

Faye A Chadwell. "A License to Kill For...." *Managing Electronic Serials/ Essays Based on the ALCTS Electronic Serials Institutes, 1997--1999*. Ed. Pamela M. Bluh. ALCTS Papers on Library Technical Services & Collections, no. 9. Chicago: ALA 2001. Pp.109-128.

A License to Kill For. . .

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This presentation was a part of the institute, "Blazing the Trail: Electronic Serials from Acquisition to Access," presented by the Serials Section of the Association for Library Collections and Technical Services, a division of the American Library Association, on April 16-17, 1999 in Portland, Oregon.

Disclaimer: Faye Chadwell does not present this material as comprehensive legal advice necessary for effectively amending and evaluating all contracts and agreements that librarians and other professionals may have with publishers and vendors. She encourage all librarians working to amend agreements to consult with the appropriate legal staff available to them and to enlist their capable support in the development of the "license to kill for."

Introduction

Before launching into what steps it takes to create the "license to kill for," let us address why any librarian would kill for a license. Licensing electronic journals, indeed licensing electronic resources, is not a responsibility that most collection development librarians might advocate to add to their plate. It is easier perhaps to joke that librarians might easily kill because of a license, having been desperately driven to this act by hierarchical and uncooperative institutional environments, unresponsive or inflexible publishers, lack of power when facing questions about signature authority, or indecipherable and boring legal jargon found in most terms and conditions or licensing agreements.

The truth is that librarians seek the “license to kill for” because providing dedicated, timely, and excellent service to our users demands it. Washington State University’s John Webb states this quite succinctly, “There is simply no excuse for a library to accept a vendor’s ‘standard’ license agreement unless it meets all of the conditions now accepted as ‘best practices’ by the librarians and legal advisors to them who are the leaders in licensing issues today. It must also meet the needs of the users of the library, which must forcefully negotiate the changes necessary to make it a ‘win-win’ agreement for both library and resource provider.” (p. 199. in “Managing Licensed Networked Electronic Resources in a University Library,” John Webb, *Information Technology and Libraries*, December 1998, 198–205.)

Essentially then, our drive to examine licensing agreements is not out of sync with our overall mission to provide relevant research materials and deliver the best possible services to our users. Nevertheless, the process for creating that “license to kill for” may be out of sync with our traditional tasks, roles, and responsibilities as librarians. The introductory pages to Yale University’s helpful pages on licensing, titled Liblicense!, state: “. . . licensing agreements often are complex, lengthy documents filled with arcane and unfamiliar terms such as indemnity, severability and force majeure” (<http://www.library.yale.edu/~llicense/intro.shtml>, paragraph 3). In short, most librarians are not lawyers and have no immediate plans to attend law school.

Acknowledging this reality doesn’t make the licensing task any less onerous, less challenging, or less significant. The exact opposite is true, and this reality really makes this task potentially more onerous, more challenging, and more significant. Rather than stick our heads in the sand like the proverbial ostrich, we can be proud as a profession for our effective response to this new dimension to our work. Librarians have really stepped up to the plate in terms of the

discussion of issues, the collaboration within and outside the profession, and the provision of education and training opportunities that have resulted. The list of licensing resources included later in this discussion provides substantial evidence of our initial and ongoing successes. Toward this end, it is my hope that this discussion will be a useful and engaging addition to the resources already available.

Establishing the Collaborative Organizational Environment

Even before examining the first licensing agreement in order to amend it, librarians should establish and work to foster the best possible environment, both external and internal to the library, for accomplishing this task. Conditions or guidelines for licensing will vary from organization to organization or from institution to institution, but across them all, librarians still need to scan the landscape and consider who outside and inside the library needs to be involved.

External Environment: Librarians need to bear in mind that the following personnel or offices from outside their libraries may need to (or have to) be involved: legal counsel, business affairs, purchasing agents or higher administrative officers. Why should we seek outside cooperation or consultation? We could joke that it is only right to do so since we are likely increasing these individuals' workload with our numerous agreements needing amendments and signatures. Perhaps the chief reason to involve personnel from outside our libraries is that librarians actually may not have the complete authority either to amend or to sign legally binding terms and conditions. It may very well be that there are very good reasons for librarians' not having signature authority or not being solely responsible for amending the terms of agreements. The merits of librarians' having this authority or the frustrations of not having it will be discussed on a case by case basis at the individual institutional level. Until a broader discussion ensues, however, we as librarians should try to follow and respect the

boundaries of our organizational settings to avoid isolating ourselves and alienating potential allies to our cause.

