

STANDARD LICENCES: SIMPLIFYING THE ACQUISITIONS PROCESS

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Paper presented at the UKSG 23rd Annual Conference, Keele, April 2000.

Relying on copyright law is no longer sufficient to define the rights and obligations of publishers and librarians in the digital environment. Licences are needed in order to cover all the issues that arise when scholarly information is distributed over the Internet. The variety and complexity of licences can be minimised by using model licences, which are available to the whole serials community on <http://www.licensingmodels.com>

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Why is licensing necessary? What is wrong with copyright?

When scholarly literature was published in print, all that was needed was to bring the work to market, and rely on the protection of copyright law. The high-speed photocopier made it necessary to develop licensing systems to legitimise photocopying in universities, and to establish the Copyright Clearance Center and other Reproduction Rights Organizations around the world, but the paradigm did not shift fundamentally. The digital environment, however, is different. Most national copyright laws do not provide effective protection for electronic publications. The little case law that exists provides no guidance on the applicability of fair use and the inter-library loan privileges libraries have enjoyed in the print environment. The range of uses which digital works make possible – and the ease with which they can be used – suggests that we now have a tool to meet needs that print simply cannot satisfy, but that the protection of the intellectual property provided by the law is incomplete and uncertain. Moreover:

- It is not only faculty and students on campus who need access to literature, but also distance learners, alumni, and others working with the university.
- Purchasing consortia are negotiating licences for their members that require 'bulk' prices, performance standards and archiving requirements.

It is no secret that basic copyright law is riddled with ambiguities. Ambiguity leads to conflict. If conflict leads to litigation, the legal costs are formidable, and the disruption caused to both parties is huge. The outcome of such litigation can be quite unpredictable, and nobody gains from so much uncertainty about basic ground rules.

A more deliberate system, which sets out what the purchaser can do with a work, is needed. The law of contract provides the

solution. Licences, which are in fact contracts, confer predictability and clarity and remove the uncertainties inherent in the interpretation and application of copyright law.

What have publishers done?

In the digital environment, both parties have to be more deliberate in defining their needs:

- What do libraries and their patrons really require? A licence has to be clear and specific; to say 'everything', or 'whatever we can do with print' is neither specific nor clear;
- What potential uses can publishers accommodate without harming their business or inviting misuse? Is it sensible to deny the benefits the technology brings to readers by being restrictive?

Publishers have met the need for clarity and definition with a profusion of licences that define what sort of usage rights they think are needed by the individual institution or the members of the consortium. The result has been that both publishers and librarians face the daunting task of negotiating terms, preparing agreements, reviewing agreements, and ensuring compliance with legal and university policy requirements for each and every individual license transaction. The administrative burden this entails is wholly disproportionate to the variety and complexity of the transactions.

Publishers, librarians and subscription agents desperately need a rationalization of this process and the harmonization of the many versions of similar provisions – the so-called “boilerplate clauses” – used to implement license transactions. But the development of a predictable licensing environment requires better mutual understanding of publishers’ and librarians’ respective requirements and concerns. It also requires cooperation between all members of the scholarly community.

Harmonization: is it anti-competitive?

Neither publishers nor vendors, as suppliers of goods and services, can discuss prices or other terms together; these are matters on which they should compete. Under US anti-trust and European competition laws, they can engage in developing pre-competitive standards and protocols, including standard “boilerplate”

provisions such as warranties and applicable law that will be enable publishers, librarians and intermediaries to operate flexible, market-driven arrangements efficiently. Under proposed new European law, co-operating in order to provide benefits to customers will not be treated as anti-competitive.

In the UK, the Publishers Association (PA) and the Joint Information Systems Committee of the Higher Education Funding Councils (JISC) set up a working party of publishers and librarians to develop a model licence that they could recommend for use in the UK. The PA/JISC licence was developed over two years of meetings and twenty drafts, and put in the public domain in 1999. It is the first model to be developed and endorsed by producers and customers in the serials community.

Developments in the US have taken a different form. Dialogue has often taken the form of “megaphone diplomacy.” Librarians have been vocal – and skilful – in putting forward their case. *The Principles for Licensing Electronic Resources (PLER)* from the American Library Association et al¹, and the *Statements of Current Perspectives and Preferred Practices for the Selection and Purchase of Electronic Information* from the International Coalition of Library Consortia (ICOLC)² have succinctly set out the market’s requirements. The LIBLICENSE discussion list is a treasure trove of advice, examples and shared experience. US publishers, constrained by anti-trust law, have not managed to engage in the constructive dialogue achieved, for instance, in the UK.

What role do the subscription agents and other intermediaries play?

