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

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**On the Road**  
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theater, had gone to Oxford, her name was **Annabel**.) The London populace re-materialized. Lots of people were walking, and some entrepreneurial types were selling tea in paper cups. Four cents wouldn't buy me tea, but even so, I started to feel like a person again. **Annabel** said I was very brave and I said no, very stupid, and she said well, perhaps both. She made me laugh.

After about an hour, we parted ways, but the **Marriott** sign was in sight. The lobby was chockablock with people who should have checked out but were trying for another night, because Heathrow was closed. I began dripping, as my snow melted. I elbowed to the counter and asked for my room. They asked for my ID, passport, driver's license?

The whole story again. They called **Bonnie's** room, but she wasn't there. (She was walking back from her appointment on the other side of London. She had miles to go yet.) I asked them to let me in. They said not without ID, but I could wait in the bar. I said, "You're not listening. I have four American pennies. No bar." They said sorry, I might be anyone, they couldn't let me into the room.

I got steely. "Look at me," I said, pointing to my dripping hair, and getting the counter wet. "As you can see, I am a Harmless, Middle-aged, American Woman. Now. Let Me. Into. That. Room." (Okay, in hindsight, the tone of menace probably made "harmless" sound pretty debatable, but I was winging it at the time.)

Finally, they let me into the room. I had been planning my next move. I would tell **Bonnie**, but she'd known me since junior high and harbored no illusions. I couldn't call anyone who saw me as a capable adult, but I could call my travel agent! I did, and asked if she could contact United, and figure out which bus I'd left my purse on, and see about getting it back. She said she'd try. But she didn't call back.

A couple of hours later, the hotel room phone rang. It was my teenage daughter. She said, in her patented calm-and-patient tone, "Mom, your purse will be at Heathrow, at the United lost and found counter, where you can retrieve it tomorrow morning."

I asked how she knew about my purse. She said, "Oh, everybody knows about your purse. The bus driver found it right away, and took it to United. It had your business cards in it, so United called your office in Portland, and they called Oxford, but no one in either office knew where you were, though they asked everyone on staff. You should have called and told somebody what happened. People have been searching for you for hours."

It was true. My mortifying secret was common knowledge. Absolutely everyone knew I had left my purse on a bus. New people, people I had never met, people in Oxford, they all knew I had left my purse on a bus. After I got home, people who hadn't exchanged six words with me in months would stop me in the hall, and say how glad they were I was okay, and what happened, anyway? How could I leave my purse on a bus? Did I know about those little passport-holder things you can wear around your neck?

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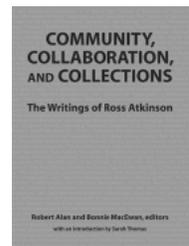
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It was good for me. Valuable life lessons abounded: If you are in trouble, tell everyone immediately. They will find out anyway, they might help, and it saves time. Also, it turns out that other people never thought you had it all that together in 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. 🐼



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

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In the print world placing a journal subscription was a simple process of ordering from the publisher or subscription agent. After checking in each issue, it was available for library patrons to use. No extra paperwork was involved. No additional paperwork was required, as decades of custom and practise had defined usage rights. Both publishers and librarians relied on copyright law and **CONTU Guidelines** to govern how the journal content could and could not be used. Oh happy days!

One of the unintended consequences of the migration to online distribution of journals,

followed by reference and other types of eBook, has been the administrative burden of negotiating licenses. Licenses became necessary because neither publishers nor libraries were clear about how electronic resources could or should be used. There was no experience, little understanding of the other's needs and concerns, and no meeting of minds. This in turn has been created by uncertainty about how copyright law would deal with digital usage rights. Let us remember that online journals became a reality less than fifteen years ago. The technology offered functional-

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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 still insisted on a formal signed license agreement. The result was a plethora of licenses, each of which required individual review and negotiation. Even if the substance was similar, the wording was different.

This really constitutes a failure on the part of librarians. There was a failure to take advantage of an uncertain situation by stating their own requirements and crafting their own terms and conditions — in effect pre-empting publishers by setting out what was required to meet the reasonable needs of library patrons. Unlike suppliers, customers can collaborate on such things. After all, the library is the customer, and any procurement professional will tell you that the customer should clearly set out its requirements as a condition of purchase.

The dying gasps of the last century saw the first moves to some form of standardization of license terms. The first was the UK's PA/JISC model license, jointly developed by publishers and librarians from the **Publishers Association** and the **Joint Information Systems Committee (JISC)**, representing UK universities. At the same time, statements of licensing principles

were published by **ALA** and the **International Coalition of Library Consortia**.

Using these as sources, together with ideas from listservs such as liblicense-l and from individual publishers own licenses, a suite of licenses was released in 1999, with a substantial updating in 2000 ([www.licensingmodels.com](http://www.licensingmodels.com)) — an early version of truly open access publishing. They were sponsored by and developed with the major subscription agents, **EBSCO**, **Harrassowitz**, and **Swets**, and were subject to extensive consultation among publishers and librarians internationally. The project itself was fraught with difficulty, as it was essential to avoid breach of anti-trust law. Nevertheless, we were allowed to proceed as this was deemed to be "pre-competitive collaboration" that did not involve recommending any particular terms.

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/](http://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 Website** is that it does not make this 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://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/ISI) <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.

And, as we sign off for February, be sure and read **Robert Darnton's** "Google and the Future of Books," *The New York Review of Books*, vol 56#2 (February 12, 2009). <http://www.nybooks.com/articles/22281>. The full text can be found at <http://www.googlebooksettlement.com/agreement.html>. 🐘