

Ann Okerson: The World of Licensing: Issues, Concerns, and Promises

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My thanks to John Teskey, the Planning Group, and CARL for your invitation to join this important program. Today I would like to describe the licensing landscape and challenges and to relate them to academic libraries' overall mission.

We have much for which to thank the "new" information technologies. Though they have been years in development, it is in the 90s that we have truly begun to experience the firstfruits of their power to re-invent the way in which we go about our daily pursuits and to turn upside down assumptions about our positions, roles, and institutions. I purposefully use the word "thank," because although technology generates immense power, the power is ours to use in the ways that we devise. For many of us who were competent at our jobs, fairly certain about our careers and chosen professions, and at times even complacent about these things -- occasionally worried that we might grow stale and not face enough worthy challenges -- much of that is gone. Our agility, flexibility, and our imaginations are being stretched in new ways that -- most days of the week -- leave us breathless.

Even better is the fact that those of us who have known for a long time how to do our jobs, now have significant opportunities to engage with other stakeholders. A great deal of my own interaction with electronic information suppliers, as many of you know, relates to the pricing and licensing of electronic materials for institutional library customers, through projects such as Yale's LIBLICENSE web site(1), the LIBLICENSE-L internet discussion list(2), and licensing work both at Yale and as Coordinator of NERL (NorthEast Research Libraries consortium), a group formed to jointly license and make available electronic resources for our 18 research library members. During the course of this work, I observe that much of our libraries' information business is vastly different to what it was even 10 years ago and a lot of it could not have been predicted even 5 years ago.

What Are Some of These Changes?

1. *Sheer numbers of electronic resources.*

Thousands of information providers have jumped into the scholarly marketplace with electronic products of one sort or another: CDs, online databases, full text resources, multi-media. Many learned societies, scientific publishers, university presses, full-text publishers, vendor/aggregators, as well as new entrants to the publishing arena, now offer versions of either print-originating or completely electronic information. The numbers have ballooned in a short 2 to 3 years with no signs of abating. For example, NewJour, our online forum for announcing new e-journals, magazines and newsletters reported 3600 titles in its Web archive as of April 5, 1997, and 4500 as of October 5th, six months later -- this without the 1100 science journal titles that Elsevier is now making available in electronic form(3). Carol Tenopir's "The Data Dealers," Library Journal, May 15, 1997, describes a universe of databases numbering in the tens of thousands.

The Yale University Library alone licenses over 400 electronic resources of varying size, type, and price and reviews about two new electronic content licenses a week. We offer direct access to over 1,000 scholarly electronic journals and indirect access to many more; and we now estimate that about 6% of our acquisitions budget goes to electronic information sources, excluding our online catalogs.

2. *Licensing has become the mode of defining the electronic information deal.*

This is a very different way of working than was the traditional acquisitions mode. In some part, this situation has come into being because no consensus or national guidelines on electronic fair use or fair dealing have been achieved. For example, the U.S. CONFU group quickly began to come unstuck in reaching agreements on most of the dozen or more areas defined as needing guidelines. Interestingly enough, with the ball in the court of publishers, intermediaries, and librarians on this matter, we are finding constructive ways of working. Instead of waiting on Congress or other national bodies, a number of publishers and libraries appear to be able to make their peace together, thoughtfully and responsibly, one step at a time.

3. *The rise of aggregators.*

The costly technological investments that producers need to make to move their publications onto an electronic base; the publishing processes that are being massively re-conceived and reorganized; and not least, the compelling vision of digital libraries that proffer information to the end user through a single or small number of interfaces, with a single or modest number of search engines, gives rise to information aggregators of many sorts. Few publishers convert or create just one journal or book in an electronic format. From the viewpoint of academic research libraries, it appears that the electronic environment has the effect of shifting transaction emphasis from single titles to collections or aggregations of electronic materials as marketplace products.

