

Signing away Fair Dealing

Why it's more important than ever to negotiate e-resource licenses that work for libraries and our users

LEGAL

ECONOMIC

POLITICAL

PSYCHOLOGICAL

SOCIAL

“We face an information divide heaped on top of a digital divide, and the creation of classes of users driven by licensing terms. Will licensing and contract supplant the role of copyright in governing access to information in our nations libraries?”

- James G. Neil

Overview

The Ideal License vs. Reality – [Heather]

- best practices – resources and guides
- current licenses that limit fair dealing uses

Ebook/eJournal licenses and ILL [Lei]

Current practices and ongoing projects

Model Licenses

ILL implications

Negotiating local licenses/use of addendums [Ann]

DRM [Mark]

QUESTIONS FOR DISCUSSION

Best Practices

LIBLICENSE: Licensing Digital Content



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Licensing Terms & Descriptions

The topics consist of clauses that generally appear in licensing agreements. Each topic contains as well as some general advice to consider when negotiating the particular clause. Following relating to the topic that have appeared in actual licensing agreements, along with a disc

 Clauses marked with this symbol are, we believe, unduly burdensome for

- [Authorized Use; Specific Use Restrictions](#) (example clauses)
- [Delivery/Access; Authentication](#) (example clauses)
- [Force Majeure](#) (example clauses)
- [Governing Law; Dispute Resolution](#) (example clauses)
- [Licensor Performance Obligations](#) (example clauses)
- [Licensee Performance Obligations](#) (example clauses)
- [Mutual Performance Obligations](#) (example clauses)
- [Terms; Renewal; Early Termination; Perpetual License](#) (example clauses)
- [Warranties; Indemnities; Limitations on Warranties](#) (example clauses)
- [Relevant General Clauses](#)

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Canadian Libraries and Librarianship

Negotiating licensing agreements for electronic resources: a selective bibliography

Bibliography series #7
ISSN 1203-2468

Compiled by *Douglas Robinson*, January, 1999

Introduction

This selective bibliography contains references to both print sources and Web sites which deal with the question of negotiating licensing agreements for electronic resources. Works that are available both in print and electronically are listed with the ISSN or ISBN number for the print version and the URL for the electronic version. There are live links in the electronic version and we will do our very best to ensure that these links are maintained.

Databases such as Library Literature, Library and Information Science Abstracts (LISA) and Information Science Abstracts were used in compiling this bibliography. Internet Web sites also provided additional sources.

Resources

- Center for Research Libraries: *LibLicense: licensing digital content – a resource for librarians* (1997)
<http://liblicense.crl.edu>
- LAC: *Negotiating licensing agreements for electronic resources: a selective bibliography* (1999)
<http://www.collectionscanada.gc.ca/6/7/s7-2604-e.html>
- ARL: *Principles for Licensing Electronic Resources* (1997)
<http://www.arl.org/storage/documents/publications/licensing-principles-1997.pdf>
- NISO: *Shared Resource Understanding Agreement* (SERU)
“an attempt to establish a statement that describes common understandings around e-resource subscriptions, allowing libraries and publishers to forgo a license by referencing the common understandings”.
<http://www.niso.org/workrooms/seru/>

ARL's Principles for Licensing Electronic Resources (July '97)

“...in a licensing situation, it is generally the seller (or licensor) who has prepared the agreement. It is imperative that the buyer (or licensee) review the terms of the agreement and communicate concerns to the licensor before signing it.

Discussion may continue until either agreement is reached or a decision is made not to contract for the particular product or service”.

“In the area of licensing electronic resources, failure to read and understand the terms of the agreement may result in such unintended consequences as:

- the loss of certain rights to uses of the resource that would otherwise be allowed under the law
- obligations to implement restrictions that are unduly burdensome or create legal risk for the institution; or,
- sudden termination of the contract due to inappropriate use by a member of the user community”.

