Licensing and Managing Electronic Resources
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# Contents

List of tables vii  
About the author ix  
Acknowledgements xi  
List of acronyms xiii  
Legal note xv  
Introduction xvii  

1 Know your copyrights 1  
A brief history of US copyright law 1  
Title 17 3  
Copyright versus contract law 19  
Note 21  

2 Who are you? Identifying your institution and its needs 23  
Institutional characteristics 23  
User populations 26  
Library uses 27  
Network and security infrastructure 28  
Conclusion 34  

3 The license 37  
Introduction 37  
Parts of the contract 40  

4 Successfully negotiating an agreement 83  
Negotiating licensing terms 86  
Negotiating business terms 105
List of tables

2.1 Database breach management process 33
4.1 Sample pricing model for a publisher’s journal package 118
5.1 Sample database troubleshooting FAQ 133–4
About the author

Becky Albitz holds the position of electronic resources and copyright librarian at the Pennsylvania State University. She earned her undergraduate degrees in film and English from the University of Rochester, her master’s in film from Penn State and her MLS from the University of Pittsburgh; she is working on her doctorate in higher education at Penn State. As a former media librarian at the University of Iowa and New York University, Becky has extensive experience with copyright issues as they pertain to media, and has actively engaged in media and copyright-related organizations within the American Library Association. She is currently chair of the Association of College and Research Libraries Copyright Committee. Her publications on media, licensing and copyright have appeared in a variety of venues, including portal, the Journal of Academic Librarianship, The Reference Librarian, Collection Development and The Acquisitions Librarian. Becky co-taught the Association of Research Libraries online licensing workshop with Trisha Davis from Ohio State, and has given numerous presentations and workshops on copyright, the Digital Millennium Copyright Act, the Technology, Education, and Copyright Harmonization (TEACH) Act and electronic resource licensing.

The author can be contacted via the publishers.
Before I became an electronic resources librarian, I had no background in law or business. I did understand the fundamentals behind copyright law, because, as a media librarian, I had to understand what people could and could not do with the library’s video collection. That after only seven years in this position I am able to write a book offering advice to other newly minted electronic resources librarians is due to the help and support given by a number of wonderful colleagues. I will forever be in debt to Bonnie MacEwan, who gave me the opportunity and offered the guidance I needed as a new electronic resources librarian. Trisha Davis had the faith in my abilities to take me on as her ARL online licensing workshop co-instructor. Jim Stemper, Susan Barribeau, Wendy Shelburne and Jaime Jamison all provide me with the laughter and support I need to make it through the tougher negotiations. And I thank the faculty and staff of the Penn State University Libraries, at all locations, who continue to support and encourage me every day.

Above all, I thank Cherry Ekins for her wonderful editing and excellent sense of humor, John Swinton, my father, for his indexing skills and constant, unwavering support, and finally Donna Ferullo for reading a draft of this book and correcting all my legal misunderstandings. I am forever grateful to you all.
## List of acronyms

<table>
<thead>
<tr>
<th>Acronym</th>
<th>Description</th>
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</thead>
<tbody>
<tr>
<td>AEA</td>
<td>American Economic Association</td>
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<tr>
<td>CLIR</td>
<td>Council on Library Information Resources</td>
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<tr>
<td>CLOCKSS</td>
<td>controlled LOCKSS</td>
</tr>
<tr>
<td>CONFU</td>
<td>Conference on Fair Use</td>
</tr>
<tr>
<td>CONTU</td>
<td>National Commission on New Technological Uses of Copyrighted Works</td>
</tr>
<tr>
<td>COUNTER</td>
<td>Counting Online Usage of Networked Electronic Resources</td>
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<tr>
<td>DDP</td>
<td>deep discount pricing</td>
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<tr>
<td>DLF</td>
<td>Digital Library Federation</td>
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<tr>
<td>DOI</td>
<td>digital object identifier</td>
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<tr>
<td>ECCO</td>
<td>Eighteenth Century Collections Online</td>
</tr>
<tr>
<td>ERL</td>
<td>electronic resources librarian</td>
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<tr>
<td>FAQ</td>
<td>frequently asked questions</td>
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<tr>
<td>FERPA</td>
<td>Family Educational Rights and Privacy Act</td>
</tr>
<tr>
<td>FTE</td>
<td>full-time equivalent</td>
</tr>
<tr>
<td>ICOLC</td>
<td>International Coalition of Library Consortia</td>
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<tr>
<td>IE</td>
<td>Internet Explorer</td>
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<tr>
<td>IP</td>
<td>internet protocol</td>
</tr>
<tr>
<td>ISSN</td>
<td>International Standard Serial Number</td>
</tr>
<tr>
<td>LOCKSS</td>
<td>lots of copies keep stuff safe</td>
</tr>
<tr>
<td>MARC</td>
<td>machine-readable cataloguing</td>
</tr>
<tr>
<td>NISO</td>
<td>National Information Standards Organization</td>
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<tr>
<td>SERU</td>
<td>Shared E-Resource Understanding</td>
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</table>
SUNY  State University of New York
TEACH Technology, Education, and Copyright Harmonization Act
UCITA Uniform Computer Information Transactions Act
WIPO World Intellectual Property Organization
Legal note

I am not an attorney. Nothing in this book constitutes legal advice. Please contact your institution's legal counsel if you have any questions concerning the legal policies and practices of your library, college, university or state, if appropriate.
Introduction

Ownership versus access has been a long-standing issue in libraries. In the print world, interlibrary loan gives us the opportunity to choose to spend our collection dollars on a book or journal subscription, or to borrow that information from another institution. This option allows us the flexibility to build strong collections in areas that support our institution’s research and curricular foci, while still providing access to research-level materials in other areas of faculty and student interest. Those materials we choose to purchase become ours to use as permitted under US copyright law, and to share with other libraries upon request.

