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# Tactics and Terms in the Negotiation of Electronic Resource Licenses

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# Electronic Resource Management in Libraries: Research and Practice

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# Chapter X

## Tactics and Terms in the Negotiation of Electronic Resource Licenses

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### **ABSTRACT**

*This chapter introduces the reader to the realm of electronic resource license agreements. It provides the reader with an overview of basic contract law as it relates to electronic resource licensing. The chapter then discusses the electronic resource license negotiation process as well as license agreement term clauses. The aim of this chapter is to provide librarians with an understanding of basic licensing concepts and language in order to aid librarians in the review and negotiation of their own license agreements. The author hopes to impart lessons and tips he has learned in reviewing and negotiating license agreements with a number of publishers to further the awareness and understanding of licensing in the library community.*

### **INTRODUCTION**

Almost every electronic resource to which a library will subscribe requires either a signed license or an acceptance of a vendor's terms and conditions via a click-through license. Every signed license or clicked-through acceptance of a vendor's terms is a legal contract that provides rights and protections (mostly) to a vendor, but also to a library. Some vendors allow for interlibrary loan and off-campus access while other vendors

want to limit usage to individual computers and have limits on printing or downloading. It is important for librarians to understand what a license is, what its terms mean, and to be able to get a vendor to agree to terms more aligned with a library's interests through negotiation. This is especially important, as many librarians are uncomfortable with the licensing process, not just because of the opaque legal language but also due to the prospect of trying to get, often monolithic, corporations to agree to our terms.

## **BACKGROUND**

The increase in the use of license agreements is fueled by content owners' beliefs that the fair use, interlibrary loan, and other library principles and practices that have served well in the print era are sure to cause rampant copyright infringement in the digital era. License agreements are, in fact, the publishers' tool of choice for protecting their intellectual property (Okerson, 1997) by specifically counteracting the "first sale doctrine" (Rice, 2002). The "first sale doctrine" transfers ownership of a title with the initial sale of a copy and is what has historically allowed libraries to lend and interlibrary loan materials or permitted a bookstore to resell used books. Because licensing grants a mere permission instead of ownership to a user or library, there has been no "first sale" and the publisher can tightly control the uses of its digital copies via the license agreement terms.

From the library point-of-view, it is important that licenses be negotiated to allow libraries to continue their mission of promoting access to information. This is especially important as electronic resources have continued to be more expensive than their print counterparts despite the consensus among librarians that electronic format materials should be less expensive than the print because of the elimination of printing, binding, and shipping costs (Alford 2002; Okerson, 1997). Due to the cost of digital resources, which is further exacerbated by the present economic climate, libraries are finding that they have to choose between digital resources and materials in other formats. In order to best serve patrons and steward a library's budgetary resources, libraries will have to carefully monitor their license agreements and try to negotiate terms that are favorable to libraries. Most licenses are written by publishers to protect their interest and as such can rarely be signed without at least some minor amendments (Okerson, 1996).

## **THE LAW GOVERNING LICENSE AGREEMENTS**

A license agreement is a contract between a user/subscriber (licensee) and a content owner/vendor (licensor). In the library realm, a subscription for an electronic resource will generally entail the signing of a written license agreement or the acceptance of a slate of terms and/or conditions. The contract determines the rights and obligations of the parties, including the services that the licensor will provide and the conditions the licensee must adhere to in order to use the electronic content. In the library setting where most electronic resources are subscriptions, the license provides the library and its patrons permission to use the vendor's electronic resource and/or content pursuant to the agreed upon terms for the time period specified.

According to Murray (2001) a valid contract is formed when its formation is comprised of the following components:

- A promise, offer and acceptance that are "sufficiently definite" (see below)
- Consideration (value such as payment or performance of a service),
- The parties have the legal capacity to make a contract (for example, no party is a minor or mentally ill)
- There is no legal barrier to the formation of the contract (for example, a contract entered into through fraud or duress)

A promise is one party's intention to act or not act in a particular manner, (American Law Institute, 1981-2006) for example by providing certain goods or services to another party. Breaking a contractual promise is where a party opens itself up to liability for damages or penalties for the harm caused to the other party. An offer is one party's willingness to make an agreement regarding such a promise and an acceptance is another party's willingness to so agree.

The promise, offer, and acceptance also need to be definite enough to be enforceable. This means that if the contract ends up in litigation the court must be able to precisely decide what the party at fault must do to make the other party whole. This may be to perform the service or provide the goods contracted for or pay monetary damages as a remedy (Farnsworth, 1999).

The offer, acceptance, and consideration are the three main elements of an enforceable or valid contract (Bielefield & Cheeseman, 1999; Harris, 2002). These elements are controlled by state law (Richards, 2001), but because all of the states have passed some form of the uniform commercial code there are relevant similarities in the contract law across the country (Bielefield & Cheeseman, 1999).

Many electronic resource license agreements take the form of end user license agreements (hereinafter EULAs) which are sometimes called browse-wrap, shrink-wrap, or click-through licenses. EULAs are a list of terms or conditions that generally take two forms (Kutten, 2003-2006). The first version is where the licensee must agree to the terms prior to using the resource by clicking a button often labeled “accept” or “agree” at the end of the list of terms. The second form is where the licensee is told that by using the resource he or she accepts the terms and conditions that are then referred to on a separate Web page (Kutten, 2003-2006).