Uses prohibited by some licenses

- Digital delivery of interlibrary loan documents
- ALL interlibrary loan (document delivery)
- Scholarly sharing
- Use in print course packs
- Use in electronic reserves
- Use in course management systems
- Linking (HBR)

Model Licenses and Fair Dealing

CRKN Model License

“3.3 Nothing in this Agreement shall in any way limit the ability of the Consortium, Authorized Users and Walk-in Users to engage in or conduct any activity that would not constitute an infringement under Canadian copyright laws, in respect of a copyrighted work”.

Actual CRKN Licenses

CRKN JSTOR license, 2011-14

“...[permits] fair use under Section 107 of the U.S. Copyright Act, educational exceptions, or other similar provisions to the copyright laws or other intellectual property right laws in the United States or in other countries”

CRKN Elsevier Science Direct license, 2011-2014

“3.3 Intentionally deleted”

- [Heather insert examples here of restrictive license clauses and terms that limit the exercise of fair dealing]

eBooks/eJournals and ILL

- Current practices overview – local and consortia levels
- Ongoing projects:
 - ebook licenses
 - ebook chart
 - Ontario Usage Rights ERM
 - OCUL new website products
- Negotiation example

Model License

Current model license

<http://www.ocul.on.ca/node/114>

ILL clause that is impacted by the new copyright legislation:

Members shall be permitted to supply to a library of a non-Member (whether by post, fax or secure transmission, using Ariel or its equivalent, whereby the electronic file is deleted immediately after printing), for the purposes of research or private study and not for Commercial use, a single copy of an electronic original of an individual document being part of the Licensed Materials. (2005)

Interlibrary Loan: Member Institutions shall be permitted to supply to a library of a non-Member (whether by post, fax or secure electronic transmission or secure post-to-Web, provided that the Member Institution requests that the electronic file is deleted immediately after printing), for the purposes of research or private study and not for Commercial Use, a single copy of an electronic original of an individual document being part of the Licensed Materials. Files transmitted in this manner must carry the copyright notices in the Licensed Materials. Licensee agrees to fulfill interlibrary loan requests in compliance with Canadian copyright law. (2011)

New model license almost ready to go, pending on lawyer's final approval:

3.11 Interlibrary Loan.

Member Institutions shall be permitted to supply to a library of a non-Member (whether by post, fax **email** or secure electronic transmission or secure post-to-Web, provided that the Member Institution requests that the electronic file is deleted immediately after printing **or other reasonable measures are taken to protect further distribution of the Licensed**

Materials), for fair dealing purposes and not for Commercial Use, a single copy of an electronic original of an individual document being part of the Licensed Materials. Files transmitted in this manner must carry the copyright notices in the Licensed Materials. Licensee agrees to fulfill interlibrary loan requests in compliance **with sections 29 or 30 of Canadian Copyright Act.**

Sample Licence

- Including secure post to web, to fulfill requests from non-commercial, academic libraries located within the same country as licensee; provided, however, that such practice: (i) complies with Section 108 of the US Copyright Act OR for OCUL, comparable sections of Canadian Copyright Law....

Issues of Communications

- Not having fair dealing in all licences cause confusion in communication strategy
 - Confuses and frustrates faculty
 - Complicates the simplicity of fair dealing
 - Too many licences and various terms of use
 - Lots of checking
 - Makes it difficult to develop a consistent communication strategy for the use of electronic resources

Institutional Specific Licences

- Many do not have fair use or fair dealing provisions
- Some have fair use provisions only
- Important to try to get fair dealing rights into contracts
- One way to try is to use set addendums

Addendums

- Institutions can try to negotiate fair dealing into licences
- Two addendums
- 1) for contracts with no fair use or dealing
- 2) for contracts that mention fair use only

AMENDMENT AGREEMENT

In your contract, “fair use” rights under the laws of the United States are not restricted. We would like to request that this contract recognize fair dealing rights under the laws of Canada.

THIS AMENDMENT AGREEMENT made as of _____, 20____
is between Ryerson University (“**Ryerson**”) and ___[NAME OF OTHER PARTY]___ (“_____”).

