

Principles for Licensing Electronic Resources

Final Draft
July 15, 1997

Introduction

License agreements are a fact of life in conducting business in the electronic environment. Providers of electronic information resources are employing licenses as a legal means of controlling the use of their products. In the electronic environment where the traditional print practice of ownership through purchase is being replaced by access through license, libraries need to be aware that licensing arrangements may restrict their legal rights and those of their users. As responsible agents for an institution, librarians must negotiate licenses that address the institution's needs and recognize its obligations to the licensor.

To help provide guidance in this continuously evolving environment, the American Association of Law Libraries, American Library Association, the Association of Academic Health Sciences Libraries, Association of Research Libraries, the Medical Library Association, and the Special Libraries Association have combined to develop a statement of principles. These six associations represent an international membership of libraries of all types and sizes. The intent of this document is two-fold: to guide libraries in negotiating license agreements for access to electronic resources, and to provide licensors with a sense of the issues of importance to libraries and their user communities in such negotiations.

The Special Libraries Association provided funding to support the development and distribution of the principles. The Principles are available on the Web (<http://arl.cni.org/scomm/licensing/principles.html>).

Legal Background

A license agreement is a legal contract—"a promise or set of promises constituting an agreement between the parties that gives each a legal duty to the other and also the right to seek a remedy for the breach of those duties. Its essentials are competent parties, subject matter, a legal consideration, mutuality of agreement, and mutuality of obligations." (*Black's Law Dictionary*, 6th edition, 1990, p. 322) Key to the concept of a contract is the fact that it is an agreement, a mutually acceptable set of understandings and commitments often arrived at through discussion and negotiation. Most commercial contracts are intended to spell out the mutual understandings between buyer and seller for products or services.

Although the original contract document may be the work product of either the buyer or seller, 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 (for example, in the United States, such uses as fair use, interlibrary loan, and other library and educational uses);
- 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.

Given the obligations that a contract creates for an institution and the possible liability associated with not meeting those obligations, most institutions will delegate the authority to sign contracts to a specific office or officer within the institution. In many institutions, this signatory authority will reside in the purchasing department, legal counsel's or vice president's office, or the library director's office, although in some institutions, a library staff member may be granted authority for signing license agreements. Nevertheless, library staff will often be responsible for initial review and negotiation of the material terms of the license because they have the most knowledge of the user community and of the resource being acquired. Library staff should be well informed of the uses critical to the library's user community (for example, printing, downloading, and copying).

An important category of license agreements is that including "shrink wrap" and "click" licenses. Such licenses are commonly found on the packaging of software, appear when software is loaded, or appear, sometimes buried, on Web sites. The terms of these licenses are made known to the user at the time the product is purchased, or just before or during use. The user has only two options: accept the license terms or do not use the software, electronic product, or Web site.

Traditional contract terminology defines these agreements as "contracts of adhesion," because there are no formal negotiations between licensor and licensee. Hence, the rules of use are imposed by one side, rather than evolved through a discussion leading to a mutual understanding or "meeting of the minds." While many courts reject these contracts or rewrite particular terms on the basis of equity, one cannot assume that the terms are unenforceable. In fact, some states are in the process of passing legislation that makes shrink wrap or click licenses enforceable. A purchasing library should consider contacting the licensor directly to determine if there are any license terms which can be modified to fit the special needs of libraries. Often, if there are competing products which can satisfy the user's needs equally well, exceptions to the form agreement may be negotiated. If negotiation is not possible, it is suggested that legal counsel be consulted for an opinion of enforceability prior to accepting or rejecting the product.

The following principles are meant to provide guidance to library staff in working with others in the institution and with licensors to create agreements that respect the rights and obligations of both parties.

