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## Copyright and E-Resources : Licensing and Access Issues

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# Copyright and E-Resources: Licensing and Access Issues

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January 23, 2014



# roadmap

1.0 intro to licensing

2.0 practice tips for licensing in the library

3.0 counseling authors

4.0 resources & contact info



# what is a license?

- An agreement between two parties, where one party gives another permission to do something.
- A copyright license is an agreement by one party to let you use their copyrights in a particular work. In a contract, the rightsholder *licenses* you their work, in exchange for your payment and/or agreement to terms of use.
- So it's based on a copyrighted work – but the terms of use are written in the contract, rather than laid out in copyright law.



# fair use? Section 108?

- Contractual obligations trump legal rights such as Section 107 and Section 108 library rights.

## 17 USC 108(f)(4)

“Nothing in this section ... in any way affects the right of fair use as provided by section 107, or any contractual obligations assumed at any time by the library or archives when it obtained a copy or phonorecord of a work in its collections.”



# open licensing

- Creative Commons and open source both rely on licenses
- Distribution & reproduction permitted
- Not for money, but for agreement to terms of use (such as, “attribution”, “no derivative works”, “share alike”, “non-commercial use”)



# licensing scenarios in academia

- Licensing (acquiring) content by the library, for end users
- Authors depositing content in institutional repositories
- Publishing services offered by library, university, etc.
- Library / archives / special collections content being published by vendors
- Faculty/Student authors negotiating publisher contracts
- Faculty/Staff negotiating to include third-party content in their publications or presentations
- Campus presses, editorial boards, scholarly societies negotiating agreements with (a) submitting authors, & (b) publishers



# Licensing is a process of negotiation.

You SHOULD scrutinize and read carefully.

You CAN

- Strike whole clauses or language within;
- Propose alternate language;
- Insert language; and
- Attach addenda (which inserts language), such as ARL SPARC's Author Addendum

Strategies:

- Explain when state law or campus policy forbids or requires particular terms
- Ask other libraries for the terms they got / negotiated.



# Practice Tips

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What clauses should we watch out for or negotiate for?

2.0 practice tips



# Standard Clauses to Scrutinize

- Indemnification clauses.
  - May be illegal for state universities to indemnify the publisher.
  - Also, inequitable and silly, since libraries can't control end user behavior. Reject / modify any clause that requires libraries to be on the hook for user behavior. Negotiate to the library making “reasonable efforts” to correct or address misuse if the library has “actual knowledge”.
  - On the other hand, the content provider (licensor) should indemnify the library for content that they provide that turns out to be illegal.



# Standard Clauses to Scrutinize

- **Jurisdiction / Choice of forum clauses.** May be illegal for state universities! Pick your own jurisdiction or have the contract be silent on jurisdiction.
- **Unilateral alteration of terms.** Don't accept this.
- **Termination clauses.** Negotiate for reasonable notice for termination, based on "material breach" of the license terms.
- **Disclaimers of warranty.** The Licensor should warrant reasonable performance as promised.
- **Confidentiality of terms clauses.** State agencies may not be able to accept these, and they're not advisable in any case.



# E-resource Clauses to Scrutinize/Negotiate

## Library issues

- **Renewal / cancellation clauses.** Pay careful attention to the amount of notice you have to give, and make sure they have to give you notice well in advance of your notice window – watch out for automatic renewals.
- **Archival / use rights.** After the license ends, do you still have access to the content? Can you download it locally? For how long?
- **Scholarly sharing / Interlibrary loan.** Can you lend the materials? Especially important for ebooks. Should permit or not abrogate rights under 17 USC 108.
- **Embedding into other systems.** Should permit or not foreclose incorporation into systems for otherwise permitted uses (ereserves, course management systems).



# E-resource Clauses to Scrutinize/Negotiate

## User issues

- **Definition of users.** Alumni? Consortial members? Public coming on to campus?
- **Simultaneous users.** How many?
- **Disabled users.** Can you explicitly provide access to disabled users? Or at least, can you not expressly foreclose that?
- **User privacy.** Your vendor should adhere to state user privacy law for libraries, and to your user privacy policy.



# E-resource Clauses to Scrutinize/Negotiate

## User rights to use content

- **Fair use.** Should permit (“uses consistent with fair use”) or not abrogate user rights under copyright law, including fair use (17 USC 107).
- **Educational uses.** Should permit or not abrogate educational uses as in 17 USC 110. For instance, ereserves/course management.
- **Public domain content.** No restrictions on use of public domain content should be accepted. Insert language limiting restrictions to “content protected by copyright”.
- **Embedding into other systems.** Course management systems, for example.
- **Data mining.** Can your researchers download to data mine?



