The Turkish National Site License (TRNSL)

Negotiating consortial contracts with suppliers of electronic resources is at best a complicated process. Having an agreed statement of licensing principles and an appropriate national site license embodying those principles greatly facilitates the negotiation process and serves to make it more transparent to both parties. In this article the author notes the reasons why ANKOS (Anatolian University Libraries Consortium) felt the need to have its own model license and describes the methodology utilized by the ANKOS Site Licensing Group in creating the ANKOS Licensing Principles and the Turkish National Site License (TRNSL). Main features of the TRNSL and incorporation into it of specific aspects of other consortia's model licenses are explained in some detail.

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Origins of TRNSL

ANKOS (Anatolian University Libraries Consortium) is maturing into a vibrant national consortium. Participation in consortial purchasing increases every year, as members expand their IT capabilities and convince their administrators of the benefits of joining ANKOS agreements, and as users gain experience with online resources. Likewise, the position of ANKOS vis-à-vis suppliers of electronic resources is gaining ground, as the consortium demonstrates its good faith as a consortial partner and proves its viability, in spite of the economic situation in the country. However, functioning as an informal consortium without central funding or legal recognition as an entity in itself, ANKOS cannot sign contracts on behalf of its member libraries. Rather, each library must sign contracts with the suppliers whose products ANKOS licenses. With 78 libraries joining one or more agreements for 2003, this meant that a total of 411 contracts had to be signed!

When a consortium does not have its own site license, a supplying publisher or vendor usually is able to impose terms that favor the supplier rather than the consortium. Certainly in the case of ANKOS, most negotiations in 2000 and 2001 tended to revolve around the price of a contract and little else, in what may best be described as a 'take it or leave it' situation. Additionally, because

site licenses are written in English and framed in accordance with contract laws of the countries in which the supplying firms are incorporated, they are difficult for many of our members to read and understand. This in turn sometimes results in unintentional breaches of the terms by users. Needless to say, such breaches put ANKOS in a difficult situation with the suppliers concerned.

Given this experience, it was evident that having a standardized site license would serve not only to make different suppliers' contracts similar to each other but also simplify negotiations with the vendors as well as presentation of the contracts to the participating members. Thus, perhaps the most significant development in the past year, and certainly the one having the most favorable impact, was the creation of the Turkish National Site License (TRNSL), which was adopted at the ANKOS general meeting in October 2002. With 78 libraries also agreeing to the licensing principles embodied in the TRNSL, the ANKOS Steering Committee was able to take a stronger and more balanced approach in negotiations with suppliers for the licensing agreements successfully concluded for 2003.

The ANKOS Steering Committee assigned the task of creating the TRNSL to two of its members, who in turn were supported by four members of

their respective staff. The collaborative effort of the ANKOS Site Licensing Group yielded the initial drafts of a statement of licensing principles and the model site license. Necessarily, these documents were drafted in English for the benefit of international suppliers, but they also were translated into Turkish for the benefit of the ANKOS members. The full ANKOS Steering Committee and the Bilkent University Legal Advisor reviewed both versions. Recommended changes were incorporated into revised drafts, which were then circulated to all ANKOS members in advance of the general meeting in which they were adopted.

Models referenced

As a starting point, the Site Licensing Group studied the generic Academic Consortia Model License[1] (ACML), developed by John Cox Associates in collaboration with several consortia-friendly international vendors, and read with great interest Cox's article in which he discusses the key issues related to serials licensing[2]. All of the current ANKOS contracts were then compared clause by clause with the ACML. The Canadian National Site Licensing Project (CNSLP) model[3] and NESLI[4] (National Electronic Site Licensing Initiative – UK) were also compared with the ACML. The comparative analysis revealed that most clauses were identical or very similar in all of them. It also was noted that many of ANKOS's suppliers were dealing with the Canadian and British consortia on the basis of their respective licenses.

After studying all of this documentation, a statement of fundamental licensing principles was drafted first. Based on the principles, it was decided that the ACML should be used as the foundation of the TRNSL, with inclusion of a few points from the Canadian and the British licenses that were thought particularly relevant to the Turkish situation. Three special clauses catering to our unique requirements were added, and those deemed not relevant to Turkish university and research libraries were deleted.