What should we do when we have the attention of such business officers or legal counsel? Primarily, librarians need to communicate the library's needs and expectations regarding access to electronic journals. We should emphasize the important need for the timely turnaround in completing agreements so as to avoid delayed access to needed research materials and prevent user frustration. The turnaround time needs to be quick, particularly when a library is renewing or switching subscriptions and could lose access for even a relatively short time. Because business officers or legal counsel may not have experience or familiarity with libraries' resolve to provide the broadest, most barrier-free access possible, it is very important that they understand that in most agreements there must be changes that apply beyond the general contractual language found on every agreement. Overall, sharing this information should become a means of sharing expertise. Communicating our expectations should present an opportunity for personnel outside the library to examine the ways that they have amended agreements over a given period of time. Perhaps some changes will result.

Internal Environment: Within the library itself, individuals to consult might include librarians or staff with responsibilities for collection development and acquisitions as well as for systems and public services. Some libraries even opt to organize a team or unit for managing the licensing and access of electronic resources. This team might be a short-lived task force or an ongoing committee. Whatever the composition, the goal should be to establish an efficient process for licensing, acquiring, and setting up access to electronic journals that mirrors the selection and ordering of print materials as much as possible.

From among the members of the library's internal working group, librarians need to determine who will be the central contact person for all licensing issues. At first, appointing a

central contract may appear to have the negative effect of slowing down the process by placing all responsibility with one person. Actually electing a point person provides an easily identifiable contact for publishers, vendors, other librarians and library staff, personnel from outside the Library, and users. Having a central contact also prevents communication problems. Moreover, it often has the positive effect of avoiding duplication of effort and insuring a consistent approach to amending agreements so as to avoid unknowingly breaking the terms of an agreement.

At the University of Oregon, our internal working group, which now meets informally whenever necessary, includes the head of collection development, the assistant university librarian for public services and collections, and two systems librarians—the head of systems and the librarian responsible for actually setting up electronic access. In other libraries, these roles and responsibilities might be undertaken by a single person. What is important to remember is why we need to involve these people. Why is their input necessary? And what will be the impact on the licensing process as well as on their department if we do not involve them?

Here is just one case to illustrate this point: After nearly a year of providing access to electronic journals at the University of Oregon, we realized that we needed to involve our acquisitions librarian because of the useful input her department could provide regarding print subscriptions and contacts with serials vendors. Without this input, the head of collection development, who is the central contact for licensing at the UO libraries, would have spent her time tracking down details about print subscriptions that the Acquisitions Department had practically at their fingertips. We also learned that leaving our Acquisitions Department out of the licensing process affected their workflow. We were not contacting them about electronic journals we were acquiring for free as part of our print subscription. This department's staff needed this

information for updating order records and reducing the flow of information they received about the availability of electronic access from publishers and vendors.

When members of the internal work group have been chosen, the group needs to engage in three major activities. First, the group needs to define authorized users in a way to be used for all agreements in the future. While an important licensing issue, defining authorized users will be discussed in a later section. Secondly, they need to develop a checklist of licensing “haves and have nots” to use as the group amends its first round of agreements and to use in the future. A checklist might look like the one we initially developed at the University of Oregon. (See <http://darkwing.uoregon.edu/~chadwelf/checklist.htm>). Finally, with the definition of authorized users and the checklist in hand, the group should amend one agreement together and then promptly ask the appropriate personnel outside the library, such as legal counsel, to offer suggestions for improving or enhancing the agreement.

Licensing Essentials

When librarians first sit down to amend an agreement, the process can be daunting. It is important to remember two things: The exercise of amending a licensing agreement, either as a group or as an individual, will simulate any future endeavors undertaken to amend contracts. Licensing will only become easier and easier with every agreement as the terminology becomes familiar, the process routine, and expertise develops.

