

Crazy About Consortia?

(Some Reflections on Starting and Belonging to One)

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by
Ann S. Okerson**

The information in new electronic formats is not owned but leased. The new selling vehicle is the license which, as we have heard in today's earlier presentations, is a particularly consortium-friendly construct. Furthermore, information producers are as eager to sell big resources to groups of libraries under a single negotiated agreement (and perhaps for a single price) as they are to market their materials to many individual libraries.

A cautionary note as we discuss this heady new mode of doing business together: we ought to be mindful that electronic licensing by consortia, while a new and necessary phenomenon today, may grow in importance or may as easily fade over time. For the foreseeable future, the single library is still a viable and highly desirable customer, and the single journal or index subscription sale still a desirable transaction. Consortia notwithstanding, no library can neglect its own acquisition program in favor of a group approach and an information producer downplays the individual customer and title at his own peril. The information future, in the near term, is layered, comprising single libraries, consortia, national libraries and projects, and new "libraries" of a sort we may not have hitherto imagined. In fact, the consortial layer is particularly untidy. Any given library may find itself simultaneously part of several different consortia for different purposes. These days, libraries have a tendency to proliferate partnerships, with the attendant risk of forming many not dissimilar affiliations, losing focus or dissipating their energies in the process.

Nonetheless, libraries need to invest additional resources (financial, technological, and human) in making collective arrangements work; information producers, unable to stop marketing to individual institutions, may also experience an increase in their marketing and support costs as a result of consortial activities.

Nerd or NERL?

We who watched the University of California Library System or the CIC build common, compatible online catalogs and expedited delivery mechanisms, early recognized the wisdom of their ways. We became envious when we observed that such groups secured good financial deals for electronic resources that their unaffiliated library colleagues could not match. Any libraries that can pay \$35k instead of \$45k for a database of English poetry quickly become the envy of others!

Indeed, having started work at the Yale Library full time in January 1996, I became the focal point for a number of requests for purchases of large, expensive electronic databases for our collections. Coincidentally, at that time the Academic Press's IDEAL product was first marketed and it offered attractive consortial incentives that complemented the goals of our public services staff. We were most interested by the enhanced access a single institution could receive for its users if it were part of a larger group that collectively subscribed to the entire Academic journal title list. Under those circumstances, all the individual library members of the consortium, even though they themselves subscribed to only a proportion of the list of 170+ titles, would receive access to the entire full-text collection of Academic's journals electronically, beginning with 1996 issues.

Clearly, it was time to create the Ivy League Consortium. The idea had name recognition, and cachet. Although the football league had long ago passed its Former Glory, our provosts do meet as Ivy Plus (including Stanford and U of Chicago). However, other circumstances mitigated against that particular creation. Those factors related to pre-existing affiliations of various of the Ivy university libraries: relationships between the New York Eleven, the Boston Library Consortium, and for Yale, the State of Connecticut libraries, to name a few. Additionally, a spate of e-mail messages between collections librarians in the Ivy libraries signaled that we had more positive feelings about affiliating with like-minded institutions with similar research and graduate programs than with membership in a common football league.

In advance of a creating a formal consortium (though by spring with a clearly expressed desire to form one), the Collections officers of half a dozen large research libraries in the northeast began working on two licenses: Encyclopaedia Britannica Online (BOL) and Academic's IDEAL license. Next, we held an in-person organizing meeting at ALA in New York City (July 1996) where we agreed to draft a Letter of Intent and issue an invitation to join a group we named NERL, the NorthEast Research Library Consortium -- our region's members of the Association of Research Libraries. While our mandate might expand over time, our initial purpose was articulated as follows: our group, either in its entirety or in subsets of interested parties, would jointly license substantial electronic resources in the name of NERL and would, if appropriate, develop the capacity to mount or archive those resources.

In July, we worked with Yale General Counsel to draft the start-up agreement. Scott Bennett, Yale's University Librarian, mailed an invitation and the Letter to his counterparts on July 28th, 1996, asking also that they designate an Official Representative to NERL. This Representative would participate in designing the formal protocols to govern NERL's interactions, requests for purchase, licensing negotiations, and joint payments. For a two year period, Yale undertook to house the activities of NERL, provide coordination from the Library, and offer access to general legal advice. As of this week, 15 libraries have signed the NERL agreement. One is in the process of signing; and two have asked to delay their decision.

Thus we became NERL and not NERD!

Subsets of NERL, even before we were quite NERL-ified, signed licenses with EBO and Academic Press. These particular licenses allow us to access the resources via the WWW at a remote server. The incentives for each of these have been very different and the negotiations were also very different.