In fact, several interesting "aggregating" directions bear watching and also suggest some potentially interesting directions for Canadian university presses, scholarly publishers, and government agency publications:

- Publishers of multiple journal titles are making these available through their own interfaces, as well as through non-exclusive arrangements with other providers.
- Information bundlers, such as Lexis-Nexis, OCLC, DIALOG@CARL, UMI, IAC, OVID, etc., offer large collections of materials to libraries under license. Some of these are sizable take-it-or-leave-it groupings; others allow libraries to choose subsets or groups of titles.
- Subscription agents are beginning to develop gateways to electronic resources and to offer to manage libraries licensing needs.
- Consortia of libraries are becoming significant "aggregators" of library customers and dollars for publishers and vendors.

4. *Publisher consolidation.*

Another kind of aggregation needs to be mentioned separately here: the aggregation that happens when publishers or information conglomerates merge with or buy other publishers. We have seen a great deal many such consolidations and buyouts over the last two decades and have become particularly aware of them in the STM journal arena. No doubt the primary example cited of such strategic mergers is that of Reed with Elsevier earlier this decade; and within that umbrella, the acquisitions by Elsevier Science of various journal publishers, including announcements recently of the planned acquisition of Wolters Kluwer and Current Science Group. Is this good news for information consumers? I hope it comes as no surprise for publishers here present to hear me say that librarians' experience and perception over the past years has been that this kind of consolidation has not improved our lot. The cost efficiencies of such mergers do not seem to have reduced institutional prices or price increases at all and so we are pessimistic that they will in the future.

5. *Library consortia have aggressively entered the content negotiating arena.*

While library consortia have existed for decades, and one of their primary aims has been effective information sharing, in the United States it is mostly in the last 2 to 3 years that a combination of additional state funding (for state-wide consortia), library demands, and producers' willingness to negotiate with multiple institutions have come together to make the consortial license an efficient and -- perhaps -- cost-effective way to manage access to large bodies of electronic content. Though I don't know the

Canadian consortial scene very well, it seems to me that Canada's ideal size (29 million, i.e., the same size as California; three times the size of Ohio, both places where some of the most exciting USA consortial action is happening) and the unification of research library interests through CARL, gives Canadian libraries an immense opportunity to act as one and negotiate national site licenses with powerfully favorable terms.

To sum up, electronic information is a new game; the prices are higher. Consolidating, aggregating, and all around scaling-up seem to be the name of the game and one of libraries' best strategies is, I believe, to organize ourselves, bargain well, and secure the best possible arrangements.

What are Some Challenges for the Licensing Environment:

1. *Scaling up.*

Institutional electronic content licenses are now generally regarded as negotiable, and successes of different sorts have ensued (success being defined as a mutually agreeable contract), making the parties feel that they can work together effectively in this new mode. However, negotiations are labor-intensive. Negotiation requires time (to test the resource as well as to develop the expertise and negotiate), and time is a major cost here. The current mode of one on one negotiations between libraries and their publishers seems at the moment necessary, for many reasons, and at the same time it places new demands on publishers' and libraries' staff.

- The contract that codifies the license terms is a pervasive document covering every aspect of the library/producer relationship, from authorized uses and users to technology base, duration, security mechanisms, price, liability, responsibility, etc. That is, the license describes the full dimensions of the "deal" for any resource. Those dimensions are broad and there is a great deal to work through, beyond the matters of uses and users. Where placing an order for a book or reference work is usually a straightforward act involving 2-3 people for short time, completing a deal for an electronic product involves, these days, numerous institutional players (public, selection, and technical staff, as well as users).
- Clearly, it is too early to shift the burden onto intermediaries such as subscription agencies or other vendors who have vested interests of their own. So far their intervention has been absent or not particularly successful. In fact, in some of the situations where intermediaries survey electronic databases, library customers secure less advantageous use terms than those libraries could obtain by licensing directly from the publishers.