# E-resource Clauses to Scrutinize/Negotiate

## Hidden or surprise terms

- **Hidden restrictions.** Watch out for included content with extra restrictions (*Harvard Business Review* in Ebsco; see [http://www.ala.org/rusa/sections/brass/brasspubs/publications/statement\\_hbr](http://www.ala.org/rusa/sections/brass/brasspubs/publications/statement_hbr) )
- **Additional user-oriented licensing.** Watch out for services that require users to click-through agreements, or add “pop-up” agreements on content. These may be unlawful for state employees to sign, or have unlawful, unfair, or simply non-negotiated restrictions (CCC “get it now” services).



# E-resource Clauses to Scrutinize/Negotiate

## Author rights

Authors on your campus whose works are accepted to journals included in the database, retain rights to

- **Scholarly & educational purpose uses** – Teaching & research; talks; re-use in later papers
- **Disseminate via repositories** – self-archive & deposit into local & funder repositories (e.g., NIH PubMed)

See Model Language for Author Rights in Library Content Licenses (RLI 269 April 2010), <http://authorrights.wordpress.com>



# general principle in licensing content

## SILENCE is GOLDEN.

Where copyright law defaults would benefit you, silence is preferred to explicit contract language.

Case study: *AIME v. UCLA*.

UCLA licensed videos from Ambrose Media, then digitized the videos and put them on their campus course management system. AIME sued and said that was a “distribution”. The term wasn’t defined, and the court thought it looked more like a “performance”. UCLA wins.



# Upcoming

## Library/Vendor Agreements:

- Does the vendor appropriately discount its subscription based on gold OA (author paid OA) in its database?
- Can you account for your faculty contributions of papers & editorial services?
- Can pay-per-use vendors effectively discriminate open access and public domain content? (CCC's automated systems will charge for open access, public domain, and even content that it doesn't appropriately license.)

**First sale** : *Kirtsaeng*, *ReDigi* & digital first sale, and copyright reform



# Counseling Authors

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What rights should authors keep?

3.0 counseling authors



# Author Publication Agreements

- Authors shouldn't indemnify publishers
- Try to negotiate non-exclusive license, or license with limited exclusivity, instead of assignment.
- If that fails, negotiate particular clauses or use SPARC Addendum  
<http://www.sparc.arl.org/resources/authors/addendum>
- Right to re-use content / figures in later work
- Right to distribute and reproduce content for non-commercial purposes, including
  - Right to distribute content to colleagues / students
  - Right to post papers on website
- Right to put into institutional / funding repositories



# Author Use of Third-Party Content

- Fair use
- Public domain
- Creative Commons / openly licensed content
- STM Agreement - <http://www.stm-assoc.org/permissions-guidelines/>
- Licensed Content – <http://libraries.mit.edu/scholarly/publishing/using-figures-from-major-publishers-in-new-scholarly-articles/>



# Resources

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Where to go for more information

4.0 resources etc.



# library licensing & copyright resources

- lib-license-l mailing list, <http://liblicense.crl.edu>
- Tomas Lipinski (2013) *Librarian's Legal Companion for Buying and Licensing Information Resources*
- Lesley Ellen Harris (2009) *Licensing Digital Content : A Practical Guide for Librarians*, 2d ed.



# library licensing & copyright resources

- American Association of Law Libraries, Procurement Toolkit & Code of Best Practices for Licensing Electronic Resources, <http://www.aallnet.org/main-menu/Advocacy/vendorrelations/docs/procurement-toolkit.html>
- Association of Research Libraries, Principles for Licensing Electronic Resources (1997) <http://www.arl.org/storage/documents/publications/licensing-principles-1997.pdf>
- ARL, Marketplace & Licensing, <http://www.arl.org/focus-areas/scholarly-communication/marketplace-licensing>
- California Digital Library, License Agreement Checklist <http://www.cdlib.org/gateways/vendors/checklist.html>
- NorthEast Research Libraries, Model License, <http://www.nerl.org/nerl-documents/nerl-model-license>



# professional licensing resources

- Susan Bielstein (2006) *Permissions, A Survival Guide: Blunt Talk About Art as Intellectual Property*
- Al Kohn (2010) *Kohn on Music Licensing*, 4<sup>th</sup> ed.
- Richard Stim (2013) *Getting Permission: How to License and Clear Copyrighted Materials Online and Off* (Nolo, 5<sup>th</sup> ed.)
- Lawrence Rosen (2004) *Open Source Licensing: Software Freedom and Intellectual Property Law*, available at <http://www.rosenlaw.com/oslbook.htm>
- Peter Suber (2013) *Open Access*, available at <http://mitpress.mit.edu/books/open-access>

4.0 resources etc.



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Credits: MS PowerPoint, “Paper” template

4.0 resources etc.