

Copyright and Licensing in the Digital Age^{*}

Emanuella Giavarra

Copyright lawyer, Chambers of Mark Watson-Gandy, United Kingdom

ABSTRACT

My paper today will focus on the recent developments in European copyright law and licensing practices. Firstly, I will briefly explain what is meant by copyright and its protection by law. Secondly, I will give you an overview of the recent legislative activities of the World Intellectual Property Organisation and the European Commission in relation to electronic copyright and clarify the consequences for libraries. Thirdly, I will explain the connection between copyright and licensing. Finally, I will take you through a licence agreement and show you where legal pitfalls can arise.

WHAT DO WE MEAN BY COPYRIGHT?

Copyright is concerned with the rights of authors, composers, artists and other creators in their works. Copyright law grants them the right for a limited period of time, to authorise or prohibit certain uses of their works by others. Most of the materials available in libraries consist of works protected by copyright law. This means that certain kind of uses of those works in libraries must not be made without the authorisation from the authors. What are 'those works'? Copyright protects 'literary and artistic works' this includes novels, short stories, scientific writings or manuals, and musical works, works of graphic and plastic arts, films, documentaries, but also computer programs and databases.

The rights provided by copyright are two fold: economic rights and moral rights. The main aim of copyright is to provide a stimulus for creativity. This means that the law has to make sure that the author will have an economic return on his creation and that he can protect his creation from being violated in one way or the other. The economic rights include the right to copy or otherwise reproduce the work. They also include the right to translate the work, to transform, to perform it in public or broadcast it.

For the right of reproduction, all EU copyright legislations contain exceptions for users to copy freely a part of a work or a complete work for private, research or/and educational purposes. With these provisions the governments have tried to balance the interests of the users of copyright material and the creators of copyright material.

The moral rights generally include the right of paternity, which is the authors right to claim authorship of his work, for instance by having his or her name mentioned in connection with

^{*} Originally published in International Summer School on the Digital Library : Week 3: Electronic Publishing : 7 October - 12 October 2001 / ed. by Catherine Deeley and Jola Prinsen. - Tilburg : Ticer B.V., 2001, pp. 8a.1-8a.18.

it. The other moral right is the right of integrity, which includes the right to object to transformation of the work.

All these rights are exclusive rights, which means that the owner is the only one allowed to give authorisation for the use of his work. The owner can be the author or the publisher. The rights last for the author's life plus 70 years (was 50 years) after his death. Economic rights can be transferred or licensed, however moral rights are considered to be inalienable.

PROTECTION BY LAW

Copyright is provided for in national laws. Those laws give protection within the national territory. Since 1886 international protection was provided for with the adoption of the Berne Convention for the Protection of Literary and Artistic Works. More than 100 countries signed this Convention and are bound by it.

The administration of the Berne Convention is done by the United Nations specialised agency, the World Intellectual Property Organization (WIPO) in Geneva. The Berne Convention provides for a minimum level of copyright protection to be included by the countries member to the Convention. The governments were given the freedom to regulate for certain issues and they were also allowed to regulate more than was provided by the Berne Convention. This resulted in a variety of different copyright legislations among the members of the Berne Convention.

All members of the European Union are members of the Berne Convention. The European Commission has tried in the last seven years to harmonise the European copyright environment, especially in respect of the new media and information technology. These new phenomena have changed the international copyright landscape considerably. They allow enormous amounts of material to be stored and endlessly reproduced, without quality loss.

The considerable economic interests at stake and the lobbying power of the copyright industries have had an influence on the development of national and international copyright law and on library activities. This can be seen from the recent EU Directives and the newly adopted WIPO Copyright Treaty 1996.

The following Directives relevant to copyright were adopted by the EU institutions between 1991 - 2001:

- directive on computer software ('91);
- directive on lending and rental rights ('92);
- directive on broadcasting of programmes by satellite and cable transmission ('93);
- directive on the duration of copyright protection ('93);
- directive on the protection of personal data ('95);
- directive on the legal protection of databases ('96);
- directive on the harmonisation of copyright in the information society ('01).

These Directives have given the industry more and more protection over access to electronic information. The significance of these Directives is that they have to be implemented into

your copyright law. It is, most of the times, not possible to change their content at a local level once the Directive has been adopted by the EU Council of Ministers.

ACTIVITIES THAT COULD CAUSE COPYRIGHT INFRINGEMENTS

To give concrete examples, I would like to show you a list of activities performed by the library or their users that could infringe (electronic) copyright:

- copying by library users;
- copying for users and inter-library loan;
- copying for internal use;
- copying of sound and images;
- performance to the public of a video or CD;
- lending to the public;
- copying electronic information;
- creating an electronic collection and electronic document delivery.