Librarians should proceed with amending their first agreement having several resources in their possession besides just the agreement. Two of these resources should have been created prior to actually amending the agreement: the institutional definition of authorized users, and a checklist of dos and don'ts. The other resource is the pricing information

for the journal(s) being licensed. Librarians should also consult Yale University's Liblicense page, working with the pages on terminology and language of contracts as they amend the contract in hand. (See the list of resources provided below for information on Liblicense).

Pricing Information: Negotiations on pricing or cost of electronic journals will probably occur prior to receiving a copy of the agreement. Nevertheless, it is important to include pricing information with the amended agreement as an attachment if a place for pricing information is not already provided. An organization's legal counsel or business office may even require this information. Many states and cities have rules or regulations about handling purchases in certain price ranges and about who must sign an agreement when the price is above a specific amount. In general, it is safe to say that price may dictate willingness or ability to be flexible on the part of a library's parent institution or organization.

In addition to including the cost of electronic journals, it is also imperative to present the pricing model and the basis for setting the price. In other cases, librarians will receive a separate accompanying document, often called a subscription or order form, outlining the costs, if any, and requesting that librarians answer questions about such topics as IP addresses, related print subscriptions, and library contacts. See **SAMPLE A** below.

SAMPLE A

American Society for Educational Excellence
Subscription Form

Customer Services, PO Box 002, New York, NY 00002, phone:
212-222-2222, 212-122-2222

Subscriber name: University of the Northwest
Address: 1333 University of the Northwest
Sisters, OR

Contact Person: Jane Librarian

Phone: 503-111-1111

Fax: 503-111-1110

Email: janelibrarian@un.unorthwest.edu

Subscribing to Print:

Online

Print+

Only

Online

Journal of Educational Excellence A

Journal of Educational Excellence B

Journal of Educational Excellence C

Journal of Educational Excellence D

Purchase Order Number: 585855

Institution's IP Address(es): 888.888*

Please read and sign the attached Terms and Conditions. By signing below you certify that you have read and agree to abide by all such Terms and Conditions.

Authorized signature: _____

Title of authorized signer (please print): _____

The pricing models for electronic journals can and will vary; librarians may have the option of obtaining electronic access because their libraries subscribe to the print version of a title, of obtaining electronic access only, and of acquiring a package deal for electronic access to all of a publisher's titles even if their library does not own the titles in print. Publishers may also base pricing on a variety of factors and often in combination: the size of the user community, the size of the materials budget, the actual recorded use of the product, and the level or the degree of access. To determine the size of the user community, the publisher may consider the full-time equivalent or FTE for the entire user community or the FTE for

particular departments. As for actual recorded use, publishers may consider unlimited simultaneous use, a specified number of users (within a particular building or set of buildings), or the number of actual transactions. To determine the level or degree, publishers may offer licenses for an entire site, at either the class B or the class C level, for a specified number of subnets, or for a specified number or set of terminals. It is worthy to note that more librarians will be acquiring electronic journal access via consortial deals. As a result, we can expect pricing models and definitions of FTE, along with other licensing factors, to necessarily become more complicated.

Authorized Users: The first step in actually amending an agreement is to look at how the publisher defines authorized users. If this definition is acceptable, then no substitution or amendment to the original contract is necessary. More often than not, however, librarians will want to substitute their library's definition of authorized users. (See **SAMPLE B**).

What should a good working definition of authorized users address? Ideally, such a definition will cover the following library users such as the following:

- (i) officially registered full or part-time students of the library's institution;
- (ii) full or part-time faculty and staff of the library's institution, including those with adjunct and courtesy appointments and active volunteers;
- (iii) community patrons who have updated public borrower cards;
- (iv) officially registered students in summer programs or institutes of the library's institution;
- (v) authorized users of the institution's library and campus computer networks;
- (vi) authorized users at a public library defined by a geographic/service area and limited to a single main

- library and its branches administered under a single director or board of trustees;
- (vii) currently enrolled students and current faculty and staff primarily affiliated with a licensed school (K-12) building or campus;
 - (viii) current employees of a geographically distinct institution served by a licensed special or corporate library.

At the very least, the definition of authorized users for academic libraries must include faculty, students, and staff and must allow for use by walk-in or onsite patrons.