EULAs are not covered by the uniform commercial code but are specifically endorsed by the Uniform Computer Information Transaction Act (hereinafter, UCITA) (UCITA, 2002-2006) which is an outgrowth of the failed attempt to cover EULAs within the uniform commercial code (Kutten, 2003-2006). UCITA has only been passed in Maryland and Virginia (American Library Association [State], 2006; Harris, 2002; Kutten, 2003-2006) and has been strongly criticized by the library community because it shifts the middle ground of license negotiations toward the vendor to the detriment of the licensing library

community. The library community aversion to UCITA is because UCITA:

- Accepts EULAs (UCITA §209, 2002-2006) which generally undercut a library’s ability to negotiate a license
- Allows publishers to change contractual terms unilaterally
- Eliminates the historical contract law standard where limitations in contracts need to be stated in the contract itself and favors the publisher when construing the scope of use of licensed materials (UCITA §307(a), 2002-2006)
- Specifically undermines the copyright fair use protections, including the “first sale doctrine” (UCITA states that transfer of title as a digital copy does not transfer ownership (UCITA §501-502, 2002-2006) of the title), on which libraries rely

(Alford, 2002; American Library Association [Impact], 2006). Because only Maryland and Virginia have passed UCITA and because of the conflict between historical contract negotiation requirements the state courts deciding EULA contract cases have come down on either side of the issue with some affirming the use of these click-through or browse-wrap licenses and others refusing to accept such licenses as valid (Kutten, 2003-2006).

## **THE LICENSE NEGOTIATION PROCESS**

A license negotiation begins when the library starts to consider a subscription to or purchase of an electronic resource. This is important to remember that the utility of an electronic resource is dependent in part on the license because the license agreement sets the cost, access method, uses, and users of an electronic resource. When the library begins to look at an electronic resource it

is important to ask for a copy of the license agreement because the negotiation of the license may take some time to complete. As noted previously, these licenses will take the form of either a formal written contract or an EULA. Both types of license agreements are negotiable although vendors often loathe negotiating changes to EULAs. Indeed some commentators note that most publishers are of the opinion that license agreements are not negotiable except for price because the publisher generally is the party who drafted the license and is accordingly favored (Alford, 2002).

However, at the University of Michigan Law Library we have had success negotiating changes to EULAs by altering the EULA so that signature is necessary or via an e-mail agreement. When we have amended a EULA via e-mail we indicate that our amended terms and the vendor's return message accepting the amendments become part of the EULA. When amending a EULA, regardless of the other terms that are changed, it is important to amend the notice and/or amendment clauses so that changes to the EULA on the vendor's Web site do not bind the library to those provisions without the requisite notice or agreement. Bielefield and Cheeseman (1999) state that EULAs may be negotiated on a clause-by-clause basis. Note that the Blackwell-Synergy (2006) EULA states that if an institution has signed a written license agreement, that contract will take precedence over the EULA.

Before negotiating a license with a vendor it is best for the library to have already made some decisions regarding negotiation policies and specific license terms the library may find acceptable, unacceptable, or mandatory. It is also important to have an understanding of license agreement language, especially if there is not a licensed attorney on staff to review licenses (Bielefield & Cheeseman, 1999). Library group licensing Web sites as well as workshops, library or legal literature, and other resources will aid in the understanding of license terms and will provide examples of licensing language. The library itself should also have

an archive of license agreements already in force that can be referred to for licensing language and examples of what the library was able to negotiate as amendments. It is often a good idea to have a side-file or database of license clauses that the library prefers that can be consistently used in negotiations with vendors.

When negotiating the license for an electronic resource, it is important to remember there should be some middle ground between the library and the licensor, as both parties ultimately want to reach an agreement. The library wants to gain an appropriate amount of access to the electronic resource for a reasonable price while meeting the needs of its patrons. The licensor wants the library to subscribe to its content while protecting its property rights (Bielefield & Cheeseman, 1999). Harris (2002) notes that a license negotiation should not be considered a zero sum affair with a winner and loser. Okerson (1996) states that it is rare that a publisher and library are unable to agree on an acceptable middle ground. Of the libraries answering the question in Tashbook's (2004) survey, 85% indicated that publishers met library demands at least half of the time.

Harris (2002) notes that to start a license negotiation the library must know what it needs, wants, and can afford. If a library cannot negotiate a license to meet its basic needs or a price that it can afford then the time comes when the library must walk away from that electronic resource and spend its time exploring alternative avenues to gain access to that or similar digital information. Because licenses for electronic resources begin with the vendor's standard license the negotiation can be entirely about which amendments the vendor is willing to make. But, it is also important for the library to be flexible—although the vendor may be unwilling to change a license clause to the library's preferred language a middle ground may be acceptable. Harris (2002) states that it is important to give up items in a negotiation as long as you get something in return. In the case of a license agreement, these items may be extra

protections the library may be willing to forego or specific language that may be generalized or cut back. Harris (2002) also asserts the importance of not making assumptions; a licensor may be willing to meet all of your licensing needs, but you will never know until you ask.

In a negotiation, we have often found it useful to be able to refer a licensing issue further up the library hierarchy. This is because the library administration may be able to negotiate some favorable terms by agreeing to some less than favorable terms from their position as the final arbiter of library policies or finances. We have also made use of the university's general counsel's office to refer difficult license negotiations and to get guidance on particular licensing terms.

Statistics are a bargaining chip that can be used to bolster the library's position in regard to price. This is especially true when the cost for a particular electronic resource is noticeably more expensive than what the library understands the going rate for that sort of resource is. Libraries can often gauge the amount of use that a particular resource will generate based on past experience. If a resource under license negotiation is priced too steeply, especially in the case of a price increase for an electronic resource renewal, then the ability to refer to statistics to state a case for a lesser price is important. For a first time license for an electronic resource, if a vendor does not provide statistics and you believe the cost is higher than ordinary for like resources, it is important to ask what the price is based on, if not actual usage.