WHEREAS: the parties entered into an agreement as of _____[ORIGINAL DATE]_____, 20__ , a copy of which is attached as Schedule “A” (the “**Agreement**”);

the parties wish to amend the Agreement to protect fair dealing rights recognized under Canadian federal law as set out in the *Copyright Act of Canada*, Sections 29, 29.1 or 29; and

the parties wish to amend the Agreement accordingly;

NOW THEREFORE in consideration of the premises and other good and valuable consideration, the receipt and sufficient of which are hereby acknowledged, the parties agree as follows:

The Agreement hereby amended to insert the following wording:

Fair Dealing. Nothing in this Agreement restricts the use of the materials licensed hereunder for the purposes of "fair dealing" as defined under the laws of Canada and the *Copyright Act of Canada* Sections 29, 29.1 or 29.2.

The amended wording is hereby incorporated into and forms part of the Agreement.

All other terms and conditions of the Agreement remain unamended and in full force and effect. If there is conflict between this Amendment Agreement and the Agreement or any earlier amendment, the terms of this Amendment Agreement will prevail.

IN WITNESS WHEREOF the parties hereto have executed this Amendment Agreement.

Needs to be reformatted so that there is not a “dangling execution page”.

Issues

- Time issues – how long to spend on negotiation vs. size of licence
- Vendor not responsive
- Vendor unwilling to adapt contract
- Potentially hundreds of small licences

Strategies

- Ideally send out addendums before contract renewal, this may not always be realistic
- focus on a particular set of vendors/ or price points
- Accept that it will be a gradual process
- You can also just hand write in fair dealing as in “Nothing in this Agreement restricts the use of the materials licensed hereunder for the purposes of "fair dealing" as defined under the laws of Canada and the *Copyright Act of Canada* Sections 29, 29.1 or 29.2”

Digital Locks, TPMs and DRM

Section 41 of Bill C-11 amends the Copyright Act to create legal protections for digital locks that prohibits circumvention for any purpose – even in situations where making copies would be allowed under the Copyright Act.

General erosion of fair use/dealing

- Fair dealing becoming more like fair use in the US
- Contract terms basically TRUMP the Copyright Act
- Digital Locks AUTOMATICALLY ENFORCE contracts
- The copyright act MAKES IT ILLEGAL to break digital locks for almost any purpose
- What happens if ALL materials are locked with digital locks?
 - User rights become irrelevant

Pick your digital lock battle

- Some licences were completely silent
- Others had generalized references to providing content with digital locks without specifying what these locks were
- Others had specifics (eg. prohibition on downloading over 20 percent of each book)
- Licences did not always reflect reality

Springer and the OCUL Model E-book Licence

OCUL model e-book license:

“In the event that Licensor utilizes any type of digital rights management technology to control the access or the usage of Licensed Materials, Licensor agrees to notify Licensee of the name, contact information and any technical specifications for the digital rights management technology utilized. In no event may such digital rights management technology be used in such a way as to limit the usage rights of a Licensee or any Authorized User as specified in this License or under applicable copyright law.”

“Even still, this licence does not expressly give users the right to circumvent digital locks for non-infringing uses, such as fair dealing, which could be critical if, despite the vendor’s promises, digital locks are applied in a way that limit user rights.”

Strategies (CARL)

When negotiating, address the following considerations:

- Guaranteed user rights as permitted in Canadian Copyright Law,
- No/Limited DRM with circumvention prohibited,
- The law governing the contract must be Canadian,
- Detailed user information and analysis to gauge impact on scholarship
- A removal of content clause,
- Permanent copy provisions.

Strategies

- When acquiring e-book titles, either individually or as a package, require vendors to provide advance notice of the digital locks applied to the e-books
- Maintain pressure on vendors to minimize the use of DRM
- Favour vendors with DRM free titles
- Push to include OCUL's model license provision around DRM technology or a similar provision
- Try and include the right to circumvent for non-infringing purposes
- Local content should be hosted with little or no DRM technology

Questions for Discussion

- Other examples of restrictive or problematic licensing language?
- What strategies has your institution used when negotiating local licenses?
- How to influence consortial licensing negotiation processes?
- How to convey usage restrictions to the end-user?
- Examples of licenses that were successfully modified (and how)?
- What are the keys to successful license negotiation?
- What can we expect in the future?