When amending a publisher's definition of authorized users, librarians should strive to meet other objectives besides addressing the obvious listing of categories of users. Librarians should emphasize that authorized users must have as complete and unrestricted access to content as is possible. Librarians must also define or address unauthorized users. Publishers need to know that librarians have an understanding of who should and should not have access to electronic journals. Additionally, librarians will want to pay attention to the ways in which the library or publisher will identify and authorize these users: individual registration, individual passwords, campus-wide passwords, use of restricted IP addresses and at what level, or some combination of these factors. Because the publisher may have concerns about who has remote access, when necessary or appropriate, librarians need to 1) insure that both parties have clearly defined the site and what locations or branches are acceptable extensions; and 2) clarify what users have access and what authentication methods to be employed if making use of a proxy server.

SAMPLE B

DEFINITION OF AN ACADEMIC LIBRARY'S AUTHORIZED USERS

The following definition refers to all license agreements between the University of XXX (as the sole licensee) and electronic journal providers/vendors:

Authorized Users are those patrons who may have complete and unrestricted access to the content of the journal or database. The definition of Authorized Users will change in consortial agreements.

Authorized Users refers to all those patrons who access information through terminals physically located on the site or under the control or administration of the subscribing institution.

Authorized Users also include remote users, regardless of location or means of connection. In the case of remote access, Authorized Users are:

- All enrolled UXXX students;
- All current faculty and staff including adjunct and courtesy appointments and active volunteers;
- Community patrons with active borrowers cards;
- Alumni Association members with activated borrowers cards;
- President's Associates;
- Students enrolled in special UXXX summer programs or institutes.

Unauthorized users from remote locations include:

- Students, faculty, staff from other educational institutions, regardless of borrowing status;
- Community users without borrowing privileges;
- Any other library, school, business, non-profit, or research institution.

The UXXX will make reasonable efforts to block unauthorized access through IP address detection, controlled passwords, or other reliable and affordable security technology. New categories of Authorized Users not listed above will be negotiated with the vendor or the publisher.

Since the universe of electronic journals is constantly changing, a good definition of authorized users should be open to negotiating new categories of users. Providing for such future flexibility will allow librarians to extend usage to students in distance education programs, in summer programs or institutes, and in exchange programs.

Once created, a library's definition of authorized users should be provided for all agreements unless the publisher's definition is palatable to all parties. However, just because a librarian produces the library world's best definition of authorized users, there is no guarantee that it will be agreeable to all publishers. If a publisher has concerns with the proposed definition, librarians and the publisher can negotiate until they collaborate on a mutually agreeable definition.

PROBLEM ONE

A licensing agreement includes the following language about authorized users:

For purposes of this Agreement, "AUTHORIZED USERS" means only the employees, faculty, staff, and students officially affiliated with the SUBSCRIBER.

What are some possible revisions that might broaden the scope of authorized users as defined in this statement?

- 1) Add the category of walk-in or onsite patrons to the list.
 - 2) Substitute the entire definition of "AUTHORIZED USERS" with a library's predetermined and more inclusive definition. (See the definition listed above in **SAMPLE B.**)
-

Authorized Uses: Besides paying attention to authorized users as defined by the publisher, librarians must also examine the permissible authorized uses. An overarching goal should be to always try to obtain the greatest number and broadest type of use available. At the very least, librarians should stipulate that the users must have access to materials for educational, personal, and research purposes. Some of the specific uses that librarians should always persuade publishers to permit are:

- the right to copy information and to what extent
- the right to download and store information and to what extent or for what length of time
- the right to print information and to what extent
- the right to publish information without any expectations that users must take unrealistic steps to inform the original copyright holder.

One use that will more than likely have to be negotiated is the right to interlibrary loan. The reluctance on the part of publishers to allow for interlibrary loan results directly from publishers' anxiety about the ease with which electronic documents may be copied and distributed.

Many publishers are still generally willing to allow libraries to send electronic versions of an article via interlibrary loan if the electronic versions are first printed off in hard copy. Other uses that publishers are rarely going to permit libraries to have are the right to alter, recompile or create derivative works or and the right to resell or redistribute the software and content of electronic journals.