Subscription agents traditionally have provided services that rationalize and simplify journal subscription ordering and renewal between some 20,000 publishers, and a similar number of libraries worldwide. They provide bibliographic and management services to libraries. They are a proven distribution channel for all those who publish for the library market. It is logical that they should seek an analogous role in the digital environment: to help libraries to procure the electronic journals that they select and the rights that they require to enable them to meet their individual institutional needs, and to relieve

publishers of the burden that only the very largest can resource properly. They are in a unique position to apply their transaction-processing and negotiating skills to the acquisition process.

Library utilities are also in a position to play their part. OCLC's Journal Licensing Program is a logical extension of their established function of providing libraries with the means of locating and retrieving information, be it cataloguing records or online access to journals. If they facilitate the technical access, why not handle the commercial transaction as well?

A suite of model licences

Sponsored by the major subscription agents

As a result of pre-competitive discussion, a further stage in the harmonization and rationalization of the licensing process has been reached. A suite of generic standard licences for electronic journals and detailed guidance on their use was released in mid-1999 on a web site: (<http://www.licensingmodels.com>). Updated versions, incorporating much of the feedback received, were made available in May 2000.

These model licences have been sponsored by, and developed in close cooperation with, four major subscription agents: EBSCO, Harrassowitz, RoweCom, and Swets Blackwell. They are designed as tools both during negotiation and afterwards to record the agreement reached. They do not re-invent what has already been developed. They are enhancements of existing work, and international in applicability. Moreover, they have been developed in close consultation with many publishers and librarians from many different countries.

Four licences

There are four model licences for four categories of licensee: the single academic institution, the academic consortium, the public library, and the corporate, government or other special library.

They develop what has gone before

The UK's PA/JISC model licence was the starting point; it was a vital source of format, concepts and model provisions. The PLER statement, ICOLC's Statements of Current Perspectives and the LIBLICENSE web site were important sources

of ideas. Policy statements from library groups in Germany and The Netherlands, and a wide range of existing licences from publishers, CD-ROM vendors and database providers already in the public arena, provided ideas and an international perspective.

The licences are in the public domain

These licences are in the public domain. Each follows the same recognisable format. Much of the language is common to each – there is a finite number of ways of expressing standard 'boilerplate' provisions! They are intended to help publishers, subscription agents and libraries to create agreements that express what they have negotiated. They are designed to provide wording to cover most outcomes from negotiations, especially on those issues that are contentious between publishers, who are concerned about security of material in an online environment – simply to protect their ongoing businesses, and librarians who quite naturally want the widest possible range of rights to provide the service to customers they feel is professional and appropriate.

The treatment of contentious issues

The most fundamental issue is whether the licence offered by the publisher follows the print subscription analogues, or the database/cable TV model:

- The print analogue provides for continuing access to material already paid for, even if the title is not renewed or the whole licence is terminated;
- The database/cable TV model provides access to the entire database including back volumes for the period of the licence. If not renewed, access is removed. This model may be attractive to corporate libraries where research is focussed on current activity, which changes from time to time. It may be attractive if the price is lower, reflecting the different access model.

The issues that often prove contentious include:

1. Defining "users". Are "walk-in" users (including alumni) and remote users included?
2. Availability before print. Is it simultaneous, before or after the printed edition?

3. Continuing access. Using the print analogy, volumes and issues already bought and paid for will remain accessible even though the title is subsequently cancelled or the licence terminated.
4. Archiving. What exactly do we mean? Continuing access? Or a permanent archive? The licences provide an undertaking by publishers to make appropriate archiving arrangements.
5. Course packs. The licences provide two alternatives: permitting the use of the electronic files as a source for course pack material; and prohibiting such use without further permission of the publisher.
6. Electronic reserve. This is treated in the same way as course packs.
7. Supplying copies to other libraries. There is uncertainty about the application of current copyright law on fair use and library privilege to electronic files. This issue is one of the most contentious. It is worth spending time examining the issue:

Inter-library loan is recognised by the law, and by custom and practice –

- Fair Use and Fair Dealing is recognised in the Berne Convention and even in Article 27 of the Universal Declaration of Human Rights
- ILL is recognised in UK law in the Copyright Designs and Patents Act 1988 as 'library privilege'
- ILL is recognized in the USA in Section 108 of the Copyright Revision Act 1976 and the CONTU Guidelines
- ILL is a concept accepted through custom and practice in the academic community

But it is uncertain whether ILL is recognised in the electronic environment by the law. So we should avoid confusion and conflict by calling it 'supply to other libraries' in the electronic context. For publishers, the issues can be summarised:

- Fair use and ILL are well established;
- If today's publishers are content providers, regardless of the medium of distribution, is it logical to deny ILL merely because journal content is distributed electronically?
- Is it in publishers' commercial interest to restrict or prohibit our customers from

making the best of new technology?