As a final crosscheck, the TRNSL was compared with the model commonly used in the United States. Developed by the Council on Library and Information Resources (CLIR) and the Digital Library Federation (DLF), it is known as the CLIR/DLF Model License[5] but is also commonly referred to as "LibLicense." Though formatted somewhat differently, the primary clauses of the US model were found to closely correspond to those in the ACML and, thus, to those in the TRNSL as well. In short, it was determined that in all primary aspects, the TRNSL essentially conforms to accepted international models, while also catering to the Turkish environment.

The licensing principles embody the aims to be secured by the TRNSL and essentially identify the primary terms of reference for the negotiations to be undertaken with each supplier. They also can be taken as the assurances given by the ANKOS leadership to the members, as well as suppliers, concerning the way in which the ANKOS Steering Committee will evaluate offers made to the consortium. Ultimately, the principles are the bedrock upon which the TRNSL rests and constitute the strategic aims of ANKOS.

Local requirements incorporated

Since the TRNSL is based on other model licenses, the majority of the clauses need no particular explanation. However, it may be useful to note a few points that differ from some of the other model licenses or otherwise are of particular concern to ANKOS. For example, the definition clause appearing as the first section of the TRNSL is rather lengthy compared with some models, as it contains 15 definitions. The vast majority of our contracts actually contain very few, if any, definitions. Our reason for making this clause in the TRNSL comprehensive was mainly for the benefit of our members, so as to avoid possible misunderstanding of any terms due to the language barrier.

One item included in the ANKOS Licensing Principles but not specifically in the TRNSL is the aim of having the supplier and ANKOS negotiators agree on a fair price for each database, and then allowing the ANKOS Steering Committee to determine how the cost is to be shared on the basis of a formula agreed upon by the participating members. Another item in the principles but not in the TRNSL is the provision of content metadata. It is not included in the TRNSL, because it was felt that this is becoming an industry standard; but it is included in the principles to ensure that it is discussed during negotiations with suppliers.

Because our consortium is young and interest in participating in consortial agreements continues to increase from year to year, we felt it was important to make specific provisions for new members to join multi-year contracts as our consortium grows. Most of our original site licenses did not cater to this need, and as a consequence, we seemed constantly to be going back to the suppliers to renegotiate terms of existing multi-year agreements. Other consortia apparently have not faced this problem or at least have not provided for it in their model licenses. In the case of ANKOS, many Turkish universities are new and rather small, and their libraries have not subscribed in previous years to the journals of a given publisher. However, as these universities develop, their need for access to databases licensed by ANKOS arises; and as ANKOS members, they naturally want to join the consortial agreements. The problem is that some publishers offer them flat fees below the lowest cost to members having prior subscriptions and/or already participating in a contract. The larger and older members view this as being patently unfair; but once an offer is made, new libraries understandably are reluctant to pay a higher price, just to be able to join the ANKOS contract, than the publisher expects them to pay. Therefore, we incorporated a clause into the TRNSL stipulating that new members joining a contract will pay no less than the amount paid by the lowest-paying member. Some publishers' representatives also have offered libraries institutional access to databases, licensed by the consortium, at a lower price than the ANKOS contract provided for. So, we necessarily added a clause to obviate this.

Lacking central funding, we also have encountered problems over members' non-payment of fees within the stipulated time. In the case of contracts based on the subscriptions of the participating members, any member not paying the fee after signing the agreement obviously puts the consortium in a precarious position. Clause 9.2 of the TRNSL addresses this critical issue. In examining model licenses of other consortia, we noted that they, too, have either experienced or have anticipated the possibility of a breach of the licensing terms occurring at a member institution. We especially liked the way in which the CNLSP model addresses this, and, therefore, incorporated the wording of the pertinent CNLSP clause into the TRNSL.

Most of our existing contracts, like most model licenses, provide for the supplier to transfer the license to another firm but do not provide for the consortium to transfer the license to a successor consortium. Since ANKOS presently is not constituted under any specific legal instrument, it is possible that it may take a somewhat different form in future and perhaps even a different name. This is another point on which we found the CNSLP model catered to ANKOS's need.

