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Colleges Urged to Protect Rights in Licensing Negotiations

By Robert L. Jacobson

New Haven -- A high-stakes battle over the future of on-line access to scholarly material has begun to unfold behind the scenes at some leading universities.

On one side are publishers of academic journals, whose electronic products increasingly include not only citations and abstracts, but also the full texts of thousands of copyrighted journal articles.

On the other side are computer-savvy academic librarians, who would like to insure that faculty members and students can make the widest and most effective use of information technology and electronic resources in their everyday work.

The publishers want to control the process through strictly worded contracts and "site licenses," which specify how the resources may be used at particular institutions. The librarians want to give users as much freedom as possible. How the struggle plays out could help determine, for years to come, answers to several basic questions:

* Which scholarly material will be available on line?

* Who will be able to see the stuff?

* What will they be able to do with it? (Will users be able, for example, to download a file, store it, print it, annotate it, and send copies to other people? Will they be able to incorporate the material -- or at least portions of it -- on their own World-Wide Web pages?)

According to Ann S. Okerson, an associate librarian at Yale University, many librarians and other campus officials have been too willing to accept publishers' proposals for contract terms that severely limit such options or that impose unnecessary fees.

Either out of a mistaken understanding of their legal rights or because pressure from constituents may lead them to acquire on-line products without sufficient regard for restrictions, she says, "educational institutions have signed language they shouldn't have signed."

In doing so, she believes, the institutions have relinquished rights that would have been available to them for electronic purposes under the same "fair use" provisions of the federal copyright law that people in education have relied on to make limited, non-commercial uses of printed works without special permission or fees.

Many publishers, meanwhile, reject fair-use arguments as a basis for encouraging unauthorized reproductions of electronic works, and they have been pressing for new technological and legislative protections. They also maintain that, without contractual limits on electronic use, they face a severe loss of revenue and damage to the works' integrity.

Speaking as Yale's chief negotiator on licenses for electronic journals, Ms. Okerson says she "cannot in good conscience sign many of the first drafts of licenses that are presented to us." The documents "seem to have been designed for commercial, rather than educational, customers," she says.

Lately she has negotiated with representatives of several publishers of scientific materials, including the American Psychological Association, Biological Abstracts Inc., the Research Library Group Inc., and the Institute of Physics Publishing Limited in Britain.

A recent inventory at Yale found 181 electronic data bases of all kinds scattered throughout the institution, ranging in price from about \$60 a year for a music guide to about \$33,000 a year for a data base of chemical reactions. A compendium of English poetry carries a one-time charge of \$43,500.

Some of Ms. Okerson's objections to recent contract proposals were that they would have required undue controls to prevent even some legitimate users from seeing on-line material, that they would have held the university liable for misuse by individuals, and that they would have barred users from browsing through material unless they were willing to "pay by the drink."

She has discovered, however, that if she firmly opposes a provision and explains why, publishers may well relent. "If you work with them," she says, "it is possible to have a meeting of the minds."

Several publishers reportedly agreed with that sentiment at a meeting in New Mexico last month. Their message, said one participant, was, "Please tell us what you're interested in and we will try to be responsive."

Ms. Okerson says one document submitted for Yale's approval would have barred users from reproducing material from an electronic collection "by any means." That's "crazy," she contends, and she said as much to the publisher. The language was dropped.

Another proposed agreement said items could be copied "temporarily," but then would have to be erased. "That's not reasonable language," the librarian says. "I don't know how long 'temporarily' is. For a scientist, it may be brief; for a humanist, it may span a career." The provision was deleted.

Also objectionable was part of an existing contract, signed before she arrived at Yale about a year ago, that essentially said, "No part of the information may be reproduced in hard-copy, machine-readable, or other form without advance written permission."

Ms. Okerson says she pondered the stipulation, considered the merits of the data base, and concluded, "Well, we're not going to get it [anymore] unless we change that." The language was replaced by wording drawn from federal fair-use provisions that limit copyright owners' "exclusive rights."

The law says judgments about what may qualify as fair use will depend on four main factors: whether the use involves "non-profit educational purposes"; the "nature" of the protected work; the "amount and substantiality" of what is copied, and how the use affects the work's market or value.

