

<p style="text-align: center;"><b>THE RELATIONSHIP BETWEEN COPYRIGHT AND CONTRACT LAW: ELECTRONIC RESOURCES AND LIBRARY CONSORTIA</b></p>
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### **Copyright law and contract law**

A law is an enforceable set of public rules that govern society. When laws are being made, they are usually debated by the legislature and there may be opportunities for stakeholders to put forward their views. Copyright law should reflect a balance between the rights of copyright owners and those of users of copyright material, such as individuals and libraries. As such, they may contain special provisions to allow libraries to undertake preservation activities or to make fair use of material in their collections. Printed material, such as books, journals, pamphlets, etc. are usually governed by copyright law. So when a library buys a book, it knows that the rules under national copyright law apply.

A contract, on the other hand, is a private legally binding agreement between parties who are free to negotiate the terms and conditions. A licence, which is mostly regulated by contract law, is a formal authority to do something that would otherwise be unlawful. Licences came into widespread use as a means to govern access and use of electronic products such as software, computer games, online film and music and databases. This means that most electronic material purchased by libraries is subject to a licence.

There are different types of such licences. A "shrink-wrap" licence is commonly used for off-the-shelf consumer products e.g. software or computer games on CD or DVD. A "click-wrap" licence is also a user licence, but for content downloaded from a website where the licence terms are accepted by following a "click to accept" procedure. Both types of licences are usually non-negotiable i.e. the user must accept the terms offered by the rights owner in order to access the product. (In return, there may be statutory protections to protect consumers from agreeing to unfair licence terms).

While a library may have off-the-shelf electronic products in their collections, the majority of a library's electronic resources are usually large collections of databases, electronic journals, books and newspapers, etc. purchased through commercial suppliers. All are usually subject to a licence agreement with the copyright holder (often the publisher), who will send their standard licence to the librarian. In contrast to the off-the-shelf products described earlier, it is important to note that this is an *invitation* by the publisher to negotiate the terms and conditions under which the product may be accessed and used. The librarian should read the licence carefully, amend as appropriate and return to the publisher. In other words, the librarian should negotiate the terms and conditions with the publisher. This may not always be easy to do, but it is very important because ignoring or failing to understand the terms and conditions may not stop them from applying and the library may be bound by them.

### **Practice**

The use of licences for electronic products introduced a host of new issues for libraries.

- Contract law usually takes precedence over copyright law, so anything that the library agrees to in a licence is usually binding regardless of what the copyright law says.
- Parties to a licence agreement, in this case, the library and the publisher, are free to negotiate the terms and conditions. This means that the library may negotiate extra provisions over and above what is allowed in their copyright law, or conversely, they may waive their rights granted under copyright law.

- This principle of “freedom of contract”, however, often puts libraries at a serious disadvantage. Firstly, the position of the parties is unequal because the publisher has an exclusive, monopoly right over the material. Publishers, who are often international, can afford to employ lawyers to draft their licences, which are often highly technical and written in English. The licence is usually governed by the law of the country most favourable to the publisher, rather than the law of the country in which the library is situated.
- For printed material, the library and its users have potentially unlimited access. There are no restrictions placed by the copyright owner on the length of time the library may keep a book on the shelf or where the user reads the book after it is borrowed. If a library cancels its subscription to a journal, it may keep the previous issues for future use. In contrast, the licence usually provides access to the electronic material for a specific period of time and under the conditions as specified in the licence. This means that the library must negotiate each and every use that they wish to make of the material.

The response of libraries has been to co-operate in order to increase their bargaining power and to share knowledge and costs by forming library consortia. As well as negotiating the price and terms and conditions for electronic resources, consortia in many countries have evolved to provide other programmes and services such as training, e-portals and leadership in advancing digital libraries. The increased availability of internet-based digital material in the late 1990s led to the establishment of Electronic Information for Libraries (eIFL.net) to negotiate licences and to support the growth and development of library consortia in developing and transition countries. Consortia can be national e.g. National Electronic Information Consortium in Russia (NEICON), regional e.g. NELINET, a U.S. network or they can represent similar types of libraries, such as university libraries e.g. Coalition of South African Library Consortia (COSALC).

One of the outcomes has been the development of model licences which set out the terms and conditions which are acceptable to the library or consortium. Some model licences have been jointly developed by publishers and librarians, thus easing the negotiation process. There are model licences available to cater for a variety of situations e.g. single academic institutions, academic consortia, public libraries or special libraries. Most are publicly available online, and are a recommended starting point for any negotiation.

### **Policy Issues for Libraries**

It is the responsibility of the librarian to ensure that the licence agreement contains everything that the library requires and that it caters for all its users, whether a member of a consortium or where the resources fall outside those on offer by consortium. The library must also ensure that it meets its obligations – which should not be too onerous – under the terms of the licence.

- The library should ensure that gets the best deal for its users in terms of access and use and for its funders in terms of price.
- The library should ensure that it understands and meets the terms and conditions of each and every licence agreement that it signs. If in doubt, it should seek advice.
- The library should consider joining or forming a consortium to negotiate better deals and to assist with training, management of electronic resources, fundraising, etc.

In brief, a library should avoid a licence that:

- isn't governed by the law and courts of the country where the institution is located
- doesn't recognise the statutory rights for usage under copyright
- doesn't grant perpetual access to the Licensed Material that has been paid for
- doesn't include a warranty for IP rights and an indemnity clause against claims
- holds the Library liable for each and every infringement by an authorised user
- has a non-cancellation clause
- has a non-disclosure clause
- has reasonable and best effort clauses for obligations on the Publisher
- has clauses with ambiguous periods of time
- hasn't got a licence fee that is all inclusive

Source: *Licensing Digital Resources: How to avoid the legal pitfalls*

<http://www.eblida.org/ecup/docs/licensing.htm>

### **Library Position Statements**

EBLIDA Position on User Rights in Electronic Documents (1998)

<http://www.eblida.org/ecup/docs/policy21.htm>

ICOLC Statement of Current Perspective and Preferred Practices for the Selection and Purchase of Electronic Information (1998)

<http://www.library.yale.edu/consortia/statement.html>

IFLA Licensing Principles (2001)

<http://www.ifla.org/V/ebpb/copy.htm>

### **Model licences and resources**

eIFL.net model licences

[http://www.eifl.net/services/services\\_model.html](http://www.eifl.net/services/services_model.html)

eIFL.net resources for consortium building

[http://www.eifl.net/resources/resources\\_consortium.html](http://www.eifl.net/resources/resources_consortium.html)

Liblicense Standard Licensing Agreement

<http://www.library.yale.edu/~llicense/modlic.shtml>

UK JISC model licence

<http://www.jisc-collections.ac.uk>

Model standard licenses for use by publishers, librarians and subscription agents

<http://www.licensingmodels.com/>