When addressing authorized uses, librarians must be sure to clarify who is responsible for unauthorized use(s); what steps are required to prohibit unauthorized use; what the consequences are if unauthorized use occurs; and how to handle unauthorized use be it a result of authorized or unauthorized users. Most librarians with any experience or expertise in licensing seem to agree that librarians are no more responsible for unauthorized use of electronic journals than they are responsible for unauthorized use of print materials. To use LibLicense's commentary about librarians' responsibility for unauthorized users: Librarians should not agree "to actively police the use of licensed materials, but only to report any unauthorized use of which it is aware." (See <http://www.library.yale.edu/~llicense/usecls.shtml>, "Consequences of Unauthorized Use.") At the same time, librarians need to be willing to state in the contract that they will take reasonable steps to prohibit unauthorized use by both authorized and unauthorized users and keep the use from recurring.

As for the consequences for a library when unauthorized use occurs, librarians have two responsibilities: 1) insure that even when a violation of use restrictions has occurred, at best they will be able to maintain access while addressing and correcting the violation(s); and 2) acknowledge that if they cannot adequately address the publisher's concerns, they may have to forfeit access because a breach of contract has occurred. Likewise, publishers need to understand that for most librarians, resolving problems of unauthorized use by authorized users may be easier to handle than unauthorized use by community borrowers. A university library will have stronger institutional support and guidelines in order to discipline its authorized users who violate use restrictions than it will have for handling community borrowers engaging in similar activities. Librarians in academic settings can enlist the support of faculty oversight committees, student conduct codes,

and campus computing resources. Publishers must also recognize that even when an authorized user commits a violation, a library may not act on its own accord. It must follow institutional guidelines regarding library user conduct and disciplinary actions against them.

General Contractual Elements

General contractual elements include such matters as: contract renewal, transfer, breach, and/or termination of an agreement, warranty or guarantee—basically a performance check, liability, indemnification, and governance. They rarely differ from one agreement to the next, and yet librarians should still be cautious about such matters. While these elements may seem like boilerplate items to address, they may prove the most challenging to librarians. As a matter of course, most librarians might therefore need more assistance in amending these sections of agreements because of our unfamiliarity with the relevant laws and guidelines of states governing issues like liability, indemnification, and governing clauses.

Contract Renewal: In almost every agreement there is a clause covering the renewal of the contract or licensing agreement. In most cases, this clause will provide for automatic renewal of a subscription. If not, it will stipulate that the librarian will need to notify the publisher before the contract ends should the library wish to no longer subscribe to a title. In most cases, this clause will provide a specified amount during which the librarian must notify the publisher of its intention to cancel a subscription. The time amount may be 5, 30, or 90 days. Whatever the time allotted, the librarian needs to decide if this amount of time is a reasonable enough amount of time for contacting the publisher. If not, librarians might consider changing the date so that they can be sure to give themselves enough time to either make changes in the agreement or to let it go.

Transfer of Assignment, Breach, and Termination: Other general contractual elements that occur with as much frequency as contract renewal cover these issues: transfer of assignment, breach, and termination. Most often these are written to provide greater benefit to the publisher than the library. That is, the publisher has the right to transfer the assignment of the contract to another party, for instance, if the publisher sells its company to another firm or it buys a smaller company to administer its contract and sell its products. The publisher also usually writes the agreement so it has the right to terminate an agreement if the library breaches any of terms of the agreement.

As much as possible, librarians should attempt to achieve reciprocity on these issues. Especially in regard to breach and termination, librarians should attempt to establish a situation where termination is not automatic upon breach of contract. Instead, if a breach occurs, Librarians would have the opportunity to correct the problem in a reasonable amount of time (whatever that might be) and then if the problem is not resolved, termination of access and the contract results. Regarding breach and termination, librarians should also be aware that publishers may stipulate that in addition to seeking termination of a contract because of a breach, they will pursue other legal rights and remedies. Librarians must ask what these rights and remedies are and before agreeing to them consider how they might violate state laws and regulations or users' rights.

Warranty: The warranty statement of most agreements will state that electronic journals are provide on an "as is" basis. This means, as the publisher's standard guarantee reads, that the publisher will not be providing any kind of warranty, either "expressed or implied, including but not limited to the implied warranties of merchantability and fitness for a particular purpose." A warranty also details what to expect from a product in terms of:

- Level of service
- Accuracy of information
- Absence of malfunction or defects
- Applicability of use
- Violation of someone else's intellectual property rights.