The Berne Convention in Art. 9 (1) and (2) only allows the member states to provide for exceptions for copying as long as the activity can pass the 'three step test'. Art. 9 (1) and (2) read as follows:

Article 9 (1) Berne Convention

“Authors of literary and artistic works protected by this Convention shall have exclusive right of authorising the reproduction of these works, in any manner and form.”

Article 9 (2) Berne Convention

“It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interest of the author”.

Art. 9 Berne Convention functioned well for the paper environment, but does this article also apply to the digital environment? Do the words 'in any manner and form' in Art. 9 (1) includes material in digital format? If they do, that means that there is room for exceptions for the use of digital material as long as it passes the three step test of Art. 9 (2) Berne Convention.

At present many librarians wish to digitise the material they have in the library and create an electronic collection. One step further, they wish to make this collection accessible to remote users and/or set up an electronic document delivery service. Here is where most problems with the copyright owners in the electronic environment start. Due to the economic interests involved in electronic document delivery services, most publishers claim that these services are in direct competition with the “normal exploitation” of the work as laid down in Art. 9 (2) of the Berne Convention.

As long as an activity is not in conflict with the normal exploitation of a work, a user is allowed to make a copy of the work without asking for permission and without paying royalties. The electronic environment has changed the content of the normal exploitation of a work concept. A lot of the larger publishing houses have started to set up electronic document delivery services themselves. This means that the setting up of an electronic document delivery services for journal articles by publishers, has become a part of the normal exploitation of a work. Most publishers claim that every electronic document delivery service conducted by libraries is in conflict with the normal exploitation of the work.

NEW DEVELOPMENTS

WIPO COPYRIGHT TREATY 1996

The above mentioned digital copyright issues were under discussion at the WIPO Diplomatic Conference from 2-20 December 1996 in Geneva, which lead to the adoption of the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty by representatives of 157 nations.

Due to a constructive lobby of the international library community this Treaty is less harmful for the future of access of electronic information than the draft proposals. In this paper I will limit myself to the WIPO Copyright Treaty.

The starting point of the discussions were the proposals drafted by Mr Jukka Liedes, the Chairman of the WIPO Committee of Experts on a Possible Protocol to the Berne Convention and a Possible Instrument for the Protection of the Rights of Performers and Producers of Phonograms.

During the WIPO Diplomatic Conference the library lobby focused specifically on the proposed Articles 7 (Right of Reproduction), 10 (Right of Communication) and 12 (Limitations and Exceptions) of Document 4 of the Basic Proposals of the Treaty on Certain Questions Concerning the Protection of Literary and Artistic Works. During the WIPO Diplomatic Conference many changes to these articles were proposed, especially to Article 7.

The library lobby resulted in some significant changes in the WIPO Copyright Treaty.

I. Changes in the Preamble of the Treaty.

The following statement was included in the Preamble of the Treaty:

“the Contracting Parties, recognizing the need to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information, as reflected in the Berne Convention”.

II. Deletion of Article 7 - Right of Reproduction.

The draft proposal read as follows:

“(1) The exclusive right accorded to authors of literary and artistic works in Article 9(1) of the Berne Convention of authorizing the reproduction of their works shall include direct and indirect reproduction of their works, whether permanent or temporary, in any manner and form.

(2) Subject to the provision of Article 9(2) of the Berne Convention, it shall be a matter for legislation in Contracting Parties to limit the right of reproduction in cases where temporary reproduction has the sole purpose of making the work perceptible or where the reproduction is of a transient or incidental nature, provided that such reproduction takes place in the course of use of the work that is authorized by the author or permitted by law”.

This article, as mentioned before, was the most heavily discussed article during the WIPO Diplomatic Conference. One of the consequences of this article is that even technical copies in a network are protected by copyright. During the Conference many amendments to this article were proposed. The most favourable was proposed by the Norwegian delegation. They proposed that the temporary reproduction made for the sole purpose of making a work perceptible, or which are of a purely transient or incidental character as part of a technical process, does not as such constitute a reproduction within the meaning of Article 9(1) of the Berne Convention.

In the end Article 7 was deleted and replaced by the following Statement included in Article 1.4 of the WIPO Copyright Treaty:

“The reproduction right, as set out in Article 9 of the Berne Convention, and the exceptions permitted there under, fully apply in the digital environment, in particular to the use of works in digital form.

It is understood that the storage of a protected work in digital form in an electronic medium constitutes a reproduction within the meaning of Article 9 of the Berne Convention”.

The library community was particularly satisfied with the first part of the Statement. The issue of debate between the library community and the publishing industry before the adoption of this Treaty was the viability of the exceptions under copyright for private, educational and research purposes in a digital environment. The new WIPO Copyright Treaty gives ground to extent the so called ‘user rights’ to digital material.