Access to a similar resource or the ability to subscribe to the same material from another vendor can also help in negotiating a better price. If it is possible to subscribe or purchase the same or substantially similar digital content at a lower price then use that as a negotiating tool. A threat to rely on a competing product may be enough for the vendor to lower the price in order to get a library's business. Of course, many electronic resources may be offered by vendors with a monopoly on the content so such a threat will not be

available as a negotiation tool. But, even though the content may be unique, the resource will be similar in type (e.g., a single electronic journal, a full-text document archive, or a journal index) to other resources where a library does have pre-existing subscriptions. Based on past experience, the library should have a good idea of a reasonable price range where the price for a resource should fall. In cases where a unique resource is more costly, the library should approach the vendor with a counter-offer of a reasonable price range along the lines of other resources of the same type and size. However, if the library and the vendor cannot reach a middle ground the library will need to do without that resource if the money is not available and/or the library does not want to set a high priced precedent that the budget will have to meet in future fiscal years. Additionally, libraries caving into exorbitant pricing schemes reinforce the vendor's immobility in regard to the cost.

In one negotiation we had, a vendor did not provide usage statistics and we thought that the price that was being asked was exorbitant. We looked at some of our existing subscriptions on those subjects and made some calculations for cost per use based on the statistics provided by those vendors. We then assumed similar use and calculated cost per use for the electronic resources under negotiation. Our existing subscriptions averaged out to between \$5 and \$40 per session. The same amount of usage for the resources under negotiation was going to be between \$100 and \$800 per session. And, this was for resources that that we felt were each much less complete than the resources to which we already subscribed—while much of the commentary material that comprised the resource being negotiated was unique, commentary as well as primary legal materials themselves (i.e., laws, regulations, caselaw) were also included in our pre-existing subscriptions. This cost discrepancy combined with the resource's lesser scope and inclusiveness relative to our existing subscriptions steadied our resolve not

to pay the asking price. In this case we ended up not subscribing to the resources because of the exorbitant pricing, but bolstered with our statistical analysis we were able to defend our decision to the faculty who supported us in our refusal to subscribe to those resources.

## **LICENSE TERMS**

It is important for the license agreement to reflect the terms that have been negotiated between the library and the publisher. Otherwise, the time and effort spent during negotiation will have been wasted. A license is all about the terms and as such the terms need to accurately portray the agreement that is being struck. For example, once we had negotiated to subscribe to electronic resources via IP (Internet protocol) access only to be given a license to sign that described the access method as a password system administered by the library. The vendor in this case said that it did not matter—it was merely a license for a different client group that they had all libraries sign because there was no other. We revised the access method terms in order to ensure that the license we were signing reflected the subscription that we were getting (and wanted) to protect the library from future hardship, in this case having to manage a password system to provide access to the resource.

Some of the most common license terms that require negotiation are discussed below.

### **Access Versus Ownership**

An issue that will make a large difference in the make-up of the rest of the license is whether you are purchasing or leasing the electronic content. A purchase of the content will provide ownership of content to the library generally with a large down payment and modest annual maintenance fee. A lease of the content will take the form of access to content via an annual subscription.

This access versus ownership dilemma is new for libraries with the advent of electronic resources. Libraries are paying large sums of money for information that they will lose access to at the end of a subscription, if a vendor disappears, or if the product is sold or discontinued. This practice is a direct contrast to the past when a purchased book would be on the shelf and the library would possess the information itself. Pace (2003) comments that in the past libraries would have been unlikely to spend vast amounts of money on materials where access would be lost at the end of a subscription period. Because of the amount of money at issue and its impact on the future strength of a library's collection, the access versus ownership issue is an important area within license negotiations. For many resources, such as finding aids, indexes and citators, access alone makes sense; it is for full-text materials where ownership or perpetual access is more important. Okerson (1996) maintains that an acceptable license should provide for either perpetual access to the digital materials that were published during the license term or provide an option for archival access.

The purchase of content can take many forms including the deliverance of digital backfiles of an entire database's content to the library once the license is signed (usually combined with access to the same content via the vendor's interface), perpetual access to content via a vendor's Web interface, or access to the materials published during the time of the agreement either via perpetual access or backfile but no access to materials published after the expiration of the license. For materials where the license only provides access to materials, the access will cease at the expiration of the license agreement.

Access versus ownership is something that will often be open for negotiation. The major issue will be cost, as ownership of the content will cost a premium. Note also that ownership in this context generally will refer only to the housing or perpetual access to the content for research

purposes. This ownership will not provide ownership to the intellectual property contained in the databases and will still be governed by other terms negotiated in the license (e.g., copyright or fair use provisions). Some vendors will only be willing to license for access on a subscription basis but ownership, even if it just to a partial backfile of a single journal title, may be negotiable from others.

Vendors will often license ownership of content for large digitization projects of historical materials and sometimes may not be willing to go the subscription route. For large digitization projects where licensing options may be limited to purchasing the entire backfile and paying an annual maintenance, it is often a good idea to include an “opt out” clause in the license. This clause would typically be enforceable after a negotiated term of years, after which the library could “opt out” of paying the maintenance fee if the charge became too onerous and load the digital files on its own servers. Of course, in this case the library would also need to provide a search mechanism or other access method to get to the electronic content since access would no longer be available via the vendor’s interface.

### **Amendment of License Terms or Services**

It is always best to include language in the license that requires both parties to agree in writing to any amendments to the terms of the license or the services covered by the license. In a fall back position for end user license agreements (EULA), the license should at least indicate that the licensor give written notice to the licensee when the terms are amended. Alford (2002) asserts that prior written notice and the option to terminate the license if the amendment constitutes a material change in terms is the least to which a library should agree. It is never in the best interests of the licensee library to accede to terms that allow the vendor to alter the terms of the license

at any time without notice. Okerson, Stenlake, and Harper (Amendment, 2006) maintain that any amendment or modification to the license should be finalized in the same manner as was the original license agreement.