Encyclopaedia Britannica

By the time the BOL opportunity was presented to us, the Encyclopaedia Britannica had already signed up over 400 other colleges and universities. Therefore, the license was mature, previously reviewed and signed by many institutions, librarians, and lawyers. It was as close to "boilerplate" as such a license can be, and NERL needed to make comparatively few alterations. The BOL consortial incentive is that as the number of FTE students in the consortium increases, the cost per head drops. NERL libraries achieved a substantial savings by bringing over 100,000 head count to the license.

Academic/IDEAL

At the time we began discussing the IDEAL license with Taissa Kusma and Ken Metzner, that license was in its first draft form (1/96). Because IDEAL was a new product with no US customers, and because all parties were in learning mode, the situation was vastly different to that of BOL. IDEAL took several months to complete and sign from start to finish. The business model is much more complicated and required lists and calculations as well as the customers' understanding of those calculations. Because it was our first detailed NERL (or pre-NERL) license, each of the 8 libraries involved in discussions wanted and needed to understand every phrase and had many views to express to Academic Press. We believed that if we signed the license, we could be setting a precedent for e-journal licensing language and terms, and we wanted to do it right. Indeed, I believe that a future full-text e-journal license will be much easier for us to manage next time around, as in most respects we did jointly secure an excellent model license. Much of this accomplishment is a credit to the publisher: as Academic

Press engaged in discussions with us, they adjusted terms or changed the terms of the first draft. The changes over time included important ones such as

- Enriching the breadth of user-definition
- Clarifying nicely the relationship between print and e-sub, since they are entwined in this particular model
- Moving the business model to an electronic base with print add on, as opposed to a print base with electronic add on
- Providing use and re-use language that works well for teaching and research
- Evaluation in a collaborative mode with users
- Understanding the extent and limits of institutional responsibility

We remain concerned that we were not able to obtain ILL permission for the e-version in this round, the principal remaining area that caused serious concerns for the signers.

BIOSIS -- another example

Yale has purchased BIOSIS tapes via license since 1988, so clearly this resource is not a consortial purchase for us. But I raise it as a third example here because one of our NERL colleagues has asked if they may access our BIOSIS rather than developing the infrastructure to mount it themselves. (This type of shared electronic resource deployment is part of the NERL framework, after all, and similar requests are likely as we move forward.) The Yale Library has just moved BIOSIS from NOTIS' MDAS (vanilla) interface to WebPac (world wide web) interface and we are considering an eventual move to either a SilverPlatter or OVID interface. Like BOL and Academic, BIOSIS has been a fine producer to work with. They are interested in attracting additional and better-served customers to their resource and have given us price quotes, permissions to run the database for a test period, and offers of customer support. The local loading and presentation require a considerable University support system that includes network infrastructure, hardware, human resources, licensed software, and locally produced OR vendor-licensed "middleware" to run the resource. In the case of BIOSIS via the WWW, Yale licenses WebPac from NOTIS and Yale programmers have written the "middleware" to translate the tapes to WebPac formats.

Another resource we are mounting, the Oxford English Dictionary, is more complicated: Yale licenses not only the OED itself and the Open Text system on which it runs but also, from yet another party, it licenses the programs that enable us to mount the OED at all. So, for Yale alone, at least three layers of licenses are implicated to show one product. When we deploy a resource for other libraries, the licenses grow in complexity and expense, as Yale itself becomes a licensor. I should say that NERL has not yet contemplated the licensing of enabling softwares and I don't know whether we will or not.

How to Negotiate Networked Access with Database Producers?

Obviously there is no 20-minute answer to this, nor is there a single category of answer. Here are some thoughts that strike me as important on the way to an answer:

- In many ways, negotiating a single license for a major resource is not much different than negotiating a consortial one. The differences are largely in the time it takes to consult with many partners and reach compromise; the stumbling-block issues are mostly the same ones.
- Negotiations are very diverse, at this point more different than alike. Products are different; institutions are different; consortia vary enormously.
- Necessary adjunct negotiations involve software and related goodies that are necessary to utilize the information resource.
- New products and new consortia take longer than established products and established consortia to secure agreements.
- Products and technology are in a state of flux so the license we negotiate this year may need to be revised considerably at the next negotiation time.

Some of Key Ingredients to Success for Both Parties

1. Know your goals and objectives.
2. Enter into negotiations with respect and good will; if good will erodes, stop negotiating. A marketplace, particularly in a contract environment, is very much a matter of willing buyers and willing sellers coming to agreement.
3. Be patient; this can take time. Make sure you are willing to invest the time or that someone has the time to invest.
4. Know what you **must** obtain in a contract. Librarians, for example, are adamant about such things as
 - price (no, there isn't extra money in the system for electronic information!);
 - widest possible, reasonable definition of an "authorized user";
 - ability to easily copy and download for teaching, research, scholarship, and authoring;
 - technology requirements that institutions are able to support;
 - reasonable library "responsibility" and liability clauses;
 - respect for users' privacy;
 - reasonable confidentiality clauses;
 - ability to opt out with reasonable notice;
 - a clear business model.

