

Licensing Digital Content for Your Library

by Lesley Ellen Harris

One of the early articles I read on licensing digital legal materials had to do with a lawyer licensing content on a CD-ROM only to find out that at some point his license expired and he was no longer permitted to access that content (unless he acquired a new license.) This was quite a surprise to the lawyer, who was used to having continuous access to any print books, treatises, or court cases in his print library. And it is a lesson to all of us. First, it is important because we realize that we are witnessing a revolution in how information is purchased, stored, and accessed. Second, licensing rather than ownership raises a whole series of issues not previously experienced by librarians. Unlike signing a purchase order for a new print book or print periodical, licensing digital information often involves negotiating a license agreement or contract with the owner of the digital content for use in your library. Third, we learn that licensing is new to everyone, including lawyers. Librarians faced with negotiating and interpreting licensing agreements should get some comfort in the fact that they are not alone in trying to understand this new, technical, and convoluted way of acquiring materials.

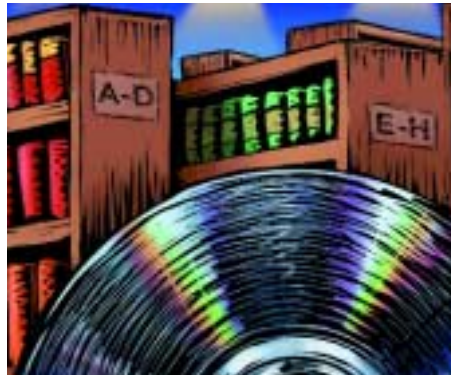
The Licensing Agreement

A licensing agreement is a legally binding contract between two parties. If you are licensing digital materials like books, treatises, periodicals, and databases, the licensing agreement will set out the conditions of use of the digital content—at a specific price for a specified period of time. The agreement constitutes the terms and conditions that you have agreed upon.

Licensing agreements may be negotiable or non-negotiable. A negotiable agreement is one where the parties to the agreement discuss and agree upon what terms and conditions should be included in the agreement. When licensing digital information for use in your library, you will be able to negotiate with the owner various terms and conditions in the agreement, such as price for the material, and who may use that material. A non-negotiable agreement is one where the terms and conditions in the agreement are set forth by one party and must be accepted by the other party if s/he wants the goods/services supplied. For example, you would find a non-negotiable agreement when purchasing software from your local computer store.

Several terms that you should be aware of when agreeing to negotiable or non-negotiable licenses are discussed below.

Who is part of the agreement? The parties to the agreement are the licensor and licensee. The owner of the digital information is the licensor—i.e., the publisher. The licensee is your library, the party obtaining access to that digital information (usually for use by end-users, lawyers, etc.). The agreement will contain your mailing address, and it's a good idea to also include e-mail addresses since much of your correspondence during and after negotiations may be via e-mail.



What's covered by the agreement?

It is vital that your agreement is clear as to what content is being licensed. Is your library licensing the electronic version of a print publication, or an electronic-only periodical or database, and what content is covered by the licensing agreement? You will want to define whether such content includes full-text articles, abstracts, table of contents, court cases, headnotes, indices, and any new or special online products, sections, or services that may be made available only online.

Do you need to define certain words?

A good licensing agreement is one that is clear to the parties who sign it, and to others who will be interpreting it and applying its terms and conditions to particular circumstances subsequent to the signing of the license. The agreement should therefore define terms whose meaning may be unclear or may have more than one meaning. Terms that you should consider defining include *territory*, *content*, *authorized uses*, *authorized users*, *premises*, and *licensed materials*. One rule I like to recommend in choosing which words to define is that if a word is being used other than in its ordinary dictionary

meaning, then include that "special" meaning in the agreement.

What goes into the license? This clause sets out the rights being licensed to the library by the publisher/owner of the digital information. The rights may be non-exclusive or exclusive. Non-exclusive means the owner may grant another organization the right to use the same material. For example, Publisher X may grant the right to use its content to Library A, Library B, and Library C. Exclusive means that the publisher may only grant the content to one party/library at any given time. Most library license agreements are on a non-exclusive basis.

The license sets out the permitted uses. What uses does your library require in relation to this online content you are licensing? Do you need to be able to view, reproduce, store, or save copies during the duration of the paid online subscription, (i.e., on a hard drive or other digital information storage media)? What about the ability to search, browse, retrieve, display, download, print, forward electronically to others, e-mail to oneself, fax to oneself or to a colleague, include in a Web site, intranet, extranet, LAN, WAN, or other closed network (or Web site that is password-protected)? These are all things that may be addressed in your agreement. Talk to the lawyers, paralegals, and others who use your library and see what their needs are, and make sure your licensing agreement reflects this.