One negotiation we had concerned a license that not only included a provision that allowed the vendor to alter the terms of the license without notice but also allowed the vendor to change the product without notice. This provision would have left us in a difficult legal position should the vendor amend the license or product in a way that is detrimental to a library’s use of the product. When we were in the process of negotiating this license, the vendor was surprised when we balked at signing it, saying in essence that they would never eliminate the database we were interested in and not return our money. Whether that is true or not is of course irrelevant from a licensing rights perspective as it could be possible under the terms of the license for the vendor to take such actions. In the principle of managing the library’s resources in the best possible way it is imperative that a licensee library not negotiate away future rights or abilities by allowing a licensor unfettered ability to amend the terms of the license. A case-in-point of a license that contains such problematic language is the CQ Press EULA (2006).

### **Authorized Users**

The authorized users section limits who is able to access the electronic resource in question. Because of the ease of access to digital information, license agreements for digital content must contain a definition for “users” (Alford, 2002) in a way that was not necessary for print materials where copyright law defined that term (Richards, 2001). If your library provides services to walk-in patrons outside of your primary patron group (e.g., public patrons in an academic library or nonresidents in a public library) this section will need to include language that allows “walk-ins”

to access the electronic resource. In academic settings, licensors may want to limit access to a resource to the school's faculty, students, and staff, so it is important to make sure that the license includes provisions that will allow the library's diverse patron base access to the resource. If the college or university has a distance education program then those faculty students should fit within the authorized user definition, but it may be best to include that in the definition or verify that point with the vendor. The same would be true of a corporate library where the resource could be used in teleconferencing or other distance communications. Some vendors will want to limit access to a resource to a school within a larger university (e.g., law, medicine, business). In this case, agreeing to such a limitation would be a point where a library can try to negotiate a lower price, in essence agreeing to less access for less money, especially when limiting a resource to a single school is not uncommon on a given campus. It is also sometimes possible to pay more in order to provide access to an additional patron group (e.g., alumni). In Tashbook's (2004) survey 15 percent of libraries indicated that the definition of authorized users was the easiest issue to get publishers to accommodate.

The authorized user section is also often where language-allowing access to patrons from outside of the library buildings should be included. If this language is not included in the "authorized users" section the license may include an "authorized site" section. Off-site access is generally provided via a proxy server which requires users to authenticate when out of the library or off-campus before using a resource. We have had success getting wary vendors to agree to allowing access via a proxy server, in an academic setting, by including license terms that acknowledge that the library is responsible for setting up the authentication system and making sure that only its primary patrons (e.g., faculty, students, and staff) will be able to access the electronic resource from off campus. Note that in Tashbook's (2004) survey,

15% of libraries indicated that use of a proxy server was the easiest issue to get publishers to agree to. Because many vendors prefer to license content in an on-campus environment only, it is imperative to make sure that the license includes language allowing off-site usage if the library wants to provide such access to patrons (Harris, 2002).

The University of Chicago Press Journals Division (2006) license for astronomy journals includes an authorized user provision that is very well suited to an academic library's needs. It allows access for faculty, students, staff, and on-site patrons as well as allows the institution the ability to use a proxy server via the university network provided that the institution take measure to prevent unauthorized users from accessing the content.

### **Authorized Uses**

The authorized uses section is sometimes named "rights granted" or "permissions" and is one of the most important sections of a license agreement. For academic institutions it would be generally reasonable to agree not to use the resource for commercial purposes, but in a corporation or business setting a commercial purpose, as defined in the license, may be the reason for subscribing to the resource (Alford, 2002). Authorized use language may contain key digital information practices like viewing, downloading, printing, and displaying. These are really basic rights of using electronic information and a library should really consider how a product is going to be used before agreeing to the limitation of such electronic rights. Uses contained in authorized use sections that more commonly are negotiated between the library and the vendor are end-use in nature. These uses include interlibrary loan, electronic reserves, coursepacks, distance education, backup copies, inclusion in an intranet, and linking. The authorized use provisions of license agreements are where the content owner aims to protect its

rights pursuant to copyright law by limiting the rights that it is licensing.

Vendor-created use license provisions will generally limit how a licensee may use the electronic content that is the subject of the license even though these uses may otherwise be protected under United States copyright law via the “fair use” provisions (17 U.S.C. §107-122, 2001-2005). The fair use provisions are rights granted to an owner of a copy of a copyright protected work by United States copyright law (Richards, 2001). Under the fair use doctrine, a use may be determined to not violate copyright law after looking at:

- “The purpose and character of the use”
- “The nature of the copyrighted work”
- “The amount and substantiality of the portion used”
- “The effect of the use upon the potential market for or value of the copyrighted work” (17 U.S.C. §107, 2001-2005)

Authorized uses are very important provisions to look at and understand because it is in the vendor licensor’s interest to limit the library licensee’s authorized uses as much as possible. Harris (2002) notes that libraries should be aware that many licenses allow or prohibit uses with general or expansive phrasing. It is important to pay attention to such language as it will have an effect on the bundle of rights that a license allows. The fair use doctrine provides users with a wide array of permissions but these permissions can be waived or negotiated away (Okerson, Stenlake, & Harper [Authorized Use], 2006; Okerson, 1997). When a license reduces the rights that a library holds in relation to a copyrighted work, the library and its users are restrained by the terms of the license and are no longer protected by United States copyright law (Richards, 2001). Needless to say, a library should think very hard before negotiating away its fair use rights. Also, note that a library licensee cannot generally negotiate away the rights of its patrons but a licensor may

try to hold a library responsible for its patron’s actions through cancellation of service or litigation (Okerson, Stenlake, & Harper (Authorized Use), 2006).