While unlikely that most librarians will be able to successfully amend such guarantees, it is still prudent, that librarians consider stipulating that should the level or delivery of service fail for a specific time period, then the Library will have some recourse and may take one of several actions: 1) terminate the access and the contract; and/or 2) receive a partial or full reimbursement. Librarians may even devise a standard statement, such as demonstrated in **PROBLEM TWO**, to regularly include in all licensing agreements. Including such a stipulation is especially important when:

- libraries are paying for access to a product
- the loss service is the publisher's fault (rather than due to force majeure)
- reconnecting to the resources is not immediately forthcoming.

PROBLEM TWO

A licensing agreement includes the following language addressing issues about breach of contract, warranty and force majeure:

Either party's failure to perform any term or condition of this Agreement as a result of condition beyond its control such as, but not limited to, war, strikes, floods, governmental restrictions, power failures, or damage or destruction of any network facilities or services, shall not be deemed a breach of this Agreement. However, should any event outlined above

continue for a period in excess of 30 days either party shall be entitled to terminate this Agreement by written notice to the other party.

What are some possible revisions to this statement that might offer a library additional benefits or safeguards as a result of its potential loss of access to this resource?

1) Add a statement specifying that in the event of termination, the publisher shall refund the Library a prorata portion of the license fees paid to the publisher.

2) Add a statement stipulating that:

“In the event that through the fault of Licensor, the Licensee is unable to access the Licensed Material for more than XX (XX) hours in total during any month of this Agreement, the Licensor shall refund to Licensee a prorata portion of the license fees paid to the Licensor for each hour over XX (XX) hours per month that the Licensed Material is unavailable.

Liability: Warranty generally goes hand in hand with liability. Usually publishers do not want to accept responsibility for these types of damages: exemplary, special, indirect, incidental, consequential, or other. For most librarians, this level of liability is reasonable and acceptable. It is when publishers do not want to accept responsibilities for direct damages that librarians should consider automatically amending the agreement to eliminate the term *direct*.

Regarding issues of liability, librarians must also be aware of how a particular agreement addresses not only the type of damages (special, indirect, consequential, etc.), but also the amount of damages a publisher is willing to pay. The tremendously resourceful Liblicense website at Yale University does an impressive job of outlining the limitations of liability:

“In addition to making (no) promises and stating who will pay for certain costs if they arise, many agreements address the

amount and kind of damages the licensor will pay. If some claim or cause of action actually gets through the first line of defense (disclaiming all warranties), the licensor may further limit its liability by providing:

- a monetary cap on damages,
- that certain kinds of damages are excluded (special, incidental, consequential),
- that certain harms are excluded (harms resulting from defects in, unavailability or use of the software or data).

(See <http://www.library.yale.edu/~license/warrgen.shtml>)

Librarians would do well to consider any and all limitations on liability and their requisite restrictions on types of damages and/or monetary caps. Otherwise, they risk losing more than just access to electronic journals. They risk losing subscription fees and they risk unknowingly limiting the amount of damages to which an injured party (including their own organization) or individual person might legitimately have claim.

Indemnification: Indemnification also relates to warranty and liability. An indemnity clause establishes who will be responsible for costs should problems or difficulties develop. For the most part, librarians should assume that the publisher will assume costs for handling any problems that occur, especially if the problems are not caused by the Library. Otherwise, librarians should beware of agreements that want them to pay for these costs. (See **PROBLEM THREE**).

Librarians also need to be aware of possible limitations on the indemnity clause that the Library's institution or governing body will not allow under law.

PROBLEM THREE

A licensing agreement includes the following language about responsibility for unauthorized use, responsibility for the activities of authorized users, and indemnification:

The Subscriber assumes sole responsibility for all use of the Publisher's online journals by the Subscriber and each Authorized User. In the event of a breach of this Agreement by the Subscriber or Authorized Users, the Subscriber agrees to indemnify and hold the Publisher harmless from and against any and all claims, liabilities, damages, expenses including attorneys' fees and experts' costs, penalties, and fees, if any, for the enforcement of this Agreement and otherwise for the Publisher's defense of indemnified claims, losses, and threatened losses arising from or in connection with that breach, including without limitation, claims of unauthorized use.

