

KEY ISSUES

Licensing serials

John Cox

The Legal Context

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 brought the Copyright Licensing Agency Ltd and other Reproduction Rights Organisations around the world into being, to develop licensing systems to legitimise photocopying in universities and companies. But the principle remained the same.

But digital is different:

1. Copyright laws are only now beginning to provide effective protection for electronic publications. The little case law that exists provides no guidance on the boundaries of fair dealing and library privilege. It is unclear if those privileges apply to digital content, although the forthcoming European Copyright Directive will deal with this explicitly. We now have a tool to meet needs that print simply cannot satisfy, but the protection of the intellectual property provided by the law is incomplete and uncertain.
2. 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.
3. Purchasing consortia require undertakings on "bulk" prices, performance standards and archiving requirements that lie quite outside copyright law.

The Copyright Directive is still in the legislative process in the EU, and so its final form is not yet clear. Once enacted, member states have eighteen months in which to legislate it into national law. Its objective is to harmonise copyright law throughout the

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Union, but one of its possible effects will be to weaken the permitted exceptions to copyright (i.e. Fair Dealing and Library Privilege) by restricting them to a bare minimum use in education. Nothing is clear yet, but it is worth noting that, in the future, publishers' licences may well be more permissive than what the law will then allow:

- many publishers' licences for electronic materials permit unlimited use for teaching and course packs within the licensed institution; some even extend this to photocopying of print publications such as journals.
- many publishers' agreements with book and journal authors also permit the author to make unlimited re-use of her or his work for educational purposes within her or his institution.
- some permit distribution of paper (and, in some cases, electronic) copies to academics in other institutions, either through ILL channels or directly, colleague to colleague.

These are three examples of provisions that extend, rather than restrict, usage rights. They are made possible by licences: contracts that set out what the purchaser can do with a work. Licences confer predictability and clarity and remove the uncertainties inherent in the interpretation and application of copyright law, and can reflect the requirements of a particular community.

Licences mean that suppliers and purchasers have to be specific

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

- What do libraries and their patrons really require? A licence has to be clear; to say 'everything', or 'whatever we can do with print' is inadequate.
- 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?

We are still in relatively uncharted waters. The essence of copyright is that of ownership. Copyright is a property right. Perhaps the best definition of copyright is that the owner has the

power to say "No". So a licence is an agreement under which the copyright owner says "Yes" to certain defined uses in return for payment, and those licensed uses override the exceptions provided in copyright law.

In the early stages, publishers, as uncertain and frightened by the future as librarians, reached for their lawyers and were advised to be as restrictive as is conceivable. Librarians have struggled with publishers to establish what types of usage rights are needed by the institution. 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.

There has been considerable convergence of view on the major issues that were originally seen as so divisive as to be almost unbridgeable. This has been helped by library statements of their requirements like the *Principles for Licensing Electronic Resources (PLER)* from the American Library Association et al, 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), and, of course, by the development of the PA/JISC licence.

In 1999, I was responsible for creating a suite of model licences, which you can find on <http://www.licensingmodels.com>. They were sponsored by and developed in close cooperation with the major subscription agents, and are now in use by publishers such as Arnold, Cambridge University Press, Lippincott Williams & Wilkins, MCB UP, the OECD, and by Portland Press / Biochemical Society. If you look at the Springer and Marcel Dekker licences, you will see they make use of large parts of these models.

What are the 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

- *Defining "users"*. Who uses your library? Are they included? Are "walk-in" users (including alumni) and remote users included?
- *Availability before print*. Is it simultaneous, before or after the printed edition?
- *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.
- *Archiving*. What exactly do we mean? Continuing access? Or a permanent archive? Many licences now provide an undertaking by publishers to make appropriate archiving arrangements.
- *Course packs*. Does the licence permit the use of the electronic files as a source for course pack material, or does it prohibit such use without further permission of the publisher.
- *Electronic reserve*. Most publishers treat electronic reserve in the same way as course packs.
- *Supplying copies to other libraries*. As it is uncertain whether ILL is recognised in the electronic environment by the law – and the law may vary significantly from country to country – we should call it 'supply to other libraries' in the electronic context. Publishers initially said "No", but most publishers now permit the use of the licensed electronic journals for supply to other libraries provided that the article is printed out and then sent to the receiving library on paper. This seems to have been accepted by most publishers and libraries around the world.

In looking at any licence, you should be aware of alternatives. Use the licence your publisher

presents as an agenda for your discussions with publishers, so that you can cover all the business issues that concern you. You might even go further, and adapt one of the model licences available to your own requirements, and insist that your suppliers use it, and not their own. Purdue University in the USA does precisely that. So does NESLI. Publishers want your money, so you can do the same.

The legalese

Warranties, indemnities and other 'legalese'

Contracts often look more complicated than they really are. You want to license a database, and you have to wade through a ten-page agreement. That is because every legal agreement tries to specify what happens in every eventuality. Most of the text is about what happens if things go wrong - what steps are to be taken if one of the parties is in breach.

One of the legalese clauses that gets lawyers excited is the "jurisdiction clause", that defines the country's or state's law, under which the agreement is to be interpreted. Publishers will always specify their own jurisdiction but your institution may have a policy on this. It is becoming more usual for the jurisdiction to be that of the customer.

There is also a group of clauses that often intimidate the unwary: warranties and indemnities. 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.

So what should you look for?

1. Know what you need in order to do your job properly and professionally and provide the library users with the usage rights they need.
2. Be prepared to compromise BUT establish your bottom line – your minimum requirements.
3. Negotiate. If the publisher's offer is too restrictive, set out what you require in writing.

- The best agreement is one that both supplier and purchaser feel is fair.
4. Review the publisher's licence and ensure it contains all the elements you need. In summary, the most important points are:
 - 1) Product to be licensed: define the Licensed Materials;
 - 2) Definition of terms – terms must be clearly defined and agreed;
 - 3) Availability of Licensed Materials;
 - 4) Continuing access: terms for material bought and paid for if title subsequently cancelled;
 - 5) Inter-library loan from electronic files;
 - 6) Library's undertaking to "enforce" terms of use;
 - 7) Legal Liabilities:
 - *warranties and indemnities*
 - *University liability for unauthorised use – the copyright policy and disciplinary code*
 - *Licensors to notify the licensee of breaches;*
 - 8) Term – period of subscription or termination date;
 - 9) Termination provisions – consequences of termination;
 - 10) Access or usage rights;
 - 11) Preservation/archival responsibility;
 - 12) Usage statistics;
 - 13) Prices or licence fee, and payment options.
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