As noted, when a library signs a license that includes more restrictive authorized uses than provided for pursuant to fair use, it is those terms that will govern. In the early days of electronic content and license agreements, many libraries signed licenses without contemplating the fair use issues and these contracts have minimized or eliminated fair use rights (Pace, 2003). For this reason the licensee should be sure to include language acknowledging its fair use rights and/or specifically delineating particular rights that it wants to reserve because of their importance to a library’s patrons (e.g., course packs and electronic reserves for an academic library or electronic document delivery and use in teleconferencing for a corporate library). Alford (2002) asserts that it is important for a patron to have the same permitted uses for print and digital materials and that the license should accordingly contain an explicit statement that fair use applies to the electronic resource content. When a license specifically mentions fair use rights or does not include restrictions on authorized uses, fair use will govern (Okerson, Stenlake & Harper [Authorized Use], 2006; Richards, 2001). For this reason, it is a good idea to negotiate license terms that include fair use rights (Okerson, 1996; Richards, 2001).

The ability of a library licensee to negotiate fair use rights will vary depending on the vendor, but it is common for a vendor to balk at the inclusion of a long list of rights that the library would like to reserve. When we have tried to include the authorized use terms from LIBLICENSE (Okerson, Stenlake, & Harper [Authorized Use], 2006, section 2) one vendor licensor refused to agree to modify any of its terms to meet ours and we spent a great deal of time and energy at an impasse. We have had greater success where we have asked vendors to eliminate specific authorized use provisions (on the licensee side)

and restrictions (on the licensor side) and rely on a general fair use statement declaring that nothing in the agreement is intended to limit the library licensor's fair use rights. Because this is a simple statement it may not merit a drawn-out negotiation between the library and the licensor and will still fully protect a library's abilities to provide interlibrary loan and other services. Note that Haworth Press (2006) specifically allows for coursepacks as pursuant to fair use.

Okerson, Stenlake, and Harper (Authorized Use, 2006) note that the interlibrary loan system that has worked well for academic and public library print material lending worries publishers when it comes to electronic publications. Accordingly, the right to interlibrary loan is a relatively difficult term to negotiate with a vendor in a license agreement for an electronic resource even though interlibrary loan is expressly permitted by the federal copyright law (17 U.S.C. §108, 2001-2005) and libraries voluntarily adhere to the CONTU (1979) guidelines that place limitations on library interlibrary loans practices in an effort to protect publishers' copyrights.

Alford (2002) states that although a vendor may not agree to the interlibrary loan of digital materials via e-mail, they should at least accede to a license where a library can interlibrary loan a printed copy of an electronic resource. Note that this is not permitted under the JSTOR (2006) or Cambridge Journals Online (2006) licenses. However, some vendors do expressly allow for interlibrary loan rights for digital materials equal to the rights available for print materials in their licenses. For example, the University of Chicago Journals Division (2006) license for astronomy journals specifically allows for interlibrary loan pursuant to United States copyright law and the CONTU guidelines.

### **Cancellation**

This provision specifies if and when a party to the license may end an agreement and what the

repercussions for that action would be. Often cancellation of a license by the licensee before its term has run will result in a forfeiture of the already paid annual subscription cost or a payment penalty in the case of a multiyear agreement. If a library's budget fluctuates year to year—for instance a court or public library whose budget is controlled by the state—it is a good idea to include language in this section that would allow the library to cancel a multi-year agreement, without penalty, if the library's financial situation changes such that continued subscription and payment for an electronic resource becomes an impossibility.

### **Choice of Law and Venue**

The choice of law section is where the license designates which state's law will govern a contract dispute as contracts are governed by state and not federal law (First Options of Chicago, Inc. v. Kaplan, 1995). In which court the contract litigation takes place is controlled by the venue or choice of forum section. Venue as specified by the license terms need only be a jurisdiction where a lawsuit can proceed often due to a connection with one of the parties. Jurisdiction in this sense (as a locale) should not be confused with the legal concept of jurisdiction which is the court's power to hear a case and is often specifically authorized by statute. See Wright (1994) for more detail on the jurisdiction/venue dichotomy.

Public institutions, whether school, government or public library, may be forbidden by statute from signing a license in which the institution surrenders to the law of another state and may hold special defenses or rights under the law of its home state (Okerson, Stenlake, & Harper [Governing Law], 2006). It is especially important to amend a governing law section that specifies the law of Maryland or Virginia for the contract as these are the two states that have passed UCITA, licensing law which is unfavorable to libraries. Accordingly, if other states pass UCITA it would

be best for a library to avoid signing license agreements that specify those additional states' laws as governing law as well. If a library's home state has passed UCITA, then the library should specify in the license that it opts out of UCITA (allowed by UCITA (§104, 2002-2006). As for the venue section, a library should not agree to a distant venue in the license. In the event of litigation, short of a granted change of venue motion, the trial will take place in that distant court, adding to the cost of the litigation.

In our experience, the choices of law and venue sections are the easiest sections to negotiate with a vendor. Because we are not able to sign a license that designates anything other than Michigan law and venue, vendors have been willing to accommodate us in order to get our business. We have had a couple of license negotiations with foreign-based companies in England and Hong Kong in which the vendors were not willing to designate Michigan law in the contract terms. In these cases we eliminated the sections entirely and both parties were able to move on.

