Millennium Minutes: A Look Back At Licensing

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MILLENNIUM Minutes

A Look Back at Licensing

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The seemingly ubiquitous license agreement has a longer history than our readers might imagine or remember. It has roots deep in contract law, and also has copyright, patent, and trademark parentage. Librarians tend to think of licenses in terms of databases and fulltext e-journals, however, it started with licensing of software and electronic data years ago. **DIALOG, Lexis-Nexis, OCLC**, to name a few, have had contracts and licenses for use of data for decades. Although there is an old and rich literature written for the publisher and developer of software and databases, for this article, I will focus on librarians and library literature to give an informal and personal look back at licensing.

I began tackling licenses around 1985 when the **Penn State Libraries** started purchasing CD-ROMs and software packages for a number of applications. Soon afterward we developed an acquisition policy and eventually one for user access. Our concerns back then were these: could we make a back up/archival copy; was it shareware, freeware, public domain or the property of the producer; could we actually allow use and circulation by our patrons; what kind of notifications were needed to discourage piracy and misuse; could it be used outside of the library building; and so on. The articles and books I consulted initially dealt with copyright and new media such as videotapes. As software started being acquired for academic purposes, I found guides and information published by associations such as **EDUCOM** and **CAUSE** to be highly useful.

Eventually resources about copyright and acquiring software began to appear in library publications as more libraries began purchasing software. An early work was the 1986 **ARL Spec Kit** entitled *Microcomputer Software Policies in ARL Libraries*. Although one might think that these early software policies are unrelated to present license terms, they have many similarities and concerns.

At the 1989 **Charleston Conference**, **Meta Nissley** and I both gave talks about software and CD-ROM acquisition and licensing. One aspect of my talk was the potential ramification of a proposed national software rental bill that never passed. **Meta** talked about practical acquisitions issues. In 1990 **Meta** and **Nancy Medlin Nelson** wrote the first practical guide on CD-ROM licenses and libraries. It used a break-through approach in that it presented samples of licenses and instructions on how to interpret them. Quite revolutionary back then! As it turns out, **Meta** and I presaged the concerns and publications about licensing that exploded in the following decade.

The 1990s were marked by educational efforts, national guidelines and development of informational resources as electronic resources permeated more libraries. The **ALA Washington Office** and the **ARL Office of Scholarly Communication** started tracking legislation and mobilizing librarians to speak up about fair use and copyright. Guides, symposia, workshops, colloquia, Websites, and listservs sprang up to assist and educate the librarians, the vendors and the publishers on licensing issues.

In the 1990s **Mary Case**, **Trisha Davis**, **Ann Okerson**, and **John Cox** all made major contributions to the debate on licensing and to solving practical issues. I asked them to share some of their memories and personal history.

Mary Case recalls many projects and events involving **ARL**. She notes that her involvement started with "Let There Be Light! A Conference on Licensing Electronic Resources: State of the Evolving Art," co-sponsored by **ARL** and **CNI** in 1996. She says "This conference was one of the first projects I undertook after joining **ARL** in June of 1996. We had about 120 people at the event, as I recall-a nice mix of librarians, vendors, and publishers. The **Planning Committee** included **Trisha Davis**, **David Farrell**, **Ann Okerson**, and **Paul Peters**. (Always attached to this conference will be the sad memory of **Paul's** death early that fall.)"

Mary also notes that in the fall of 1996 the **Shared Legal Capability**, an alliance of **ARL**, **AALL**, **ALA**, **AAHSL**, **MLA**, and **SLA** decided that their members needed help in understanding and negotiating licenses. She coordinated the work of the jointly sponsored **Working Group** charged to create a statement of principles. Participants in the process were drawn from representatives from the organizations. A final draft of the *Principles* was issued in July 1997 and was subsequently discussed at a number of professional conferences.

Following the creation of the *Principles*, **ARL** began developing the idea of a workshop for librarians on licensing. **Karen Hersey**, fresh from a talk to **ARL** directors on licensing, was contacted to see if she would participate. **Trisha Davis**, by now an established expert and contributor to the *Principles*, was also asked. **Angee Baker** of **Solinet**, joined **Karen** and **Trisha** in September 1999. **Mary** gives this impressive chronology for the workshops: Boston (September 1997), Chicago (November 1997), Los Angeles (February 1998), Chapel Hill (March 1998), Washington DC (June 1998), Kansas City (November 1998), Washington DC (May 1999), Dallas (September 1999), Washington DC (February 2000), and Seattle (August 2000). These basic workshops have educated approximately 500 people and an advanced workshop was offered in New Haven in November 2000. **ARL** also offered a workshop for publishers in August 1998 and another one in January 2001. Last, but not least, in March 1999 **ARL**, along with **SLA**, sponsored a videoconference on "De-mystifying the Licensing of Electronic Resources."