2. *Terms of use.*

Let's begin with the good news. This area has caused some of the most anguished discussions between publishers and libraries. Initially, many publishers' contact language for electronic information was highly restrictive about both Permitted Users and Permitted Uses. Assumptions and requirements about how use ought to be contained were at times ludicrous, for example, in phrases such as "no copies may be made by any means electronic or mechanical." Through dialog between librarians and producers, who are usually genuinely eager to market their work to happy customers, much of this language has disappeared from the contracts presented to library customers. The Yale Library, for example, is now party to a number of licenses that permit substantial copying and downloading for individual learning, research, in-the-classroom teaching, library reserves, coursepacks, and related activities. The licenses of 1997 represent significant all-around improvements and surely reinforce the feeling that progress between licensors and customers is being made. While we have tended to focus our licensing worries on the areas of fair use and users rights, in fact I think this has been something we manage well and the bigger challenges now lie elsewhere.

3. *Site license definition and complexity.*

Defining a user site is no small thing; a site license can encompass anything from a single workstation to an entire campus, to a campus with branch campuses in the same or distant town -- let alone distance learning programs who knows where. Consortial licenses cover multiple sites. Consider another U.S. scaling up example: As Americans adopt managed health care and merge hospitals, a university site can include state-wide networks of teaching hospitals, clinics, and doctors' offices. We have already begun

discussions on how Yale New Haven Hospital and the Medical Library will take on a central information provision role for the practitioners of medicine throughout the state of Connecticut.

4. *Price.*

Pricing models for electronic information are in their infancy; they tend to be creative, complicated and often hard to understand⁽⁴⁾. Consortial and multi-site pricing is particularly complex. Each new model solves some of the equity or revenue problems associated with earlier models but introduces confusions of its own. While pricing of electronic resources is not strictly speaking a problem with the license itself, price is a major obstacle in making electronic agreements. At the same time, it is clear that academic libraries, particularly through their consortial negotiators, expect bulk pricing arrangements, sliding scales, early signing bonuses, and other financial inducements that publishers may not necessarily feel they are able to offer.

One subset of the pricing difficulty is what I'll call the "revenue-maintenance" or "non-cancel" requirement of a number of electronic journal publishers. For example: Yale is interested in licensing the journals of XXX publisher. To do this, Yale is frequently asked to agree to the following:

- (1) a multi-year license;
- (2) the print subscription price plus an increment for the e-version;
- (3) pricing based on this or last year's print subscriptions; and
- (4) a no-cancel clause for the duration of the license.

The latter item assures the publishers that even though the institution may in fact cancel (or perhaps substitute titles), the payment to the publisher remains undiminished. While this can be an effective startup strategy, it is a mode that libraries cannot continue for very long -- for obvious reasons -- and my librarians both within Yale and in our NERL consortium have signaled that they will no longer agree to expenditures of their subject funds under these terms.

5. *Bundling/packaging/aggregating.*

The electronic collections offered to the academic library marketplace frequently include titles librarians would not have chosen for their institutions, had these resources been unbundled. This has been an issue in several of Yale Library's negotiations. Say that the publisher of a large number of quality journals or a significant aggregator of databases makes only the full collection available in e-form. By this means, from two different suppliers, the Yale Library recently "added" 50 electronic journal titles and a hundred databases to its cohort, titles it had chosen to NOT purchase in print. I am skeptical that librarians will be willing to continue to support materials they do not want or need for their clients. An interesting tension shows itself here: on the one hand, publishers and producers achieve economies of scale in producing and selling multiple electronic products together and presumably can pass these savings on to libraries; on the other, libraries don't benefit from an economy of scale that gives us resources beyond any that we or our users want.

6. *Liability & trust.*

One of the most vexing issues for producers and their licensees has been the producer's assumption that institutions can and ought to vouch for the behavior of individual users (in licenses the sections that deal with this matter are usually called Authorized or Permitted Users and what Users may do under the terms of a license is called an Authorized or Permitted Use) and that individual users' abuses of the terms of a license can, in fact, kill the deal for a library or a whole group of libraries. Working through this matter with provider after provider in a partnership/cooperative approach poses many challenges. In fact, this matter may be a microcosm of a larger issue: the development of the kind of trust that must underlie any electronic content license.