### **Confidentiality of License Terms**

Some vendors include a provision in their licenses that would prohibit the discussion of the terms of the license by the licensee. Vendors will generally include this in a license when they want to keep the licensee from sharing terms with other parties and libraries. This is most often an issue when a vendor is in the practice of varying its pricing, access, or authorized uses for a product on a license-by-license basis. These terms are problematic in that they allow vendors to control the information available to libraries as they try to negotiate their own licenses and generally ensure that the library has a weaker bargaining position because of this lack of information.

It is always good practice to eliminate this clause if a vendor is willing to do so or to negotiate a clause that only prohibits the sharing of specifically identified information (Okerson,

Stenlake, & Harper [Confidentiality], 2006). At the very least, public institutions will often need to modify such a confidentiality section to comply with state "Freedom of Information Acts" (a.k.a. FOIA, generally modeled on the federal Freedom of Information Act, 2001-2005) as contracts signed by a public institution are records that can be requested pursuant to many state FOIA statutes such as Michigan's Freedom of Information Act (2004-2006).

### **Cost**

The price of a resource can be a major issue in a license negotiation and sometimes will be the main issue. Many resources will have a standard list price on a take it or leave it basis. This is especially the case when a license is for a single electronic journal where the price is set for print only, electronic only, or print plus electronic subscriptions, but is also true for larger packages. Indeed, half of the libraries surveyed by Tashbook (2004) that answered the question indicated that price was the issue on which publishers were least likely to make accommodations to a library. It is for the larger databases and digital archives where the price may be negotiable although it may always be the case that a library will have to go without a resource because funds are not available for the one-time purchase or the encumbrance of an expensive annual subscription. Regardless of the payment model, it is important that the contract prohibits the vendor from unilaterally changing the pricing (Okerson, Stenlake, & Harper [Fees], 2006).

One model for negotiating down the price of a resource is to agree to restrict access to the resource. It is possible to reach a consensus point with a vendor by limiting access to an electronic resource to a particular campus (for a state-wide institution), affiliates of a single or few schools on a campus, eliminating alumni or walk-in patron access, or restricting access to on-campus use only. In a public library options include restricting

access to in-building use only, limiting access to one or more dedicated terminals, or requiring a patron to login (thereby limiting access to residents for many public libraries). Obviously, the palatability of these options will depend on the nature of the resource, the perceived usage of a resource by the groups to be excluded under a license, the degree of hardship the exclusion would cause those groups (e.g., is it unreasonable to make students on a campus go to the business school to use a resource on the stock market if it will halve the price?), and the mission of the library. A less onerous way to restrict access to a resource would be to negotiate down the number of simultaneous users that may access a resource. Often simultaneous user limits will be tiered and each tier will have a standard price affixed to them. When a resource is available with various simultaneous user price tiers, statistics are an important tool in understanding how much access a library needs to negotiate and pay for. The statistics for total number of uses are important, but when negotiating a level of simultaneous usage the statistics for peak simultaneous logons and turnaways will let a library know whether the current level of usage is too little or too much.

Another way to easily reduce the annual cost of an electronic resource subscription is to license a multiyear subscription to the resource. A multiyear license can cut 5 to 20% from the annual price for a resource. Additionally, if a resource is available from multiple vendors you will often be able to get vendors to match or beat the subscription cost offered by another vendor. If multiple libraries on a university campus are interested in the same electronic resource then it may also be possible to share the cost so that no one library has to pay for access to a resource where usage would be largely spread across a campus. A further way to cut costs is for a library to cancel print subscriptions to material that it is also subscribing to electronically. If this is a real possibility or definite plan it is imperative to negotiate the ability to cancel print into the license agreements

as some licenses have language prohibiting print cancellations.

Some resources will have alternative pricing models that may be less expensive. These models can be flat-fee, package, or pay-per-view. A flat-fee model is similar to a monthly or annual subscription cost. Usage, but more usually downloading, can be capped at a certain amount in any given month or annually. A package plan, which is often a pricing model for electronic journals, will provide access to an array of journals for a single cost rather than licensing each journal separately. Richards (2001) notes that package plans often do not meet librarian expectations because usually a small percentage of the journal titles in a package get the large majority of usage, in essence meaning that libraries are paying for electronic access to additional journals that may not be necessary for their patrons' research needs. Package plans will often allow for the cancellations of print subscriptions, but allowed cancellations may be capped at a certain percentage per year. A pay-per-view plan would limit the cost to the library to the actual searches and downloads performed. This plan is most appropriate for an electronic resource that will not receive much use and is costly on a subscription basis. For a resource that is highly used, a pay-per-view model will generally be more expensive than a subscription.

A library's membership in a consortium is another way for a library to get more electronic resources for less money. As Kohl and Sanville (2006) note, this should not be confused with getting electronic resources more cheaply via a consortia membership (i.e., a library can increase its access to electronic resource titles, usually e-journals or e-books, for a percentage more money than it currently pays for the titles it holds in print). While the relatively cheap additional expenditure for access to a large number of new titles can be a tantalizing incentive, consortial deals can have other costs including high administrative costs (Stange, 2006), a movement away from a patron-focused collection to a more general col-

lection due to the aggregate nature of multilibrary packages (Scigliano, 2002), and a lesser ability to re-negotiate deals at renewal. Other positives to consortial packages include the ability to cancel print subscriptions to rely on the electronic version (this needs to be negotiated at the outset as many consortial packages have print cancellation limitations) and the ability of the member libraries to withdraw print collections in reliance on the electronic for access and a particular member library for archival purposes.