- Has ILL really, demonstrably, and by itself, reduced subscription levels to print journals in the last decade? Or is this due to library budget increases falling short of that necessary to pay for the increased number of papers published?

The licences provide three options: the use of the licensed electronic journals for supply to other libraries is not allowed; it is permitted in both paper and electronic form, and it is permitted from electronic files provided that the article is printed out and then sent to the receiving library on paper. This third option is the one that is accepted by over a third of publishers, and by most academic libraries.

The provision of such options and alternatives is a feature of all four licences. The intention is that, whatever the parties agree to, they will find a set of words in a recognizable format to incorporate in a formal licence. The licences are tools to minimize the legal complexity so that publishers, libraries and agents can concentrate on the real business issues.

Warranties, indemnities and other 'legalese'

Warranties and indemnities are almost universal, in defining and putting boundaries around the parties' respective promises and liabilities. These are particularly important in relation to licences for intellectual property, where the licensee needs to know that what is being licensed is legal and authorised, and where the licensor needs assurances from the licensee that the licensed material will be used in accordance with the terms. However, public institutions in some US states cannot accept any limitation on liabilities, or any requirement that they indemnify the publisher. This constitutional issue does not occur in other parts of the world in the same way.

Adoption by libraries and publishers

We are in the early days. These licences have already been adopted by Arnold, Cambridge University Press, Lippincott Williams & Wilkins, MCB UP, the OECD and by Portland Press / Biochemical Society. They have also been adopted by CIRLA and Purdue University as their licences for purchasing purposes.

Licensing is a continuing, evolving, iterative process

These licences cannot stand still. They are being revised as feedback from publishers and librarians is received and evaluated. A second, revised version of each licence was completed in May 2000 and is now available on www.licensingmodels.com.

In the future, licences will need to reflect changes in business models. Much research and experimentation is needed in structuring information and designing formats for easy location and retrieval and viewing on the screen. Every publisher needs to be involved with every librarian in the development of standards such as the DOI, in creating better metadata, and in the economic and cultural issue of archiving. This will inevitably affect the business models and pricing schemes utilized by publishers.

Just as consortium licensing has changed the reliance on the individual journal subscription, it is likely that new and different forms of doing business will emerge. Examples include:

- Pre-payment for access at the article level, as Elsevier has been testing with the University of Michigan in its PEAK project
- Package pricing by discipline or sub-discipline; this may be single publisher offerings, or aggregations of multi-publisher materials
- Usage-based pricing where libraries pay per article download. This will almost certainly be subject to a minimum guaranteed payment and a ceiling to protect the library budget. As the model matures, the price per download may be on a sliding scale where the price per use reduces as usage increases.
- Transactional, or pay-by-the-drink, models similar to document delivery. This will become more important as users of secondary databases locate items they need, and want to buy them while online.
- The database(or cable TV) model, where the subscription provides access to a core collection of titles, including back volumes, for a set period – usually a year – at the end of which access is denied unless the subscription is renewed
- Micro-pricing, in which a payment will become due every time an item of information is accessed. The item might be a diagram,

table or paragraph, and access might be downloading, printing or simply viewing for more than a set period of time, but the unit price per access will be low.

Model licences, not standardised licences

New ways of doing business require a predictable – not a standardised – licensing environment. Standardisation is, of course, the enemy of innovation. No publisher wants to lose the competitive advantage of devising innovative terms of use or an attractive new price structure. No librarian could contemplate being deprived of the advantage of accepting them. As more online products and services become available, and as publishers begin to offer librarians a variety of different pricing schemes for their online literature, an effective licensing model has to be maintained in order to accommodate changes, and the sponsoring agents are committed to doing so.

These licences are tools to help fashion the licensing environment

Licences should not be seen as a matter of competitive advantage, but as tools to be used to help both publishers and librarians. The preparation of these licences would not have been possible without the five subscription agents' recognition of this. But they are not 'publishers' licences' or 'agents' licences'. They are entirely neutral. They are simply a box full of tools; you do the deal, and then select the tools you need from the contents. While a number of major publishers have initiated direct negotiations with libraries, including consortia, there is clearly a hunger in all parts of the serials community to simplify the process. This project has been financed by the subscription agents, but is there for the whole community.

References

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2. International Coalition of Consortia(ICOLC). Statements of current perspectives and preferred practices for the selection and purchase of electronic information. March, 1998. www.library.yale.edu/consortia/icolcpr.