



EBLIDA Council Meeting 2000 **www.licensingmodels.com - MODEL STANDARD LICENCES**

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The social and economic context

The academic community is beset by changes, some economic, some cultural, and some technological. Many of these changes go back to the 1960s.

The rapid expansion of university education in the 1960s and 1970s was matched by abundant resources both for research itself and for collecting the resulting abundant literature. Today there are twice as many scientists conducting research as there were in 1975. Twice as many papers are published per year than twenty years ago. However, the money to support libraries started to dry up in the 1970s; library budgets have increased by only 40 percent over the same period.

Higher education is being forced to respond to students' expectations, as more adults seek qualifications and the demand for lifelong or continuing education and off-campus studies increases. Universities have adopted many of the techniques of modern business, in the quest to attract and retain students and to obtain research grants. The contemplative culture of traditional academic life has been replaced by the challenges and pressures of the market place where the consumer is king.

The Internet has transformed the speed, universality and volume of communication. Suddenly, scholarly communication has been revolutionised. Until recently it has been conducted by telephone and letter. Then by conference - itself enabled by technology: the advent of jet air transport. Its results appeared in books and journals. Today, the Net is the dominant means of informal communication between scholars in the "invisible college", and is about to transform the formal communication that the printed journal and monograph have dominated until now.

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 establish the Copyright Clearance Centre and other Reproduction Rights Organisations around the world. But the paradigm did not shift fundamentally.

But digital 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 - suggest 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 licenses 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. 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. Licenses, 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 definitions with a profusion of licenses 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 rationalisation of this process and the harmonisation 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 co-operation between all members of the scholarly community.

Harmonisation: 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 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 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 license that they could recommend for use in the UK. The PA/JISC license 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 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) have succinctly set out the market's requirements. The LIBLICENSE web site 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 rationalise and simplify journal subscription ordering and renewal between some 20,000 publishers, and a not much smaller number of libraries world-wide. 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?

We have developed a suite of model licenses

Sponsored by the major subscription agents

As a result of pre-competitive discussion, we reached a further stage in the harmonisation and rationalisation of the licensing process. A suite of generic standard licenses for electronic journals and detailed guidance on their use was released in mid 1999 on a web site: www.licensingmodels.com. They are designed as tools both during negotiation and afterwards to record the agreement reached.

These model licenses have been sponsored by and developed in close co-operation with four major subscription agents: EBSCO, Harrassowitz, RoweCom, and Swets Blackwell. 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 licenses 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 license 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 licenses 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 licenses 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 words 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 license offered by the publisher follows the print subscription analogues, or the database/Pay-TV model:

The print analogue provides for continuing access to material already paid for, even if the title is not

renewed or the whole license is terminated;

The database/Pay-TV model provides access to the entire database including back volumes for the period of the license. 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". The inclusion of "walk-in" users (including alumni) and remote users is a novel idea for some publishers.

Availability before prints. 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? The licences provide an undertaking by publishers to make appropriate archiving arrangements.

Course packs. The licenses 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.

Electronic reserve. This is treated in the same way as course packs.

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:

a) *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 recognised 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.

b) *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?.

c) The licenses 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;

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 licenses. The intention is that, whatever the parties agree to, they will find a set of words in a recognisable format to incorporate in a formal license. The licenses are tools to minimise 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 licenses 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 by publishers

We are in the early days. These licenses 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 licenses for purchasing purposes.

Licensing is a continuing, evolving, iterative process

These licenses cannot stand still. They are being revised as feedback from publishers and librarians is received and evaluated. A second, revised version of each licence has recently been completed and is now available on www.licensingmodels.com.

In the future, licenses 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 utilised 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;

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 Pay-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 licenses, not standardised licenses

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 licenses are tools to help fashion the licensing environment

Licenses 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 licenses would not have been possible without the five subscription agents' recognition of this. But they are not "publishers' licenses" or "agents' licenses". 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.