What are some possible revisions to this paragraph that might prevent the library from taking responsibility for unauthorized use, even by an authorized user?

- 1) Change the first statement to read that the Subscriber only assumes responsibility for use of the journals by the Subscriber.
- 2) Amend the second statement likewise, deleting the reference to authorized users.
- 3) Add any necessary provisions from state law or regulations of appropriate governmental bodies that would decrease the Subscriber's level of liability for the losses.

Force majeure: Force majeure (greater force) clauses acknowledge that events beyond the control of the the publisher, such as natural disasters, "Acts of God", war, or third-party failure, do happen and may hinder the availability of a product. These clauses are meant to excuse the consequences of such an event when it is truly beyond the control of the publisher. It is not meant to excuse them because they were not exercising care in judgment. (See **PROBLEM TWO.**)

Governance: A governance clause determines what state's or country's laws will govern the terms and conditions of an agreement. It also establishes which state's or country's courts will be the source for arbitrating any and all potential lawsuits. For most academic and public libraries, the governance clause

will have to reflect the law(s) of the state where the library resides. Librarians should recognize that it is advantageous to their local lawyers to be able to argue a case in a court where they are most familiar with the state laws and regulations. For the most part, publishers are agreeable to any amendments to this clause or else to deleting it altogether.

Severability: A severability clause establishes that if one particular term or condition within an agreement is proven invalid or is not enforceable, then the rest of the entire contract remains valid.

Complete and Entire Agreement: When amending a contract, it is important to pay attention to the appearance of any statements about what constitutes the “complete and entire agreement.” Most of the time, this statement suggests that all terms and conditions are set down within the written contract rather than through any verbal negotiations. It also can clarify that the written contract and any accompanying addenda will be the record of negotiations.

Service Issues To Address In Licensing Agreements

Provision of usage statistics: Negotiating for the provision of usage statistics may prove to be the most important bargaining collection development librarians will undertake regarding renewal and future use of electronic journals. Whether libraries actually pay for access to electronic journals or just add on access to a print subscription, libraries still pay for the time and effort that staff spend identifying, selecting, licensing, setting up electronic access, and cataloging electronic journals.

Because librarians need to be sure that this staff time and energy is money well spent and that users are making the most of the product, they should attempt to obtain usage statistics when negotiating and amending a licensing agreement. Simply adding the following statements might at least trigger a conversation between the publisher and the Library about why usage statistics are useful for librarians:

Publisher X will provide Licensee with quarterly usage reports. Each report will provide the number of sessions or number of transactions by month for the Licensee.

Compatibility and related issues: While the Y2K scare may be behind us, librarians still need to be sure that publishers of electronic resources are equipped and preparing for the new developments in technology. Also, publishers need to let librarians know about any developments they may be planning regarding browser capability, compatibility with lower versions of the browser, formats for providing copies of documents or articles (i.e. PDF), technology for archiving issues, and new means of authorizing users. Another basic concern is the stability of the URL because of the importance for librarians creating webpages and to libraries cataloging these resources. To protect against troublesome changes occurring, librarians might opt to include a statement like the following:

Publisher will take reasonable steps to ensure that the Library has continuous access to its electronic journals, that routine updates will not disrupt the usage of materials, and that performance of the Product will remain as effective as similar databases being offered to similar users.

Technical assistance: Most often if technical assistance is mentioned in an agreement, it is going to just be a statement that assistance is available and it will provide the dates and times for this assistance. It is frequently not included because publishers may not be as used to dealing directly with librarians as are vendors for databases, serials and books. (See **PROBLEM FOUR**). Nevertheless, such inexperience on the part of publishers makes a strong case for adding the information about technical assistance rather than excluding it. Likewise, librarians should expect an appropriate level of technical assistance for resources that they license and acquire.

PROBLEM FOUR

A licensing agreement includes the following language about customer support:

Any assistance via telephone that Company X may provide to the Subscriber is provided at the sole risk of the Subscriber.

How might a librarian address such a statement about customer support?

- 1) Rewrite the statement to specify that technical assistance is provided on certain days of the week at specified times and provide the appropriate contact information.
- 2) Delete the statement.