As noted above, **Trisha Davis** has been active in educating librarians about their rights and how to negotiate to retain them. A very lively speaker, she recalls that her first talk was at the 10th **Texas Conference** on Library Automation in October 1995. She soon gave sessions sponsored by **Texas Library Association**, **CAPCON**, and **SOLINET**. Then came the landmark **ARL** and **CNI** symposium held in San Francisco in December 1996. 1997 was a busy year for **Trisha** - she participated in the development of the jointly sponsored national *Principles* that were released in July and then followed that with delivering the first official **ARL** workshop in Boston. **Trisha** has been a fixture of the **ARL** workshops ever since. Most recently she was part of **ARL's** first Advanced Licensing workshop held in New Haven in November. Along with all these teaching and speaking engagements, she found time to write informative guides and articles on licensing.

Ann Okerson, also a frequent speaker and contributor to the literature on licensing, relates that when she went to **Yale** in the fall of 1995, the **Biosis** renewal was one of her first challenges. The **Biosis** license contained the phrase, "no reproduction by any means, mechanical or electronic." She recalls: "It seemed to me upon a common sense read that this was quite simply not a workable license. I didn't know that librarians weren't negotiating -- I assumed that everyone was. So I contacted **Biosis** and said we could not renew the sub under those terms. Folks here and at **Biosis** said, "But **Yale** has had that license for a few years now and has not complained about it before! What's changed?" So I said that what had changed was the person who had to sign off on the renewal. Then **Biosis** asked me what

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we'd like instead, and I asked them to insert the language of Section 107 of the Copyright Act (fair use) — and eventually they did and we renewed and the **Yale Library** has never looked back!!"

Ann also started the **Liblicense** Website and **listserv** that have been successful in fostering information exchange and discussion about licensing. She writes that at present "**Liblicense-l list** archives about 2200 messages and has about 2500 subscribers worldwide, including librarians, attorneys, publishers, vendors, aggregators, and others." As of May 2000 the **Liblicense** Website has a draft **Model License** up for review for possible adoption by the **Council on Library and Information Resources** and the **Digital Library Federation** (see *http://www.library.yale.edu/~llicense/modlic.shtml*).

John Cox came to licensing from a different avenue, being a lawyer and having worked on the publishing side. In his career he has written and negotiated many contracts. By email he says, "Digital is different... The flexibility, speed and ease with which we can use digital content involves us in considering a range of issues that copyright law alone cannot address: who is entitled to use it, what performance standards and customer support are required, how do fair use privileges work in the digital domain. We had none of the answers, because the technology itself is less than ten years old."

John confirms that licensing has been around for a long time. He believes that the real problems arose with the development of e-journals, which prompted publishers to develop extensive, complicated and customized licenses. The administrative burden of negotiating licenses, among other things, led to work on developing model licenses in the UK and US. He remembers starting conversations with vendors, librarians and publishers at ALA in January 1999. These conversations resulted in a project, sponsored by the vendors, to develop a range of licenses with common structure and language that could be used by academic, public and special libraries. They were first released in September 1999 and updated in May 2000 (see *http://www.licensingmodels.com/*). He believes that "we have reached a general understanding among publishers and librarians on the content of licenses."

Speaking of the serials vendor, I sought their input for this article. **Dave Fritsch** of **Faxon** remembers that, "At the first **Faxon Institute Colloquium** in 1996, **John Cox** raised the issued of replacing copyright with licensing as the governing body of law over etexts." (I remember that **Faxon Colloquium** — I argued with **John** for copyright to govern usage of electronic resources rather than contracts. Looks like I lost!) "Later that year I got a vivid idea of what licensing was doing to librarians when **Julie Gammon** sent me a picture of herself standing next to her shelf load (nine three inch binders) of license agreements. I still have the picture." **Dave** also recalls that the introduction of **Academic Press's IDEAL** package "was a real wake-up call to the agents, because of the loss of revenue to us that it entailed."

To add one last note on the role of vendors, in 1998 I returned in print to the subject of licensing and explored, with ideas from a conversation with **Adrian Alexander** (then at **Faxon**), how vendors could expand their roles in assisting libraries with licensing. Although vendors are indeed inserting themselves into the process, it remains to be seen how successful they will be in re-inventing themselves in the era of licensing and electronic publications.

Conclusion

This brief history does not begin to cover the rich fabric of intellectual property laws and their application to electronic resources. It should, however, give some understanding that licensing has a deeper history than has been appreciated. As this is being written new and bolder measures are afoot to further limit the rights of libraries to acquire and negotiate access to resources on behalf of their users. The successful push by the entertainment industry for protecting the rights of creators and publishers is overwhelming the ideals of copyright and fair use. Librarians are also struggling to document and develop software to track the terms of licenses. Prices of resources keep rising, and competition among publishers is shrinking. Vendors are vying to establish a role within the world of licenses and e-journals.

The challenges continue!

Endnotes:

Quotes and personal stories are drawn from emails from **Mary Case** (Nov. 30, 2000); **Trisha Davis** (Nov. 21, 2000); **Ann Okerson** (Oct. 23, 2000); **John Cox** (Nov. 6, 2000); and **Dave Fritsch** (Oct. 26, 2000).

A chronological sample of resources on licensing

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