

TAILORING LICENSED RIGHTS TO USERS' REQUIREMENTS: A PUBLISHER'S VIEW

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Simplicity, consistency and clarity in the wording of licences will ease negotiations, but the content will still be complicated by the need to safeguard publishers' revenues, libraries' value for money and the users' freedom of access.

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Introduction

Both publishers and librarians would like licences which deliver what they want without creating unnecessary and costly work in scrutinising and negotiating individual documents. Fundamentally, what both of us want is a 'win-win' outcome which safeguards what we both currently get from the print status quo, while migrating to a digital environment which can in principle deliver greater benefits to both sides.

General principles

Publishers can maximise the chance that our licences will be signed without lengthy negotiations by bearing in mind certain general principles.

Consistent terminology

It is in everyone's interest (both publishers' and our customers') that we all use words in our licences to mean the same thing. The joint working parties between the UK Publishers' Association and the universities have made considerable progress in coming up with agreed definitions, and it would be highly desirable for this exercise to be extended both beyond academia and beyond the UK, once the UK participants are in final agreement¹.

Short, simple licences

Ideally, licences should be as short and comprehensible as possible; neither publishers nor librarians want to have to spend hours poring over documents just to understand what they mean. It is far harder to write a short licence than a long one (in this respect the Draft Model Licence¹ produced by the above-

mentioned working parties is not a good example), but it is worth the effort.

Minimise the areas likely to require negotiation

There is little point in including terms in your licence which are going to be rejected by your customers. Do your best to understand what the majority of your customers will accept, and go as far as you can to accommodating this in your licence. Neither you nor they want to spend many man-days negotiating the details of every single licence; the manpower required would add hugely to the costs for both sides.

Use the same licence (as far as practicable) for all your products

I do not personally believe that it is very likely that publishers will agree to use standard licences; even the Draft Model Licence¹ mentioned above can, realistically, only offer definitions and wording from which publishers can select what suits their needs.

However, it will help your customers if they know that every licence from a given publisher is essentially the same, so that they do not have to scrutinise every detail. It will also help the publisher; issuing and administration of licences is much less complex and time-consuming if, as far as possible, you use a standard 'shell' document for all licensable products, with a separate Appendix containing all the variable elements such as product, licensee and price.

Consider using established wording

If you are creating your own licences for the first time, look at the wording other people have developed rather than starting from scratch. The Draft Model Licence¹ mentioned above was created for precisely this purpose. The LibLicense website², as well as providing a very useful discussion forum which will help you to be aware of what worries librarians, also has a section which quotes good and bad bits from various publishers' licences.

Key elements in your licence

Various publishing groups (eg UK Publishers' Association³, Association of Learned and

Professional Society Publishers⁴) have come up with checklists or guidelines on drawing up site licences. All agree that there are certain key areas where it is particularly crucial to be clear what you mean, and to use language in the same way that everyone else uses it. These areas are, broadly, as follows.

- Definitions - particularly the definition of the product, the licensee, the site and the users.
- Terms and conditions - most importantly, what uses are permitted in all instances, what uses are only permitted under certain conditions, what uses are never permitted, the responsibilities and guarantees of both sides, and the circumstances under which the licence might be terminated and what happens if it is.

The difficult bits

Judging both from our own conversations with librarians and other publishers, and from the discussions on the LibLicense list², there are a handful of areas which people seem to worry about particularly.

Multi-location 'sites' and consortia

In some ways, this is the hardest part of all. Obviously, electronic media make resource sharing an easy and obvious way for libraries to make their hard-pressed acquisitions budgets go further. To the extent that it makes contributors' work more widely accessible, it is of course highly desirable from publishers' point of view too. The difficulty comes when one (electronic) subscription starts to take the place of two or more print subscriptions. This can lead to a familiar vicious spiral - publisher loses subscription revenue, prices go up to compensate, more cancellations follow. There is no magic solution that is going to save libraries money while at the same time keeping publishers' revenues up. In the end we may all have to compromise - publishers will get less money than they would like, while libraries will have to spend more than they would like.

At present, it has to be said that publishers' attitudes vary widely - from those who will only license to consortia, to those who will not deal

with them at all. The picture will no doubt settle down over the next few years, as we all become more familiar with this new environment.

It might, however, be worth bearing in mind that what libraries spend consists of both subscriptions and article supply; though most of the latter is probably Inter-Library loan, there is still a cost attached (for both the lending and the receiving library). Cost pressures are likely to shift the balance between the two, away from subscriptions. Possibly, if publishers' licensing arrangements include a certain amount of document supply for journals to which the library does not subscribe, this could reduce the library's ILL costs; thus, in principle, freeing up a bit more money.