Many librarians wonder if electronic inter-library loan ("ILL") is permitted for the content licensed under the agreement. Again, this is something you may have to negotiate if you would like ILL included. The inclusion of ILL is somewhat controversial and agreements vary on whether to include it or not. If you require it, then ask for it in your agreement.

What are the publisher's obligations?

This clause sets out what the licensor/publisher is obliged to do under the agreement. The licensor is providing you with content, so you will need to address the following issues related to content:

- In what format will the information be provided to you (i.e., CD-ROM, diskette, online)?
- Will you need to access the information from the publisher's server?

- If you are receiving a CD-ROM, will it be in working order and free of defects?
- If you are accessing the owner's server, what about server problems? Will there be back-up servers?
- Will the owner provide technical support?
- How often will the content be updated? Monthly? Weekly?
- Will you be notified of changes to content?

It is important that your agreement address in what format the material will be supplied to you, when it will be supplied, and what technical or other support you will receive in the event that there is a problem accessing the information.

What are your obligations? As a user of information, you have certain obligations towards the owner of the material. The owner will want to place restrictions on how to use his/her material in your library. Here are some examples of restrictions on usage you should consider:

- Will you be allowed to print out the material, forward the material via e-mail, include the material in a database?
- Will you be required to monitor illegal uses of the content? (Generally you should not be obligated to police illegal uses, but perhaps to inform the licensor of any illegal uses that you may spot.)
- Do you have to keep statistics regarding usage of the content?

How much do you pay for the content? How will you be paying the licensor for use of the material? Will the licensor be paid per use of material (e.g., per article), for time the materials are accessed, or perhaps a set fee for a specified period of time with unlimited access during that time? Again, there are no standards for method of payment—it depends on what works for the parties involved. You might have different arrangements with different publishers for different types of content, depending on both your and the publisher's preferences.

How long does the agreement last? As set out in my opening paragraph, duration of the licensing agreement has an important role in

licensing digital content. The agreement can specify a certain date that it will terminate or a certain length of time that it will continue for. Something to consider including in your agreement is an automatic renewal clause—for example, that the agreement will renew automatically under the same conditions and terms—by inserting a renewal clause in the agreement. This would be provided both parties to the agreement are satisfied with it and would like it to automatically renew.

The agreement should address how and when the agreement can be terminated. You can include the right to terminate the agreement for serious violations of the terms and conditions in the agreement or include termination of the agreement for any reason, provided notice is given to the other party. Automatic termination is another option, whereby you set forth in the agreement what events automatically end the agreement. Reasons for invoking automatic termination might include default in payment, bankruptcy, or material breach.

How can the content be used? This part of the agreement will delineate how your library and its patrons can use the licensed digital information and what uses of the information are prohibited. The publisher will want to place limitations on how the information can be used and where it can be accessed. For example, all alterations may be prohibited, including the alteration or removal of authors' names. The library may also be prohibited from making multiple copies of the licensed information. The owner may prohibit distribution of the licensed materials in a number of ways—from prohibiting distribution to library patrons to prohibiting distribution on an unsecured electronic network.

It is important to clearly set out how your library and its patrons are allowed to use the licensed information. Keep in mind the following questions:

- How are you allowed to use the information?
- What are the consequences of unauthorized use?
- What impact will the usage restrictions have on your library and its patrons?

Set forth in the agreement what uses are permitted and what uses are prohibited.

Who may access the content? It is important to determine in your licensing agreement who will be authorized to use the digital information being licensed. How will authorized users be defined? Will it exclude certain patrons of library and library staff? Will there be any restrictions on the users—restrictions on who is allowed to access the information and where it can be accessed?

The owner of the digital information may want to limit who may access the materials and where. It is important to ensure that these parts of the contract are broad enough to serve your patrons and your staff. If your patrons are denied access to the information or unable to access them from a convenient location, this can be problematic. For example, is access only available from the premises of your library? What about libraries in other counties, or what about remote, or home access? Some authorized users you may want to consider in your agreement include lawyers, paralegals, researchers, students, other employees, temporary and contract workers, and if applicable, the public.