In the electronic era, access in particular has taken on a very different meaning. It no longer just refers to borrowing a physical piece from another library. We now use the term to describe information delivery through an electronic product we license, rather than purchase outright. Licensed resources provide our users with a great number of benefits, including remote access, sophisticated searching capabilities and rare content. But because we have to sign a license to offer this access, our ability to use the content is no longer consistent with our rights under copyright law. Our faculty and students do not realize that they may not be permitted to use that electronic journal article as they would the print version, because the license we signed prohibits that use. For librarians, offering access to content rather than purchasing it raises issues concerning use of this material for interlibrary
Licensing and Managing Electronic Resources

loan and reserves, long-term access and preservation, and content management.

Licensing agreements are not limited to online products only. Our acquisitions departments are now finding contracts accompanying some print books, most frequently those published in business and law. Textbooks in engineering and the sciences now include single-user CD-ROMs with highly restrictive licenses. Some of these contracts require a signature, while others go into effect upon payment of the invoice or with the first use. Some video and DVD distributors are requiring signed license agreements from acquiring libraries, or are imposing usage restrictions that are, again, accepted tacitly when the library pays the bill. And, of course, CD-ROMs and software continue to arrive with shrink-wrap licenses – those that require no signature and whose terms and conditions become valid when the packaging is opened.

Along with this growing number of licensed resources comes the need to manage the licensing process as well as the products themselves. In response, many libraries have established electronic resources librarian positions, while others may assign the licensing, negotiation and management of these products to people already on staff, in addition to their other responsibilities. The person handling some or all activities related to your electronic resources might be the head of serials or acquisitions, a reference librarian or the head of collections. But no matter where in the organization electronic resource oversight lives, these responsibilities are unique within the profession. No other job requires a knowledge of library services, the ability to read and negotiate legal contracts, the skill to maneuver within the world of publishers and information providers, and the technical knowledge to troubleshoot access problems. These positions merge elements of both library
and business worlds, and require knowledge taught in library science, masters of business administration and law school programs. Needless to say, opportunities to learn the skills and information necessary to do this job are not widely available. While a few organizations offered in-person and online seminars in the past, these programs have all but disappeared from the continuing education landscape. The goal of this book is to fill that void, and to offer some guidance to those who are new to the arena of licensing and electronic resource management.

Licensing terms and copyright determine how clients and libraries can use information resources. Understanding the relationship between them is a crucial first step in negotiating a license. Copyright is federal law, while contract law is governed by the states. Pre-emption is a doctrine stating that federal law overrides state law, articulated in the Supremacy Clause of the US Constitution (1787). Section VI, Article 2 states:

This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

When a conflict exists between state and federal law, the constitution states that federal law will prevail. This is, however, a point of discussion within the legal community, because many courts will uphold contract language even if it is in direct conflict with copyright law. So understanding the difference between what copyright allows us to do with a work and what a contract mandates is necessary to ensure
that you can use licensed content in a manner that corresponds to your users' and library's needs.

Once the relationship between copyright law and licensing terms and conditions is understood, the novice license negotiator needs to know the definitions of common legal terms and concepts found in a contract. A generic license will be the foundation of this book, not only to provide definitions of standard licensing terms, but also to offer guidance in making appropriate changes to a contract's language. The changes that will be discussed will fall into two categories: necessary and preferred. Necessary changes are those your state, institution or library mandates for legal or operational reasons. These are considered deal-breakers, meaning a company’s willingness to accept these changes will determine whether an institution can move forward with the agreement at all. The contract changes falling in the preferred category may not be legally or operationally necessary but are highly desirable, depending upon a specific institution's needs. Communicating what changes are essential, which are desired and why all are wanted is an important part of the negotiation process.

Selecting and managing individual electronic resources can be as complicated as the licensing process. In some cases the same content may be available from multiple companies. Selecting the most appropriate company might depend upon a company's willingness to negotiate licensing terms and conditions. But other factors, including interface functionality, pricing and access options, can play a part in choosing one company over another. Once a product is selected, you, as the electronic resources librarian, along with your library's collection managers need to review these resources annually, as you do your other subscriptions. You might choose to renegotiate pricing, select a new provider or even cancel the product altogether. These options will be
reviewed as part of the management process. Finally, model licensing and other approaches to publisher/librarian agreements, which could reduce or potentially eliminate the need for licenses and negotiations, will be discussed as alternatives to the publisher license.

Licensing, negotiating and managing information resources are responsibilities that are constantly evolving. The intent of this work is to provide a foundation upon which the new electronic resources librarian can build. Since I am not an attorney, and do not have knowledge about individual state and institution requirements, this book should not take the place of consultation with your institution’s legal counsel or the administrative officer responsible for purchasing institution-wide. These people understand your university’s unique needs and can offer advice to ensure the terms and conditions of these agreements comply with your institution’s policies.