright owner, which will breach copyright as it involves the exercise of the copyright owner's rights of reproduction. Furthermore, in retrospectively distributing electronic versions of paper-based theses (especially older theses) there is the difficulty in getting the permission of the author. Obtaining such permissions would be expensive both in terms of time and actual fees. One suggested option is to adopt a risk-management approach and engage in the digitization and digital archiving process anyhow, given that the risk of copyright infringement proceedings commencing is low. Another problem with older theses is that even if the author is located, it is unlikely that the author will invest much time or money in establishing that use of any third-party content copied is permitted or, indeed, engaged in resolving any of the issues that may arise. Therefore, considerable caution needs to be taken when dealing with the authors of paper-based theses and a more specialized licence agreement may be needed.

6) Third-party Copyright in Electronic Theses and Dissertations

A high proportion of ETD will contain third-party materials in the form of quotes of text passages, drawings, photographs, reproductions of paintings, video and sound clips, and so on. It is essential for ETD repositories to develop and implement strategies to avoid incurring liability (whether through an action for copyright infringement or through a request for payment of equitable remuneration to a copyright collecting society) due to the unauthorized use of any third-party copyright materials included in ETDs.

If the copyright owner of the third-party content has given permission for the work to be used, repositories must ensure that the terms of such permission are not only confined to use in the original theses or dissertation but extend to reproducing or communicating the content for the purposes of digitization and public access via the repository. The use of third-party copyright materials in ETD will typically involve acts within the scope of the copyright owner's exclusive rights to reproduce or make a copy and to communicate to the public.

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137 Copyright Act, above note 4, s. 39(1)(b).
138 Ibid., s. 31 and cce. See also ss. 31 and 33. Section 31(2) applies to a manuscript or a reproduction of an unpublished thesis or other similar literary work that is kept in a library or a university or other similar institution. It provides that copyright in the thesis or other work is not infringed by the making or communication of a reproduction of the thesis or other work by or on behalf of the officer in charge of the library if the reproduction is supplied (whether by communication or otherwise) to a person who satisfies an authorized officer of the library that she requires the reproduction for the purposes of research or study. Section 33 extends the application of s. 31 to illustrations accompanying the thesis or other work. See further, Emily Hudson & Andrew Kenyon, Copyright and Cultural Institutions: Guidelines for Digitisation (Penville, Australia: CMG, 2001) at 129 [Hudson & Kenyon].

139 See Hudson & Kenyon, ibid. at 50. Arguably, authors of theses would be happy to have their dissertations. The greatest risk of copyright infringement would arise if the student assigned the copyright in their thesis to a third party, such as a publisher, and the publisher sought to take action against the repository for breach of their reproduction and communication rights.

140 Copyright Act, above note 4, Part III "Copyright in Original Literary, Dramatic, Musical And Artistic Works."

141 Ibid., Part IV "Copyright In Subject-Matter Other Than Works."

142 "Communications" is defined in 321(1) of the Copyright Act, ibid., as meaning to "make available online or electronically transmit (whether over a path, or a combination of paths, provided by a material substance or otherwise)."