Management Issues

Librarians might believe we are naturally inclined to managing and retrieving information well. Unfortunately this may not always be the case when dealing with documents that we create as part of our daily work. It is especially important when handling licensing agreements to document all the processes and steps involved in licensing a group of electronic journals. Librarians should seek to keep copies of all the various drafts or the extra paperwork or computer documents created as a result of amending and adding documents to a publisher's pre-existing licensing agreement. Only when the access is provided can the librarian consider recycling some paperwork.

Here are some tips for developing amendments or addenda to licensing agreements:

- Compose the amendments or changes using word processing documents, labeled so that it is easy to identify the amendments for a particular publishers' agreement. Maintain a central file to make it easy to cut and paste

certain statements regarding governance, authorized users, etc. that librarians regularly change in all agreements. The development of such a file allows for consistency of terminology and changes across all amended agreements.

- Print two copies of the agreement for the publisher to sign and make a copy for yourself.
- Because publishers may be reluctant to return the second copy of the signed licensing agreement, combat this reluctance by writing a standard letter to accompany all amended agreements. This letter should state firmly that the library needs one of the signed copies returned and insist politely that if the second copy is not received, the agreement will not be in effect.

Here are some tips for organizing and maintaining files of agreements.

- Try to create and maintain files of agreements based on where they fall in the licensing process. These might include these distinctions: 1) licenses to be amended; 2) licenses that are amended, but waiting for signature from either the appropriate signature authority or from the publisher, and 3) signed and fully executed agreements that have established access
- Depending on the division of labor when setting up access to electronic journals, many librarians are also beginning to develop databases using software like Microsoft Access to manage the terms and conditions as they vary on a per publisher per contract basis. These terms might include information about rights to ILL, printing, and downloading, user restrictions, basic access information such as password, and the proper level of access.
- Creating a database would work well for a single-librarian operation or within a large library where the

responsibilities are shared across departments and divisions. Depending on the type of integrated library systems they use, librarians may also be able to put some important information about electronic access in the catalog record for the title

- Make this database available via an Intranet or restricted server so that more librarians can check on the terms and on the bargaining status of agreements.

Licensing Resources

The availability of licensing resources on the Web and in professional literature along with the frequent discussion and sharing of expertise via listserves, has grown tremendously since the emergence of electronic journals. Every librarian should take advantage of these resources because they will make the job of licensing agreements that much easier. There have also been some excellent local, regional, and even national institutes and workshops, like this ALCTS E-Journal Institute in Portland, OR. These have provided opportunities for learning about new issues and first-rate training or orientation to this new aspect of librarians' responsibilities and they can help us continue providing the best available access to important library resources.

Licensing Resources from Yale

LIBLICENSE: Licensing Digital Information, A Resource for Librarians

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

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

LIBLICENSE--on liblicense-l@lists.yale.edu--Can subscribe to this listserv at this site:

<http://www.library.yale.edu/~llicense/mailling-list.shtml>

Licensing Resources from the Association of Research Libraries

ARL E JOURNAL LISTSERVE--Information available at this site:

➤ <http://www.cni.org/Hforums/arl-ejournal/about.html>

Listserves subscription link at this site:

➤ <http://www.cni.org/Hforums/arl-ejournal/>

ARL booklet: Licensing Electronic Resources: Strategic And Practical Considerations For Signing Electronic Information Delivery Agreements

➤ <http://www.arl.org/scomm/licensing/licbooklet.html>

Additional Licensing Resources

ICOLC's Statement of Current Perspective and Preferred Practices for the Selection and Purchase of Electronic Information

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

Principles for Licensing Electronic Resources developed by Multiple Library Associations including among others the American Library Association, the Special Libraries Association, and the American Association of Law Librarians

➤ <http://www.arl.org/scomm/licensing/principles.html>

Samples of Model Standard Licenses, a site sponsored by and developed in close co-operation with five major subscription agents: Blackwell, Rowecom, EBSCO, Harrassowitz and Swets.

➤ www.licensingmodels.com

University of Oregon Libraries--A Checklist for Negotiating Licensing Agreements

➤ <http://darkwing.uoregon.edu/~chadwelf/checklist.htm>