Is your library the police? The publisher may require your library to take security precautions, such as requiring passwords for use of its materials. It may also want your library to track usage of their materials. Although it is not unreasonable to take security precautions, do not guarantee the licensor that you can prevent unauthorized use of the materials by your patrons. This is something that you cannot prevent no matter how effective your security precautions are. It is acceptable to agree to have security precautions in place, but do not promise that you will prevent all unauthorized use of the licensor's materials.

The licensor may also want your library to track usage of its materials: who is using their materials, how often is it being used. Tracking usage raises the question of privacy. Monitoring how and when your patrons are using licensed materials may be an invasion of their privacy. It also requires staff time and equipment, such as software, and even hardware to conduct this monitoring. Before agreeing to track usage, think about the privacy of your patrons and the other costs involved for your library. If you do agree to track usage, it is a good idea to inform your patrons about this practice.

(continued on page 30)

Basic Contractual Terms

Basic contractual terms or boilerplate clauses are general clauses found in licensing agreements. Below are number of boilerplate clauses that you should consider including in your licensing agreement.

Confidential information: Those licensing digital information may want to have certain aspects of your agreement (i.e., payment) kept confidential from their competitors and customers. However, if your library is government-operated and subject to access to information legislation, you should not agree to keeping the terms of the agreement confidential. You may want to keep the usage and users of the digital information confidential. If so, make sure the agreement is very specific about what is to remain confidential and limited to that information only.

Warranties: Warranties are promises that the licensor makes to you in the agreement. For example, the licensor may warrant that it has not infringed the intellectual property rights or other rights of a third party when providing your library with the materials. The licensor may also warrant that s/he has the authority to enter into the contract.

Indemnity and limitation of liability:

An indemnity clause states that the licensor must pay the cost of any legal expenses and other claims that arise from breaching the warranties in the agreement.

A limitation of liability clause sets out how much and what kind of damages the licensor will pay for. The licensor will want to limit its liability by restricting the amount of damages and excluding certain kinds of damages and harms.

Remedies: A remedy clause provides for certain remedies in cases there is a breach of the contract. Examples of remedies include court injunctions to stop

an action harming one of the parties to the agreement, and lawsuits to obtain monetary damages.

Dispute resolution: This provision of the agreement provides a means for resolving disputes between the parties to the agreement. Examples of dispute resolution techniques often included in agreements include mediation (where both parties sit down with a neutral third party to resolve their dispute), and arbitration (where a neutral third party is appointed and renders a decision on behalf of the parties). Dispute resolution is a quicker and less expensive alternative to the courtroom.

Force majeure: A force majeure clause provides for the contract to be either suspended or terminated because of events beyond the control of either party. Examples of these events would be acts of nature, such as natural disasters, wars, "Acts of God," or the failure of third parties (i.e., suppliers or subcontractors) to perform their obligations. It is important that the force majeure clause covers only those events that are beyond the control of the parties—not those that are within control. It is a good idea to include examples of the events that will excuse performance under the contract.

Governing law: It is important to have a clause stating what laws govern the agreement. This will help in case of any dispute under the agreement. If your library is part of a state institution, you may be required to have the laws of this state govern your agreement. Be aware of your institution's policies on agreements in general.

Amendments: An amendment clause states that any changes to the contract must be in writing and signed by the parties. This will ensure that no changes are made to the contract without agreement between the parties.

Complete agreement: This states that the written agreement is the entire agreement between the parties. This ensures that there is no confusion as to what discussions and documents form the agreement and means no party can rely on any previous conversations that do not form part of the written contract. This may be an important clause with all the telephone conversations and e-mails that may eventually lead to a signed licensing agreement.

Final Words

As is evident, licensing digital content is a complex process. However, as content required for your library becomes available more and more in a convenient and timely digital format, either in addition to the same print material or as a substitute, libraries must enter into various licensing agreements. It is important to take the time to understand as much about these agreements as possible, and to be educated when discussing them with publishers.

Lesley Ellen Harris (lesley@copyrightlaws.com) is a copyright, licensing and e-commerce lawyer/consultant. She edits *The Copyright & New Media Law Newsletter: For Libraries, Archives and Museums* (<http://copyrightlaws.com>) and is currently writing a series of e-reports on e-commerce for libraries, archives, and museums.

Want more information? A multi-library association document, *Principles for Licensing Electronic Resources*, is available on AALLNET. This 1997 document was developed by a working group consisting of representatives from AALL, ALA, SLA, MLA, ARL and AAHSL.