As she advocates a tough university posture against restrictive licenses, Ms. Okerson says she depends heavily on the existing federal law -- which many observers agree is murky at best and invites interpretation by the courts on a case-by-case basis. But the lack of clarity also can work in education's favor, she says, by offering institutions a basis for challenging restrictive parts of proposed licenses.

The Yale librarian recognizes that legislation pending in Congress may give strong new copyright protections to producers of electronic works, including exclusive rights over all transmissions. But that, she says, is all the more reason for universities to insist on licenses that maintain a favorable environment for on-line uses.

Moreover, she says, what academic libraries do now -- or fail to do -- on the licensing front could serve as precedents down the road, when on-line resources are likely to become much more widespread.

Her underlying message to publishers of on-line material is: "We want this available on the desktop of every member of the university community. If they can switch on a computer, they can get it on their screen. They can download it. They can print it. We want to bring as much of the library to as many people as possible."

But if licenses for electronic products are so limiting that users cannot legally tap the full power of their computers for important educational uses, "the resource might as well be in print" only, Ms. Okerson says. "And we might as well be taking it to the photocopier."

Another result of bad licensing agreements, she tells publishers, is that many users may simply ignore restrictions they don't like "and do all that stuff anyway, because it's hard to stop them."

A former director of the office of scientific and academic publishing at the Association of Research Libraries, Ms. Okerson has been sharing her views with fellow librarians in several ways.

Beyond her role as a Yale negotiator -- in which she consults regularly with campus lawyers -- she has been a leader of an informal group of private-university librarians who are trying to promote users' rights as part of common agreements with publishers. She also heads a new Yale project, financed by the non-profit Council on Library Resources, that will use the World-Wide Web to help academic libraries obtain more-favorable licensing terms through analyses of "good and poor" language.

"Although we know that many libraries are entering into license arrangements," a prospectus for the project says, "we have found little documentation about what licenses have been signed and with what terms. In part, the lack of documentation grows from the mystique of licenses ..., their comparative newness as a tool for the library community, and the scary fact that librarians do not always read carefully what they sign." The prospectus adds: "This under-informed situation must change."

Many colleges have already found that they can hold down the prices of electronic products by using consortia to obtain collective agreements with publishers (*The Chronicle*, February 9). Now, Ms. Okerson argues, it is time for institutions to collaborate on ways to minimize restrictions on use. By signing group contracts or at least sharing information about provisions, consortia can help their members save on legal fees and avoid the time-consuming process of negotiating every new contract on their own.

The group of private-university librarians, tentatively named the Northeast Research Library Consortium, comprises people from Cornell, Columbia, Harvard, and Princeton Universities, Dartmouth College, and the Massachusetts Institute of Technology, in addition to Yale. The librarians have been trying to negotiate an agreement with Academic Press Inc., a division of Harcourt Brace & Company, for collective on-line access to 179 scientific journals.

Ms. Okerson calls Academic Press's proposal for a license a "fine" effort, but she and her colleagues also have reservations.

Among other things, they want to broaden its definition of "authorized users" to include some people whom the universities consider to be legitimate users of their electronic services even though they aren't currently identified as students and employees. Such people might include academic visitors or former students who still need electronic access for brief periods before becoming affiliated with other institutions.

Another concern, according to a summary of the librarians' position, is that the "normal pursuits of study, research, and publication" not be precluded by licensing language aimed at preventing people from using the electronic journals for commercial purposes.

"We assume that our readers have non-commercial purposes," the summary says, "but we cannot predict that excerpts or citations will not appear in something that is sold (such as a journal or book)."

A.W. Kenneth Metzner, director of electronic publications at Academic Press, declines to comment on the proposed license, citing "ongoing negotiations."

Many educators and librarians, including Ms. Okerson, say publishers are understandably anxious about the harm that rampant, unauthorized copying could do to their still-fledgling efforts to produce electronic journals. "They are vulnerable," she says, "and they have to find ways to protect themselves and their income sources."

But then, she adds, "it's up to the other side of the market to say, 'Well, that works for us' or, 'It doesn't.'"

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