7. *The special challenges of consortia.*

Ideally, groups of libraries can negotiate favorable usage terms and prices with producers. Publishers in turn can save substantial legal and marketing costs by dealing with groups of libraries. In practice, both licensors and licensees still have much to learn about how to operate in this scaled up environment. Some of the particularly vexing issues, for example, include:

- Not all producers desire to negotiate with consortia; some are not able to negotiate with consortia at all.
- In the early days of making a consortial agreement, the libraries may not achieve any efficiencies because all of them (and their institutional counsel) may feel the need or desire to participate in the negotiating process. Thus, in fact, a license for 12 institutions may take nearly as long to negotiate as 12 separate licenses.
- As one who at times attempts to bring 18 large libraries into consortial deals, I observe that this form of cooperation comes no more easily to libraries than does cooperative collection development in print form. It is not easy to get a consortium, which is after all composed of individual libraries, to agree to a single license, at least in early days.
- Consortia overlap greatly, particularly with existing bodies such as cataloging and lending "utilities" offering consortial deals to their members. It seems that every library is in several consortia these days, and many of us are experiencing a "competition" for our business from several different consortia at once for a single product's license. The matter of "consortial muddle" badly cries to be sorted out.
- No one is sure precisely what a consortial "good deal" comprises. That is, it is hard to define and measure success. The bases for comparison between individual institutional and multiple institutional prices are thin and the stated savings can often feel like a sales pitch.
- Small institutions are more likely to be unaffiliated with large or powerful institutions and left out of seemingly "good deals" secured by the larger, more prosperous libraries or consortia. Surprisingly enough, in the U.S. private schools can be at a disadvantage since they are generally not part of state-established and funded consortial groups. NERL tries to help the affiliation matter along by including small regional libraries in our group licenses, whenever the producer permits and the small libraries express an interest.
- In fact, treating individual libraries differently to collectives may, in the long run, not be in the interests of publishers let alone those libraries.

8. *Save the best for last: Interlibrary loan and resource sharing.*

It should come as no surprise to you that, at least in the United States, the matter of Interlibrary Loan or Resource-Sharing is the most vexing of all in full-text licenses. Many hours have been given over to this topic, both at the national level and in numerous specific negotiations throughout the country. Very rarely is any such use permitted by publishers or vendors, though there are a handful of exceptions. Every publisher knows he is right to NOT open the thin end of the wedge to uncompensated uses; every librarian knows that there should be some leeway in a license to allow shipment of e-materials to users or libraries who are not able to gain or afford access. The concept of fair use and the underlying purpose of copyright law (to balance rights of creators/readers) support librarians in our stand, we are sure. This past summer, a straw poll on the Liblicense-I list⁽⁵⁾ showed just how adamant librarians are about this point of principle -- as adamant as publishers are in their public position papers!⁽⁶⁾ What are we to do with this bone of contention? My suggestion here is that our only productive course of action is to develop together some experiments that test the conditions under which such delivery would in fact be workable and acceptable to both parties. I suspect such an experiment between willing buyers and sellers could be designed and we could learn much from it.

The Bigger Picture

Before I conclude, a few observations that put some context around the kind of discussion we are engaging with here in Ottawa:

It is easy in the exciting digital information environment to become carried away with the thrill of the marketplace chase -- for it is thrilling indeed -- and lose sight of how this all fits with our larger research and academic library missions. I have found a touchstone for myself in recent months in the most exotic book-buying trip I have yet taken for Yale: not quite Indiana Jones and the Temple of Doom, but there were close moments.

In August 1996, at a time when we were without a Southeast Asia curator for our important collection in this area, I made a trip to restore and sustain some working links with publishers and distributors there. One stage of

the trip led me to Phnom Penh, Cambodia. At that moment, Cambodia was living through a privileged interlude of quiet and relative prosperity, since shaken by coup and civil unrest (though our contacts there say that matters are less dire than the western press portrays them). My specific purpose there was to establish a link with a local source of supply for the thin trickle of materials published in Phnom Penh: mainly newspapers, reports, and books by NGOs -- the international non-governmental agencies and organizations that seek to support the development of the country.