The biggest concern is "fair use" in an electronic content contract.

5. Know the law; understand copyright and contracts -- the relationship between them and the differences between them.
6. Keep things simpler rather than more complicated; shorter rather than longer where possible.
7. Educate your community as well as those with whom you are negotiating the license.
8. Be flexible and creative.

Where are Contracts Headed (Where are Consortia Headed?)

To clarify the issues and offer some ways to think forward along the trajectories suggested here, I conclude with a discussion of two possible outcomes for the information futures of libraries under an electronic licensing scheme and the implications of these scenarios.

First, consider this extrapolation. At the time of this writing, publishers of scientific and scholarly information are actively encouraging and cooperating enthusiastically, with libraries that gather together in consortia to obtain cost-effective bulk pricing "deals" for the purchase of on-line versions of existing journals and other databases. What can we expect next under such arrangements, particularly when they scale up to multiple consortia dealing thus with many publishers?? This begins to look like a combination of institutional economic interests working together where before there has been disunity. Now the buying power of a number of large and influential customers is being aggregated. Will such an aggregation bring with it a shift of power between the producer and the licensees?

Take this further case. Some publishers are advocating what they call a "national site license" -- that is, a single fee paid them by the research-funding authorities of a given country, in return for which all patrons in that country (or state) have free access to the electronic publishing output of the publisher with whom the wide area site license has been arranged. The information becomes akin to a public good and it certainly betokens a simplification of ways of doing business for the publisher: one price, one server, no hassles, and an assured income stream.

Extend such an ultra-wide-area licensing scenario five years into the future. Then imagine that research funds, for some reason, become tight; a new government has taken office and is squeezing the spigots wherever possible. Instead of a cutback in local institutional subscriptions (as would happen in today's print, copyright regime), might there instead be a draconian 15% cut to deal with? How might the affected publishers respond to such a situation? Would they cut prices? Cut back on their offerings? Who benefits? Who loses? Who manages the outcomes?

Let us now take a second tack. What licensing agreements have in common with the current copyright regime is that both accept the fundamental underlying idea of the nature of intellectual property inherent in a given work of authorship. Where they differ is only in the vehicle by they seek to balance users' rights and authors' (and, to be sure, and of greater economic importance here, publishers') rights and to regulate the economy that springs up around those rights. Copyright represents a set of regulations negotiated through statutory enactment, where the power of concentrated economic interests has been modulated, by the original constitutional objective of copyright (to promote progress of science and the useful arts). Licenses, on the other hand, represent a market-driven approach to this regulation. The scholarly marketplace is imperfect, but it is still a place where interests meet, deals are struck, and working arrangements between parties are negotiated and revised over time. In fact, it is possible for libraries and publishers to negotiate licenses which include the precepts of copyright (such as fair use) into the agreement.

The confrontation between the models that copyright and electronic licenses offer, moreover, further changes the imperfect market relationship in a way in which users have some advantages. Users know what their rights are under copyright statute, and that puts them in a relatively strong position to negotiate license deals. That is, users (their institutional aggregators being the libraries) already have something: What they seek from publishers is an incentive to transcend statutory obligations and privileges to a different relationship.

It is surely not unreasonable to suggest that the gap between the two ways of doing business (copyright governed and license-governed) will narrow over time in a kind of dialectical relationship. If they seem at odds just at the moment, the true interpretation is that legal and market forces are still scrambling to keep up with the changes in users' habits driven by empowering new technologies. It would not be reasonable to expect such great changes in media to arise without consequent disruptions in long-stable patterns of economic and legal relationships.

The lesson to be drawn from this meditation is perhaps no more elaborate than this: that in a time of rapidly changing technologies and uses of technologies, room needs to be left for experimentation and exploration. Both publishers and academic libraries have, naturally enough, real fears about the security of their economic livelihood in the short term -- and the larger they are, the more fears they are likely to have. Both groups are relatively vulnerable to the risks of short-term fluctuations in what they can expect from the other, but both -- in a curious kind of prisoner's game -- are least vulnerable if together they work pragmatically towards mid-term, modest solutions to pressing difficulties and leave ambitious re-engineering to a later time. The consortia/producer licensing relationship is one way of working together. Over time it may prove unnecessary or it may thrive. At the moment, we are learning about this relationship and it seems promising.

Members of NERL as of 9/20/96

Boston University
Brown University
Columbia University
U Connecticut
Cornell University
Dartmouth College
Harvard University
U Massachusetts
MIT
New York State Library
New York University
U Pennsylvania

Rochester
Syracuse University
Yale University
[Princeton signed in November of 1996]

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