The ANKOS Site Licensing Group endeavored to balance the interests of both the supplier and the consortium on several other key points. With regard to copyright and intellectual property rights, we included not only standard clauses protecting the publisher's rights but also added a clause recognizing the statutory rights of ANKOS members under the copyright laws of Turkey or any international copyright convention to which Turkey is signatory. We also believe that all parties should be protected against delay or failure to comply with a license due to forces beyond their control. Most ANKOS contracts have clauses that protect the supplier in such cases but not the consortium or its members. This is especially important to Turkish libraries, situated as they are in a country that sits astride seven major earthquake faults and that is located in the midst of a highly volatile geopolitical region. Model licenses vary considerably with respect to remedies for unacceptable performance by vendors, some not even having them at all. Here, again, we relied especially on NESLI and the CNSLP models for suitable references.

A special feature of the TRNSL not found in most other models is the legal jurisdiction for settling any disputes that may arise. The final clause of the TRNSL requires that Turkish laws and the jurisdiction of courts in Ankara will pertain to any disputes that cannot be resolved by negotiation and reasonable compromise. This is vitally important, because all universities in Turkey, whether public or private, come under the purview of the Turkish Ministry of Higher Education and necessarily are bound by the constitution and laws of Turkey, which means that the university libraries cannot bind themselves to any foreign legal jurisdiction. So, where we cannot get a supplier to accept our clause, we are insisting

on having the clause deleted. Ultimately, perhaps the most significant aspect of the licensing principles and, thus, the TRNSL, is the purposeful effort to balance the interests of the suppliers with those of the consortium and its members.

Results

Where we have had the most success in getting publishers to accommodate our concerns and at least rephrase the clauses in their site licenses, if not totally incorporate the language of the pertinent TRNSL clause, is with the major commercial publishers of academic journals. Conversely, it is with aggregators and third-party vendors that we so far have had the most difficulty getting contracts that closely mirror the TRNSL. A particular problem with these suppliers is their insistence on all members paying the same fee, rather than ANKOS being able to scale the fees based on its own pricing formula, which takes into account the budgets, FTEs and English language usage of the participating member institutions. These contracts also tend to be the most restrictive in terms of usage rights, limiting if not entirely prohibiting interlibrary loans, course packs and e-reserves, as well as local downloads for archival purposes. It also is extremely difficult to get relevant and reliable usage statistics from these suppliers, with the exception of just one or two major aggregators.

Interestingly, our experience with societal publishers has been the most varied. Only in the cases where the initial agreement offered to us essentially complies with a similar model license of another consortia have we found the concerned societal publisher ready to deal with us on the basis of the TRNSL. In most cases, they are very reluctant to modify their standard licenses to cater to our concerns. One major sticking point we frequently run into with societal publishers is restrictions on simultaneous users as well as scaled fees. They tend to offer a very limited user license or to demand an extraordinarily high fee per institution, which our members simply cannot afford. We see no reason for not granting unlimited access for all authorized users at a reasonable cost, based on the number of participating institutions, and allowing ANKOS to determine how the cost will be shared by its members.

In summary, the TRNSL and the Statement of Licensing Principles have greatly facilitated negotiations between the vendor's representative and the ANKOS negotiators by making what ANKOS wants to see in a contract transparent to both sides. Of course, the TRNSL is our 'ideal' license, and it is unlikely that we will succeed in getting every supplier to comply entirely with the precise language of every clause in it. Nonetheless, it is our aim to bring all of our agreements into as close conformity with it as possible, and we have been gratified to find that many of the suppliers with whom we negotiated new contracts for 2003 were very willing to incorporate into their agreements with ANKOS most of the clauses that are of specific concern to us. Anyone interested in knowing more of the details of the ANKOS Licensing Principles and the TRNSL will find them on the ANKOS website [6].

References

1. John Cox Associates model license:
   http://www.licensingmodels.com/

2. Cox, J., Licensing Serials, *Serials*, Vol.14 no.2, pp139-142, 2001

3. CNSLP License Agreement:
   http://www.cnslp.ca/pr/achievements/
   CNSLP-License-12Feb01.doc

4. The ANKOS Site Licensing Group used the Model NESLI Site Licence in its study. An updated model license for journals has been issued by JISC. Both versions are available at the following website:
   http://www.nesli.ac.uk/modellicence_info.html

5. CLIR/DLF Model License:
   http://www.library.yale.edu/~llicense/index.html

6. ANKOS website:
   http://www.lib.metu.edu.tr/ankos/

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