Chapter X

Tactics and Terms in the Negotiation of Electronic Resource Licenses

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ABSTRACT

This chapter introduces the reader to the realm of electronic resource license agreements. It provides the reader with an overview of basic contract law as it relates to electronic resource licensing. The chapter then discusses the electronic resource license negotiation process as well as license agreement term clauses. The aim of this chapter is to provide librarians with an understanding of basic licensing concepts and language in order to aid librarians in the review and negotiation of their own license agreements. The author hopes to impart lessons and tips he has learned in reviewing and negotiating license agreements with a number of publishers to further the awareness and understanding of licensing in the library community.

INTRODUCTION

Almost every electronic resource to which a library will subscribe requires either a signed license or an acceptance of a vendor’s terms and conditions via a click-through license. Every signed license or clicked-through acceptance of a vendor’s terms is a legal contract that provides rights and protections (mostly) to a vendor, but also to a library. Some vendors allow for interlibrary loan and off-campus access while other vendors want to limit usage to individual computers and have limits on printing or downloading. It is important for librarians to understand what a license is, what its terms mean, and to be able to get a vendor to agree to terms more aligned with a library’s interests through negotiation. This is especially important, as many librarians are uncomfortable with the licensing process, not just because of the opaque legal language but also due to the prospect of trying to get, often monolithic, corporations to agree to our terms.
BACKGROUND

The increase in the use of license agreements is fueled by content owners’ beliefs that the fair use, interlibrary loan, and other library principles and practices that have served well in the print era are sure to cause rampant copyright infringement in the digital era. License agreements are, in fact, the publishers’ tool of choice for protecting their intellectual property (Okerson, 1997) by specifically counteracting the “first sale doctrine” (Rice, 2002). The “first sale doctrine” transfers ownership of a title with the initial sale of a copy and is what has historically allowed libraries to lend and interlibrary loan materials or permitted a bookstore to resell used books. Because licensing grants a mere permission instead of ownership to a user or library, there has been no “first sale” and the publisher can tightly control the uses of its digital copies via the license agreement terms.

From the library point-of-view, it is important that licenses be negotiated to allow libraries to continue their mission of promoting access to information. This is especially important as electronic resources have continued to be more expensive than their print counterparts despite the consensus among librarians that electronic format materials should be less expensive than the print because of the elimination of printing, binding, and shipping costs (Alford 2002; Okerson, 1997). Due to the cost of digital resources, which is further exacerbated by the present economic climate, libraries are finding that they have to choose between digital resources and materials in other formats. In order to best serve patrons and steward a library’s budgetary resources, libraries will have to carefully monitor their license agreements and try to negotiate terms that are favorable to libraries. Most licenses are written by publishers to protect their interest and as such can rarely be signed without at least some minor amendments (Okerson, 1996).

THE LAW GOVERNING LICENSE AGREEMENTS

A license agreement is a contract between a user/subscriber (licensee) and a content owner/vendor (licensor). In the library realm, a subscription for an electronic resource will generally entail the signing of a written license agreement or the acceptance of a slate of terms and/or conditions. The contract determines the rights and obligations of the parties, including the services that the licensor will provide and the conditions the licensee must adhere to in order to use the electronic content. In the library setting where most electronic resources are subscriptions, the license provides the library and its patrons permission to use the vendor’s electronic resource and/or content pursuant to the agreed upon terms for the time period specified.

According to Murray (2001) a valid contract is formed when its formation is comprised of the following components:

- A promise, offer and acceptance that are “sufficiently definite” (see below)
- Consideration (value such as payment or performance of a service),
- The parties have the legal capacity to make a contract (for example, no party is a minor or mentally ill)
- There is no legal barrier to the formation of the contract (for example, a contract entered into through fraud or duress)

A promise is one party’s intention to act or not act in a particular manner, (American Law Institute, 1981-2006) for example by providing certain goods or services to another party. Breaking a contractual promise is where a party opens itself up to liability for damages or penalties for the harm caused to the other party. An offer is one party’s willingness to make an agreement regarding such a promise and an acceptance is another party’s willingness to so agree.