

## Negotiating Licenses

by Michael Reddy

Librarians were among the first professionals responsible for acquiring access to online content, years before the advent of the Internet. Back in the "old days" of electric typewriters, librarians were negotiating agreements to use Dialog, OCLC Online Computer Library Center, LexisNexis™ and WESTLAW, among other online databases. Today librarians are increasingly required to obtain licenses for electronic information as their users rely less on print sources for research. This fundamental shift from ownership to access has many ramifications. Now more than ever, librarians need to understand the nature of licenses and how to negotiate the best possible agreement with their information vendors.

Fortunately, many resources are available about the business of licensing. In fact, AALL and the American Library Association recently offered their members a free six-week e-mail tutorial, "Signing on the Dotted Line: Licensing Essentials for Library Professionals." The tutorial is written by a leading authority in the field, Lesley Ann Harris, <http://www.copyrightlaws.com/index2.html>, who also authored *Licensing Digital Content: A Practical Guide for Libraries*.

A number of other library associations have been providing seminars on licensing in the past couple of years. In October 1999, the Special Libraries Association presented an excellent videoconference, "Effective Negotiating Techniques for Licensing Content." Summarized below are a number of key points in the program materials written by the presenters, Jane Dysart, Tanya Wood Mollenauer, Ann Lee and William Goodrich Jones. Anne

Klinefelter lists some additional Web resources in the notes to her article, "Copyright and Electronic Library Resources: an Overview of How the Law is Affecting Traditional Library Services," in volume 19, pages 175–193, of *Legal Reference Services Quarterly*. She indicated that the Association of Research Libraries has sponsored licensing seminars for librarians; more information about these offerings can be found at <http://www.arl.org>. Another important Web resource is Yale University's "Library Liblicense: Licensing Digital Information: A Resource for Librarians" at <http://www.library.yale.edu/~llicense>.

The most obvious difference between buying a book and buying a license is that a book is tangible, while a license provides only access to a database. Even though copyright law can govern use of both the information in the book and licensed information, one important right is only available to the buyers of print materials. The First Sale Doctrine gives the purchaser of a copyrighted book or journal the right to sell or lend that entire work. This copyright provision, which is the foundation of all lending libraries, is not available to the licensee of electronic information because there was no "sale" to begin with, merely a contractual agreement to provide access. In short, licenses are contracts, the terms of which have to be negotiated.

*Black's Law Dictionary* defines a license as "a revocable permission to commit some act that would otherwise be unlawful." For example, but for a license, anyone would be infringing the copyright of the content owner whenever he or she printed out the results of a database search. There are a number of different kinds of licenses, including non-negotiated shrink wrap and click-through licenses. This column addresses only those licenses initially drafted by a vendor but open to negotiation by both the content provider and user. The purpose of the negotiation is to reach agreement on specific content to be made accessible for specific users over a specific length of time.

Ideally, the license negotiated fulfills the bottom line requirements of both parties. The library gets access to valuable electronic resources at a reasonable price that will meet the information needs of its users while maintaining the right to fair use and other copyright protections. The content vendor can control its intellectual property, while getting a fair profit from its efforts at aggregating and distributing the information that librarians and their users

want. When a good license is negotiated, both parties will both know exactly what they are getting out of the agreement and both will be happy to get it.

"Negotiation," according to *Black's*, is "a consensual bargaining process in which the parties attempt to reach agreement on a disputed or potentially disputed matter." The number of people negotiating on each side can vary depending on what kind of library is involved and what type of vendor. What will not vary, however, is the need for the parties to build a good working relationship based on mutual trust. Both parties must ensure that they treat each other fairly and with respect, while understanding the needs and limitations of the other side.

There are a number of bargaining styles. For further assistance in determining a suitable style, consult *Negotiating Style Profile* by Rollin Glaser and Christine Glaser, 800/633-4533, or the *Thomas-Kilmann Conflict Resolution Inventory* by Kenneth W. Thomas and Ralph H. Kilmann, 800/759-4266.

While the style of negotiation can differ, the substance does not. First and foremost good preparation is key. Librarians should familiarize themselves with the exact content the library wants to have access to, in what format, for how many users, at which locations, with what reproduction and distribution rights, for how long, with what level of service, and with what kind of price structure. Librarians should research possible alternatives to the vendor they are negotiating with, because like all contracts, content licenses are governed primarily by market forces. Is the information desired available for free from government Web sites? Does another vendor provide the same information but without any value ads? Think about what else the library can offer the vendor besides money. Does the library like the product enough to give a testimonial that could be used in the vendor's marketing efforts? Would the librarians be willing to assist the vendor develop enhancements to the product? The most important tool the library has for meeting its objectives is bargaining power. The more power the library has, the more better its chances of obtaining its ideal license.

Many books can provide more information about effective negotiation techniques. Four recent works are *Bargaining for Advantage: Negotiation Strategies for Reasonable People*, by G. Richard Shell (Viking, 1999); *Getting Past No: Negotiating Your Way from Confrontation to Cooperation* by William Ury (Bantam,

1993); *Negotiating and Influencing Skills: the Art of Creating and Claiming Value*, by Brad McRae (Sage, 1998); and *Winning 'em Over: A New Model for Managing in the Age of Persuasion*, by Jay A. Conger, (Simon & Shuster, 1998).

For guidance with the many details of licensing, I recommend reading a copy of *Interpreting and Negotiating Licensing Agreements: A Guidebook for the Library, Research, and Teaching Professions* by Arlene Bielefield and Lawrence Cheeseman, (Neal-Schuman, 1999). It has a 50-page chapter devoted exclusively to answering the question "What Do Licensing Agreements Really Mean?" It provides an invaluable series of charts that list the actual language of common clauses in licensing agreements, including parties, definitions, grant, licensor obligations, term and renewal, fees, conditions of use or scope of license, authorized users, limitation of liability of disclaimer, termination, governing law, alternative dispute resolution, complete agreement, support or documentation, assignment, waiver, severability, and

confidentiality. It also lists less common clauses, including content and copyright, monitoring use, privacy protection, indemnification or hold harmless, government use, amendments, *force majeure* and signature authority. In addition to the text of these standard clauses, a layman's translation explains what they actually mean and possible pitfalls to watch out for.

As a final precaution, before signing off on a license agreement, consult a checklist like the one provided in Appendix A of *Interpreting and Negotiating Licensing Agreements*. Another invaluable resource for making sure all aspects of the agreement have been considered is Jean O'Grady's "Checklist for the Negotiation of Internet Subscriptions," in the November 1999 issue of *The CRIV Sheet* in *AALL Spectrum*. Lastly, check whether the proposed agreement is in substantial compliance with the International Federation of Library Associations' 32 Licensing Principles, which can be found at <http://www.ifla.org/V/ebpb/copy.htm>.

Librarians are very familiar with Samuel Johnson's aphorism: "Knowledge is of two kinds. We know a subject ourselves, or we know where we can find information upon it." Libraries will continue to evolve into gateways for digital information that they will no longer own. To meet the growing needs of users for high-quality, reliable and current information, librarians will increasingly have to negotiate licenses with content providers to provide access to these electronic resources. They need to become effective negotiators so that they can use their contract drafting skills to ensure that their libraries are able to provide users with the right information in the right format at the right price, without giving up any of the rights currently available under copyright law. Fortunately, many librarians already "know this subject themselves," while the rest "know where we can find information upon it."

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