Principles

- 1 A license agreement should state clearly what access rights are being acquired by the licensee—permanent use of the content or access rights only for a defined period of time.
- 2 A license agreement should recognize and not restrict or abrogate the rights of the licensee or its user community permitted under copyright law. The licensee should make clear to the licensor those uses critical to its particular users including, but not limited to, printing, downloading, and copying.
- 3 A license agreement should recognize the intellectual property rights of both the licensee and the licensor.
- 4 A license agreement should not hold the licensee liable for unauthorized uses of the licensed resource by its users, as long as the licensee has implemented reasonable and appropriate methods to notify its user community of use restrictions.
- 5 The licensee should be willing to undertake reasonable and appropriate methods to enforce the terms of access to a licensed resource.
- 6 A license agreement should fairly recognize those access enforcement obligations which the licensee is able to implement without unreasonable burden. Enforcement must not violate the privacy and confidentiality of authorized users.
- 7 The licensee should be responsible for establishing policies that create an environment in which authorized users make appropriate use of licensed resources and for carrying out due process when it appears that a use may violate the agreement.
- 8 A license agreement should require the licensor to give the licensee notice of any suspected or alleged license violations that come to the attention of the licensor and allow a reasonable time for the licensee to investigate and take corrective action, if appropriate.
- 9 A license agreement should not require the use of an authentication system that is a barrier to access by authorized users.
- 10 When permanent use of a resource has been licensed, a license agreement should allow the licensee to copy data for the purposes of preservation and/or the creation of a usable archival copy. If a license agreement does not permit the licensee to make a usable preservation copy, a license agreement should specify who has permanent archival responsibility for the resource and under what conditions the licensee may access or refer users to the archival copy.
- 11 The terms of a license should be considered fixed at the time the license is signed by both parties. If the terms are subject to change (for example, scope of coverage or method of access), the agreement should require the licensor or licensee to notify the other party in a timely and reasonable fashion of any such changes before they are implemented, and permit either party to terminate the agreement if the changes are not acceptable.
- 12 A license agreement should require the licensor to defend, indemnify, and hold the licensee harmless from any action based on a claim that use of the resource in accordance with the license infringes any patent, copyright, trademark, or trade secret of any third party.

- 13 The routine collection of use data by either party to a license agreement should be predicated upon disclosure of such collection activities to the other party and must respect laws and institutional policies regarding confidentiality and privacy.
- 14 A license agreement should not require the licensee to adhere to unspecified terms in a separate agreement between the licensor and a third party unless the terms are fully reiterated in the current license or fully disclosed and agreed to by the licensee.
- 15 A license agreement should provide termination rights that are appropriate to each party.

Appendices

A. Terms to be Defined by the Licensee Within a License Agreement

A license agreement should define clearly the terms used and should use those terms consistently throughout. The licensee should take responsibility for defining the following terms appropriate to its user community:

- archive
- authorized use
- authorized user
- concurrent use
- institution
- local access
- local area network
- remote access
- simultaneous use
- site
- wide area network

B. Resources on Licensing

Brennan, Patricia, Karen Hersey, and Georgia Harper. *Licensing Electronic Resources: Strategic and Practical Considerations for Signing Electronic Information Delivery Agreements*. Washington: Association of Research Libraries, 1997. Also on the Web (<http://arl.cni.org/scomm/licensing/licbooklet.html>).

"Liblicense: Licensing Electronic Resources." Web site and Discussion List. 1996. (<http://www.library.yale.edu/~llicense/index.shtml>).

University of Texas System. Contains a range of resources related to copyright in the library. Includes an interactive Software and Database License Agreement Checklist. (<http://www.utsystem.edu/ogc/intellectualproperty/cprtindx.htm>).

Members of the Working Group

American Association of Law Libraries, Robert Oakley

American Library Association, Trisha Davis

American Library Association, Association for Library Collections & Technical Services, Collection Management and Development Section, Chief Collection Development Officers of Large Research Libraries, Brian Schottlaender

Association of Academic Health Sciences Libraries, Karen Butter

Association of Research Libraries, Mary Case

Medical Library Association, Karen Butter

Special Libraries Association, John Latham