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As I See It! -- To License or Not to License? SERU's the Question

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It was good for me. Valuable life lessons abounded: If you are in trouble, tell everyone immediately. They will find out anyway, they might help, and it saves time. Also, it turns out that other people never thought you had it all together in the first place, so they are often kind and consoling. Plus, for me, there was a special bonus: For years afterward, people would bring me their bonehead travel disaster stories, as if I were a collector of such things. In time, I became a collector of such things. It’s not a bad gig at all. ♣
ity undreamed of in print, but no custom and practise that might govern its use. Neither publishers nor librarians were confident about their respective rights and responsibilities where online journals were concerned.

When in doubt, we resort to professional advice. As the issues arising from the use of electronic content revolved around copyright, the professionals we referred to were our lawyers. And part of a lawyer’s professional responsibility is to protect the client from damage when things go wrong. That is why much of any license agreement contains provisions that only become important when a dispute arises. That is why they contain such detailed definitions and provisions on permitted and prohibited uses. That is why warranties and indemnities, and jurisdiction are important. They are there “just in case.”

While librarians might have hoped for the quick emergence of a predictable standard license that all publishers would adopt, the reality has always been that each publisher’s license was going to be drafted without reference to what other publishers might be doing. That is because publishers cannot talk to each other about such matters. Suppliers cannot collude with each other over price or license terms. It is simply illegal, whether under US anti-trust law or competition law in the European Union or elsewhere. Those laws are designed to foster competition between suppliers, and usage rights to online content would certainly be seen as competitive features between publishers.

Moreover, in this uncertain new world universities and other institutional customers insisted on a formal agreement in which terms would be clearly set out. Even those publishers that posted a simple set of terms and conditions on their newly created Websites found that many libraries in publicly funded institutions on their — newly created — Websites that posted a simple set of terms and conditions would certainly be seen as competitive features between publishers.

As a result, the licenses do not prescribe terms and conditions, but contain the legal text required for a range of options. Whatever the publisher and library agree on, say, inter-library loan, course packs or electronic reserve, the appropriate text can be selected. They were designed to account for the varying needs of different types of customer, and the requirements and policies of different publishers. They have been adopted by many publishers, and have eased the process of drawing up formal licenses.

Nevertheless, the need for formal license agreements has created an administrative burden for both publishers and librarians that defies common sense. The time and effort needed is out of all proportion to the value of the transaction. While a Big Deal consortium license needs to be documented in detail, a single journal subscription should not have to be subject to a process of negotiation and documentation that is vastly more expensive than the subscription itself. It can be adequately provided for by a much simpler process. After all, publishers do not want to take legal action against their customers for inadvertent breaches, and no librarian that I have ever met wants to be seen as anything but a good copyright citizen.

That is why SERU (Shared E-Resource Understanding) is such an important contribution to simplifying the process of acquiring online resources for libraries. It tackles the administrative burden I have described by removing the need for a formal license. It sets out a “framework of shared understanding and good faith” that is set out in plain language and contains general statements rather than detailed, prescriptive, provisions. Taken as a whole, an excellent job has been done.

Publishers and libraries that want to use SERU — even if it is only for some electronic products — are requested to register their support (www.niso.org/committees/SERU/). But take-up has been slow. Not all US academic libraries have registered; a small number of consortia have registered, even though SERU is designed for single institutions. Only a handful of non-US libraries have registered. On the publisher side, there are only 26 registrants: some societies, university presses and two major commercial publishers, Springer and Taylor & Francis. These are the early adopters. But SERU will not have much impact until a much wider range of publishers, including the major commercial and society publishers, join in.

The use of plain language is welcome. Anything that avoids detailed legal terminology is to be welcomed in any relatively small transaction where there is no history of confrontation leading to legal action. But there is a misunderstanding underlying the claim that SERU is an alternative to a license. It may eradicate the need for the drafting and exchange of formal written documents, which is its purpose. But the avoidance of complex legal language and a mere reference to SERU in a purchase order does not mean that a license agreement does not come into effect.

When a library places a subscription and refers to the SERU Guidelines in its order, and the publisher starts to provide access to the subscribed content, a contract — i.e., a license agreement — is created. It is still enforceable if things go wrong. My only criticism of the SERU Guidelines is that they are not clear. Non-lawyers often think that a contract exists only where supplier and customer agree and sign a formal contractual document. But a contract is created when a sale takes place, or access is granted to online content. Money changes hands. A product or service is supplied. A contract is created, in this case incorporating the SERU Guidelines.

SERU represents another staging post on creating custom and practice that renders formal licenses redundant. Even in-house counsel will welcome the relief when there are so many other calls on their time and expertise. So why do so many publishers and libraries appear to be so cautious? Come on, sign up. Simplify the subscription process. Make everybody’s life easier.

Rumors from page 76

Speaking of entrepreneurs, Excelsior College, a distance-learning institution based in Albany, N.Y., with 33,000 students scattered across the country, has outsourced its library services to the Johns Hopkins University, where a team of four employees is dedicated to maintaining Excelsior’s virtual library and assisting its students with questions both online and over the phone. Word is that Johns Hopkins Library will get $1 million for this service. See “Library For Hire: Johns Hopkins U. Sells Services to an Online College,” by Caitlin Moran, Chronicle of Higher Education, December 10, 2008, http://chronicle.com/free/2008/12/8310n.htm?utm_source=at&utm_medium=en http://www.against-the-grain.com/rumors

Had a great visit from Michael Bragg (University Account Manager, Thomson/Reuters/IISI) <Michael.Bragg@thomson.com> the other day. He made a presentation about the new enhancements to Web of Knowledge. Michael was telling me that he will not be in Chicago at ALA because his sister is getting married at the same time and he is in the wedding.