Remote users

More and more institutions have members who are not physically on campus; the extreme example is the Open University. Many librarians have difficulties with licences which do not allow people to have access to the material when they are off-site. I understand that there may be a solution to this, provided the user accesses the material by dialling in to the institution's website rather than logging on as an individual. Failing this, each such individual would presumably have to have their own password, identifying them as a member of institution x. I am not certain, however, whether all publishers' systems could handle this.

Walk-in users

Numerous institutions have an obligation to provide services to casual visitors (in the US, for example, state-funded libraries may well be obliged to provide services to anyone in the state). Obviously, if this meant providing online access to anyone anywhere, publishers would soon be out of business! However, there does seem to be a workable compromise. Walk-in users could be granted access rights (possibly more limited than those granted to 'authorised users', given that the library and the institution may have little or no authority over their actions) at specified terminals only, for example on the library premises.

Perpetual access

It is clear that librarians are very concerned about what access they do or do not have if they stop subscribing. They argue that the print editions would be in their library in perpetuity - though of course this overlooks the fact that a licence (giving rights of access) is not the same as purchase (giving rights of physical ownership).

While libraries continue to subscribe to the print editions as well, this is less of a problem since the content is still available (and in a form which is not difficult and costly to maintain because of software and hardware changes). However, it is entirely possible that in the medium-term future, many libraries will only subscribe to electronic versions of some or all of their holdings.

There a variety of different ways publishers have chosen to provide ongoing electronic access:

- Providing the material on CD-ROM when the licence expires; this may not be popular with librarians because of the technological requirements, for example for jukeboxes.
- Continuing to provide online access, but only to the material to which the customer subscribed. This demands a sophisticated access system from the publisher, which will be costly to maintain; what users can do with the material may or may not be more limited than in the original licence.
- Providing access via a third party (for example OCLC, JSTOR or national libraries)

Given the costs to them, publishers may or may not feel able to grant ongoing access free of charge.

Inter-library loan

This is a particularly contentious area. While some argue that the existing 'fair dealing' or 'fair use' provisions can be applied to electronic media, most publishers would not agree. The provision of perfect copies, instantaneously, in a form which can readily be copied onwards to someone else, is potentially a much more serious threat to publishers' livelihoods than photocopies ever were.

However, it would not be in publishers' long-term interests simply to say 'no'; this could result in a solution being imposed on us all. Neither do I think it is sensible simply to refer in the licence to 'fair dealing' or 'fair use'; there is no clear ruling yet about how far these concepts apply in the electronic context. Instead, I would recommend that publishers permit explicitly in our licences the degree of redistribution (inter-library 'loan' is a misnomer!) with which we do feel reasonably comfortable.

There are various levels of redistribution which a publisher might decide to permit:

- Print copies from print originals, with or without the use of temporary electronic copies in the course of transmission (e.g. using Ariel)
- Print copies from electronic originals
- Print, or electronic, copies from electronic originals but only from one individual to another (i.e. not systematically by a library) - Ann Okerson, the moderator of LibLicense², favours the phrase 'for the purposes of normal scholarly communication', and this is permitted in a number of publishers' licences
- Electronic copies sufficiently secured (e.g. by Cryptolope or DigiBox) to prevent cascade onward distribution without appropriate payment. This is an attractive idea, but the technological solutions available are still too expensive and cumbersome. In due course, however, this may well be perfectly workable, and at that point it would be in everyone's interest positively to encourage redistribution.

Responsibility for users' actions

Librarians have argued strongly that they have no direct control over the actions of their users, and therefore cannot be held legally responsible for those actions.

Publishers can be more relaxed about this in an environment where the importance of compliance with the licence terms is strongly emphasised (for example, the CHEST code of conduct for software which members of UK universities have to accept). It has been suggested that abuses should always be punished by dismissal of staff member or student.

A number of publishers have similar terms in their licences, essentially stating that the signatory is not legally responsible for users' actions provided:

- they have made sure users are aware of the terms
- they have not encouraged or assisted any breach
- they report any breach immediately to the publisher
- they collaborate with the publisher to stop the breach as soon as possible.

Conclusion

Even if a publisher takes account of all these points, there is of course no guarantee that every library will agree to every licence. However, at the very least it should help to speed up the licensing process, which can only be of benefit to everyone.

References

- 1 PA/JISC Draft Model Licence <http://epip.lboro.ac.uk/uksg/hi/pa.htm>
- 2 LibLicense <http://www.library.yale.edu/~llicense/index.shtml>
- 3 PA licensing guidelines available from the Publishers Association, 1 Kingsway, London WC2B 6XF
- 4 ALPSP licensing guidelines available from ALPSP, 48 Kelsey Lane, Beckenham, Kent BR3 3NE.