

GENERIC STANDARD LICENCES: COOPERATION OR COMPETITION?

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The rapid growth of the Internet has created special problems for the law of copyright. This article highlights the difficulties and suggests possible solutions.



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We are all part of the knowledge-based economy today. It extends well beyond the scholarly community to include the media, publishing, software, database, education and financial communities. While telecommunications has encouraged rapid change throughout the twentieth century and has facilitated a transformation in the ways in which people communicate with each other and conduct business together, it is the Internet that has had a truly revolutionary impact on all of us.

The online industry, led by the USA, has quadrupled in size in ten years. The scholarly community is but a small part. In 1999, seventy per cent of online information is bought by the business and financial communities, but the biggest growth is in mass-market consumer transactions:

- 25 per cent of households in the USA and Germany have PCs, 22 per cent in the UK, and 12 per cent in Japan¹.
- World Wide Web usage is forecast to grow from 69 million in 1997 to 320 million in 2002. Today, the USA has 56 per cent of WWW users; this percentage will fall to 42 per cent by 2002, as Western Europe and others catch up².

The academic community itself is beset by changes, some economic, some cultural, and some technological. Many of these changes go back to the optimistic days of 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 in research as in 1975. Twice as many papers are published per year than twenty years ago³. However, the money to support libraries started to dry up in the 1970s; library budgets have increased by only 40 per cent over the same period.
- Higher education itself 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 themselves have adopted many of the techniques of modern business, in the quest for students and for research grants.

The contemplative culture of traditional academic life has been replaced by the challenges and pressures of the competitive market place where the consumer is king.

More recently, the Internet has transformed the speed, universality and volume of communication. Suddenly, scholarly communication has been revolutionized. Until recently it has been conducted by telephone, letter and conference - itself enabled by the advent of air transport - and 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 till now.

When scholarly literature was published in print, all that was needed was to bring the work to market, and rely on the protection of the law of copyright. The high speed photocopier made it necessary to develop licensing systems to legitimise photocopying in universities, government agencies and the private sector, and establish the Copyright Clearance Center and other reproduction rights organizations around the world. But the paradigm did not shift fundamentally.

The digital information environment is unlike any we have ever known. Copyright law does 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 librarians now have a tool to meet the needs that print simply cannot satisfy:

- 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.
- Budgets no longer allow for coherent collection management other than on a cooperative, multi-institutional basis.

- Purchasing consortia negotiate licences for their members that require 'bulk' prices, performance standards and archiving requirements.
- The print medium does not meet the needs of many disciplines any more, simply by virtue of increased specialization and complexity. The sheer volume of information in traditional forms has outstripped human ability to assimilate it. Technology now gives us the means to deal with such complexity.

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. In the USA, a complex copyright case can cost as much as US\$ 250,000 and the outcome can be quite unpredictable. Nobody gains from so much uncertainty about basic ground rules.

A more deliberate system, which set 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.

Publishers have met this need with a profusion of licences that define what they think are the usage rights 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, ensuring compliance with legal and university policy requirements, for each individual licence 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 licence 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.

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. So can their trade associations.

The UK 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 licence that they could recommend for use in the UK. The PA/JISC licence has been developed over two years of meetings and twenty drafts. It was put in the public domain in 1999. It is the first model to be developed and endorsed by producers and customers in the UK serials community. More recently, the STM Association of Scientific Technical and Medical Publishers, an international trade body, and the Pharma Documentation Ring, an informal association of librarians from 28 multi-national pharmaceutical companies, have been engaged in negotiating a model licence for the pharmaceutical industry.

Developments in the USA 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, 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 LIBLICENCE Web site is a treasure trove of advice, examples and shared experience⁴. The US publishers, constrained by anti-trust law, have not managed to engage in the constructive dialogue achieved, for instance, in the UK.

But what role will subscription agents play in the new electronic order? Traditionally, they have provided services that rationalize and simplify journal subscription ordering and renewal between some 20,000 publishers, and a not much smaller 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 they select and the rights 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.

As a result of pre-competitive discussion, a further stage in the harmonization and rationalization of the licensing process has now been reached. A new Web site, www.licensingmodels.com, contains a suite of generic standard licences for electronic journals and detailed guidance on their use as tools both during negotiation and afterwards to record the agreement reached. These model licences have been sponsored by and developed in close cooperation with five major subscription agents: Blackwell, Dawson, EBSCO, Harrassowitz and Swets. 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.

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 are international in application and are the result of consultation in which librarians, publishers and subscription agents have been actively involved. Their development has been undertaken by John Cox Associates, an international publishing consultancy specializing in licensing and content management.

Developing licences is an iterative and evolutionary process. In this case, 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 LIBLICENCE 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.

These licences are in the public domain. Each follows the same format, based on the PA/JISC licence. 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 on-line environment - simply to protect their on-going businesses - and librarians, who quite naturally want the widest possible range of rights in order to provide the service to customers that they feel is professional and appropriate.

The issues that often prove contentious include: 'walk-in' users (as well as alumni) and remote users, archiving, usage data, local storage in the electronic reserve, use in course packs, availability before print, and use of electronic files for supplying copies to other libraries - i.e. inter-library loan. Two examples illustrate the approach:

- *Supplying copies to other libraries.* There is uncertainty about the application of current copyright law on fair use and library privilege to electronic files. The licences provide three options: the use of the licensed electronic journals for ILL is not allowed; ILL is permitted in both paper and electronic form; and ILL is permitted from electronic files provided that the article is printed out and then sent to the receiving library on paper (this is a position adopted by a number of major STM publishers).
- *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.

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.

These licences cannot stand still. 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:

- 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
- 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.

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.

Licences should not be seen as a matter of competitive advantage, but as tools to be used to help both publishers and librarians. This project would not have been possible without the five subscription agents' recognition of this. While a number of major publishers have initiated direct dealing with libraries, including consortia, there is clearly a hunger in all parts of the serials community to simplify the process. The subscription agents have financed this project, and have been closely involved in identifying issues and in the drafting. The decision to develop these licences was taken in the interests of the whole community.

The future lies in more cooperation and in alliances. Scholars need access to a single coherent and complete corpus of literature. Publishers have to accept that they must work together to provide their electronic content, often associated with secondary databases, through a single point of access. The challenge is to maintain the authority and integrity of scholarship and research, and the revenue needed to bring it to life, while providing simple, uncluttered access to readers.

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4. see <http://www.uksg.org/pa.htm>; <http://www.library.yale.edu/consortia>; <http://www.library.yale.edu/~licence>

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