I will not give you my travelogue (the slides are on the web(7)). My point today is to report some lessons learned.

1. Electronic texts matter, but of course so do books, newspapers, journals -- and in every case they "matter" by their relevance to our educational institutions' fundamental academic missions and programs. For example, Yale has a strong southeast Asia program, at the moment one of our leading lights being Ben Kiernan, prominent and controversial scholar of recent Cambodian history and head of the Yale program that is documenting the terrible genocide of the Cambodian 1970s.(8) For Ben and his students, the print materials I searched for, even though few in number, are of immense value. There is no electronic product or text that can currently replace them and there may not be for decades.
2. At the same time, the power of electronic resources to extend the range of our mission is potentially enormous. While in Cambodia, I was guided by two remarkable women: Margaret Bywater, an Australian librarian funded by the Asia Foundation, and Sister Luise Ahrens, a Maryknoll nun. Both have lived there for several years and have their fingers in a number of worthy activities, including rehabilitation work for landmine victims. But more relevant to my thoughts today is their work with the University of Phnom Penh, where Margaret is the library-builder and Sister Luise describes her position as "oh, something like associate vice rector in charge of actually making something happen once in a while" -- no small challenge in a University whose buildings literally needed to have the barnyard excrement sluiced out of them after the Khmer Rouge left, and whose leadership needs to be recruited from a generation of Cambodians for whom literacy -- even ownership of a pair of eyeglasses -- was a capital offence and ruthlessly punished.

As these people struggle to rebuild the University, they live at the moment with only the most tenuous of e-mail links to the outside world. It was only this summer that Cambodia gained its own Internet service provider -- and who knows who reliable that service is or will be for some years to come. I could not help thinking, as I looked through the then one large room that held all the books the University owns -- an old edition of a western encyclopedia, some science textbooks from Australian universities, and oddments better suited to an attic than a library -- I could not help think that with only the umbilical cord of a network connection and some hardware, there were already resources potentially available to this struggling institution far more abundant than anything they can ever hope to buy in the traditional way.

I believe and hope that one of the real blessings of the Internet for learning and teaching worldwide will be in the way it allows us to build new partnerships and ways of sharing that let us extend the reach of the international learned community to more people in more places than has ever been possible before.

We cannot and will not do that unless we maintain our own sense of our mission and expand our vision about the way information comes to us and is used. We cannot do that unless we too become creators and distributors of the riches of our own institutions -- as many libraries are already beginning to do through the conversion of important print materials, digitization projects, and digital library research. For the moment, the points of negotiation I have described in this talk -- the details of license contracts, the impasse over interlibrary loan -- may seem obsessively minute in many ways. But they do represent the larger issue very clearly: will the academic community retain some control of its own scholarship? will we grow into smarter business thinkers about the way we manage our information relationships? or Will the power of technology leave us in a pure market situation, buying information-by-the-drink, and unable to build the collaborations we so much desire? Our work and effort in the licensing area is guided by our larger passionate commitment to the values that universities and their students, scholars, and scientists embody for society and to the importance of securing and advancing the leadership of our learned communities in the decades to come.

REFERENCES and URLs

1. <http://www.library.yale.edu/~llicense>
2. Liblicense-l@lists.yale.edu. For access to the archives or to subscribe to the list, see the headers at the LIBLICENSE web site in #1.
3. <http://gort.ucsd.edu/newjour/>
4. A LIBLICENSE-L message of February 12, 1997, enumerated a dozen different pricing models for electronic
5. <http://www.library.yale.edu/~llicense/straw.html>
6. See the following papers: "IPCC Position Statement on Libraries, Copyright and the Electronic Environment", and "The Use of Digitised Copyright Works in Libraries; a statement on behalf of electronic, book and journal publishers by the Federation of European Publishers", November 1996.
7. <http://www.library.yale.edu/~okerson/cambodia.html>
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