Other factors that can be used to positively negotiate the price of a resource are having previously purchased the same material in another format or a library having purchased another electronic resource in the same series from the vendor. Additionally, some vendors may be willing to extend pricing deals similar to consortium pricing to university libraries that have historically purchased a large number of that vendor's electronic resources either themselves or in conjunction with other libraries on campus.

We have had the most difficulty in negotiating the cost of resources where the vendor bases the price of the resource on FTE enrollment (full time equivalent, i.e., the number of full-time students enrolled where two half-time students would be combined as 1 FTE). The difficulty we have had in negotiating down such prices is due to the fact that FTE price quotes are more set in stone from the vendor's point-of-view than other electronic resource pricing. FTE cost is based on the theory that a school with a 1000 FTE will use a resource twice as much as a school with a 500 FTE. While this may be the case for some resources, we feel that for many resources, especially those on a particular subject (e.g., tax law), this is not an accurate theory as larger institutions may have more resources available thereby reducing the usage of any specific resource. It is for these types of resources that we have tried to negotiate FTE quoted prices. We have had some, but not universal, success in getting out of the FTE price track by agreeing to restrict access to dedicated

terminals or by purchasing passwords instead of IP access (we prefer not to use passwords because of their administrative hassle). There have also been resources that we have chosen not to subscribe because of a nonnegotiable FTE-based price when we have felt that the usage based on FTE theory was not an accurate predictor of the usage from our institution.

## **Definitions**

Some license agreements will have a separate definitions section while others will include definitions of terms in the individual sections of the license where they arise. Generally, a good contract or license agreement is clear to the parties who sign it and that means that the terms at issue in the license should be clearly and specifically defined, especially if the usage varies from common dictionary meaning (Harris, 2002; Kutten, 2003-2006). Harris (2002) notes the importance of deciding whether a license term is being used in its common manner. The definitions of the terms of the license are where a great deal of the negotiation may take place. A definition of "authorized users" may not include alumni and if the library wants alumni to have access to a resource, the library will need to negotiate that change to the definition. The same is true of a definition of "library network" that omits access from off-campus in an academic setting or to a public library's patrons from home. Note that Taylor and Francis (2003) include a set of definitions including "authorized users," "course packs," "library premises," and "subscription period" at the beginning of their EULA.

## **Reimbursement**

The license agreement contract will generally cover continual access to digital content for a subscription period. There are times where access to an electronic resource is not available due to Internet or network problems at the library but

also due to network problems on the vendor side. In the latter case it is important that a library be able to receive a pro rata refund for the resource downtime if the electronic content is unavailable for a sufficient period of time. Downtime of an hour or even a couple of days may not be worth the effort of getting a refund, but if a resource is unavailable for weeks, then continual access as licensed was unavailable and the library should be allowed a refund for that time under the terms of the license agreement. Sometimes the agreement will provide for the refund by extending the license term by the same amount of time as the downtime.

### **Subject Matter**

This section deals with the content covered by the license. It is important that the license clearly and accurately details the content to which the library is subscribing. The subject matter is often included in another section of the license such as the preamble or definitions section instead of standing on its own. It is important to note that the preamble and definitions sections are not legally binding parts of a contract but are used by courts to discern the intent of parties

### **Termination**

The termination of a license will most often be due to the expiration of the term set by the license agreement. The termination section of the license delineates when one of the parties to the license can terminate the agreement for another reason. It is important that a library make sure that the termination clause allows the library to terminate the agreement for a material breach, such as the disappearance of important content, and not allow only the licensor to terminate the agreement. Murray (2001) notes that a material breach is a failure to perform the contract so substantial that a party does not receive the benefits of the contract; thereby making termination of the contract an

appropriate remedy for the aggrieved party. The termination section is where a library should indicate that a termination based on a default by the publisher mandates a pro rata refund of the prepaid subscription cost (Harris, 2002). In our experience, vendors are generally willing to agree to a pro rata refund.

The termination section is also the appropriate place to include language allowing a library to not renew a multiyear subscription that is paid on an annual basis because of funding shortfalls. This may most often be a problem in governmental libraries but can touch other types of libraries as well. This language would allow a library to terminate its subscription in the event of a budget shortfall or cut without penalty.

Harris (2002) cautions that libraries should make sure that a license agreement not allow vendors to terminate an agreement due to the actions of library patrons. The library should have a role in educating its patrons about the use of electronic resources and will generally be responsible for mediating access to an electronic resource (via passwords, the set-up of library terminals, or a proxy server) but should be wary of agreeing to allow a vendor the right of termination due to patron misuse.

### **Warranty & Indemnity**

The warranty and indemnity clauses will often be combined in a license agreement. A warranty is a promise or guarantee regarding the electronic resource at issue. In the warranty portion the licensor will generally promise that the vendor is the content owner and has the right to license the electronic content. Warranty sections will often also state that the license is for the electronic resource “as is” and that the vendor cannot be held liable for any errors in the product or damages caused by reliance on such erroneous information although the warranty should at least indicate that the product is free from defects. Warranty and indemnity terms will often be boilerplate clauses

that may be difficult to get vendors to amend. Harris (2002) suggests that it is not necessary to negotiate these sections in minute detail, as a general warranty and indemnity section will be appropriate for most licenses for library electronic resources.

Alford (2002) asserts that an important warranty for a library to negotiate is a warranty against copyright infringement where the publisher would maintain that the digital materials included in the electronic resource in question do not infringe the intellectual property rights of another party. This is especially important because a library may be liable for copyright infringement under law even if the fault in not obtaining permissions lies with the publisher (Alford, 2002). The LexisNexis (1996) terms include such a guarantee.

The indemnity section provides for compensation should there be a contractual breach resulting in damages to a party. From a library perspective, an indemnity clause should provide at a minimum that any problem with the electronic resource making it unusable must be fixed in a prompt manner or the library would be able to cancel the agreement and ask for a refund. Alford (2002) states that the library should not agree to indemnify the publisher for anything and especially not for misuses of electronic content by library patrons as the library has no real control over how patrons will use the materials. Alford (2002) continues that it would be acceptable for a library to agree to make efforts of a reasonable nature to remedy a situation of misuse once the library has knowledge of such a situation. Oker-son, Stenlake, and Harper [Warranties] (2006) state that indemnity clauses should impose equal burdens on each party.

## **Other Common License Terms**

### **Alternative Dispute Resolution (ADR):**

This clause allows for resolution of a dispute between the parties outside of a court of law. ADR processes often include mediation,

negotiation, and arbitration as a final step. Arbitration may be binding or non-binding where nonbinding arbitration allows for the parties to go to court after the arbitration stage. Arbitration may be expensive as arbitrators in the United States are generally chosen through the American Arbitration Association (Harris, 2002). When reviewing an ADR clause a library will generally want to ensure that both parties equally pay the costs.

**Assignment:** This clause may prohibit the assignment of the license to another party. Corporate libraries especially will want to be sure that the assignment clause details how an assignment may be made in the case of a corporate purchase or takeover.

**Complete or Entire Agreement:** This clause stipulates that the negotiated agreement is enforceable on its own and any other written communication between the parties is irrelevant. Accordingly, a library will want to make sure that the provisions it wants are indicated in the negotiated license and not agreed on verbally or via e-mail.

**Force Majeure:** Literally a superior force and generally refers to an act of God, act of war, or another condition outside of the control of either party. This clause will apply provided that the act was not foreseeable enough that due care on the part of a party would have avoided the failure to meet the terms of the contract (Harris, 2002). The *force majeure* section should apply equally to both parties and common technical issues (e.g., server failure) are generally not covered.

**Severability:** This clause ensures that if any provision of a contract is deemed illegal or unenforceable the remainder of the contract still stands.

**Support:** This clause indicates what kind of technical support the library may rely on under the contract. The library may want to

try to negotiate for free-of-charge support if the vendor does not typically provide that and the library believes that such support may be necessary.

**Waiver:** This clause prevents the failure to enforce a particular provision in the contract from constituting a waiver of that or any other part of the license. It is good practice to include language that states that amending the contract in writing is the only way that provisions may be waived.

## WHAT NEXT?

What will the future bring? It is probably safe to say “more license agreements.” A license agreement will likely arrive hand-in-hand with each new electronic resource as it becomes available and as the number of electronic resources increases so will the licenses to sign.

The real question will probably be whether publishers and libraries will be able to find a more universal middle consensus on some important issues like fair use, cost, ownership, and amendment of licensing terms. Libraries will certainly need to continue to argue their case regarding the use of materials and patron rights, but it will be difficult to make sweeping changes considering both the current political and publishing climate as well as the large number of publishers creating these electronic resources. It seems unlikely that Congress will reverse course against the interests of contributors and shorten the term of copyright or add material to the public domain so libraries will still need use licenses to gain permission to content. At present, publishers have no reason to start license negotiations anywhere other than a strictly curtailed list of authorized uses in order to both protect their rights in the content as well as to allow for the possibility of increased payment in compensation for looser use restrictions. This does not seem likely to change but movement toward the middle may be possible if libraries are able

to intelligently negotiate licenses and are willing to step away from a resource with unfavorable licensing language. The more libraries that are willing to take this step the more likely it is that publishers will amend their practices.

A licensing area that libraries will want to watch will be increased use of Creative Commons licenses (2007b) and their effect on electronic resources. Creative Commons’ goal is to provide a middle “reasonable” level of copyright protection between no protection and the national and international legal regimes (Creative Commons, 2007a). Note that there is some dissent about the advantageousness of the Creative Commons scheme as a way to get around the use problems of traditional copyright (see e.g., Dusollier, 2006; Elkin-Koren, 2005; Katz, 2006). Creative Commons licenses are attached to a work by the creator and in addition to requiring attribution may also restrict commercial use, restrict derivative works, or require derivative works to carry the same license as the original work (Creative Commons, 2007b). What does this mean for a library licensing resources from a vendor? Currently, it does not mean much. Resources that are currently being licensed from vendors may include works that the creator has attached a creative commons license to - probably these would be only the “Attribution” or “Attribution No Derivates” licenses (Creative Commons, 2007b) because of the commercial nature of the larger electronic database—but it would presently be a daunting task to try to ferret out any Creative Commons licensed materials on a work-by-work basis in a large database (Dusollier, 2006). At present, there are two areas where libraries may want to focus their licensing energies regarding creative commons. First, libraries may want to add a clause to license agreements that specifically protects the libraries ability to use works attached to Creative Commons licenses as allowed by those licenses. Second, libraries may want to negotiate with the vendor terms that mandate that the vendor indicate whether a Creative Commons license (and

which one) is applicable to a particular work in the work's metadata. This second area is going to be the more difficult term to negotiate, as it would require work on the vendor's part to add metadata indicating Creative Commons licensing to the existing database as well as to materials added in the future.

## CONCLUSION

As electronic resources become a larger proportion of library collection budget expenditures, the importance of being able to negotiate favorable terms for a library become more imperative. License agreements are contracts and as such use rights given to libraries pursuant to United States copyright law can be negotiated away. In order to protect a library's interest as well as the interests of a library's patrons, librarians must become more knowledgeable concerning electronic resource license agreements and the licensing language and terms included in them.

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