III. Article 10 - Right of Communication was adopted with amendments and an Agreed Statement.

This article did not get the discussion it deserved. The government representatives were convinced that the article concerning the limitations and exceptions (see Article 12) would

take care of the library fears for the provisions in this article. The Right of Communication is covered in the WIPO Copyright Treaty in the new Article 8. It reads as follows:

“Without prejudice to the provisions of Articles 11(1)(ii), 11bis(1)(i) and (ii), 11ter(1)(ii), 14(1)(ii) and 14bis(1) of the Berne Convention, authors of literary and artistic works shall enjoy the exclusive right of authorising any communication, to the public of their works, by wire and wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them”.

The following agreed statement was adopted to take away the fears of the telecom companies that their services would come under this Right of Communication:

“It is understood that the mere provision of physical facilities for enabling or making a communication does not in itself amount to communication within the meaning of this Treaty or the Berne Convention. It is further understood that nothing in Article 8 precludes a Contracting Party from applying Article 11bis(2)”.

IV. Article 12 - Limitations and Exceptions was adopted with amendments and an Agreed Statement.

This Article is crucial for libraries. Besides Article 7, most of our efforts went into lobbying for a sufficient provision on the limitations and exceptions for users under (electronic) copyright. The new Article 10 of the WIPO Copyright Treaty contains the limitations and exceptions. It allows for the applicability of the old limitations and exceptions under copyright in the digital environment, taking into account the three step test of Article 9(2) of the Berne Convention. Moreover, it also allows for the creation of new exceptions and limitations that are appropriate in the digital network environment. Article 10 reads as follows:

“(1) Contracting Parties may, in their national legislation, provide for limitations of or exceptions to the rights granted to authors of literary and artistic works under this Treaty in certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.

(2) Contracting Parties shall, when applying the Berne Convention, confine any limitations of or exceptions to rights provided for therein to certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author”.

The Agreed Statement reads as follows:

“It is understood that the provisions of Article 10 permit Contracting Parties to carry forward and appropriately extend into the digital environment limitations and exceptions in their national laws which have been considered acceptable

under the Berne Convention. Similarly, these provisions should be understood to permit Contracting Parties to devise new exceptions and limitations that are appropriate in the digital network environment.

It is also understood that Article 10(2) neither reduces nor extends the scope of applicability of the limitations and exceptions permitted by the Berne Convention”.

EU DIRECTIVE ON THE HARMONISATION OF COPYRIGHT IN THE INFORMATION SOCIETY 2001

The latest development in international copyright law is the Directive on the harmonisation of certain aspects of copyright and related rights in the Information Society (COM (97) 628 final), which was published by the European Commission on 10 December 1997 and finally adopted after three years of discussions on 22 May 2001 (OJ L 167 of 22.06.01).

The European Parliament claims that this Directive has been the most lobbied Directive in its history. The discussions were held up due to major differences amongst the representatives of the 15 Member States on the scope of the exceptions to copyright and the scope of the legal protection of technical measures.

At stake for the library community was, the possible loss of existing copyright exceptions for print, a limitation to digital copying by libraries to conservation and archiving, fair compensation as a pre-condition for each and every exception and far-reaching new exclusive rights for rightholders.

According to the European Commission, this Directive adjusts and complements the existing legal framework, with particular emphasis to new products and services containing intellectual property (both on-line and on physical carriers such as CDs, CD-ROMs and Digital Video Discs). The Directive also implements the main obligations of the WIPO Copyright Treaty 1996 and the WIPO Performances and Phonograms Treaty 1996.

The issues covered by the Directive are:

- reproduction right;
- communication to the public right;
- legal protection of the integrity of technical identification and protection schemes;
- distribution right.

The Right of Communication to the Public and the Legal Protection of Technical Measures and Rights-Management Information are, for most EU countries, new features.

Right of Communication to the Public

This new exclusive right was introduced by the WIPO Copyright Treaty 1996 and the WIPO Performances and Phonograms Treaty 1996. There is still a lot of confusion about the extent and application of this right, especially over the definition of “public” The Explanatory

Memorandum to the draft EU Copyright Directive states that the communication to the public' (the 'making available to the public') precedes the stage of its actual transmission.

In other words, the storage of material with the (future) aim of offering it on a publicly accessible site may amount to a 'communication to the public'.

The Directive grants the exclusive right to authorise or prohibit any communication or making available to the public, by wire or wireless means (in such a way that members of the public may access them from a place and at a time individually chosen by them) to:

- authors, of their works;
- performers, of fixations of their performances;
- phonogram producers, of their phonograms;
- producers of their first fixations of films, in respect of the original and copies of their films;
- broadcasting organisations, of fixations of their broadcasts, whether those broadcasts are transmitted by wire or over the air, including by cable or satellite.

Legal Protection of Technical Measures and Rights-Management Information

This kind of protection was discussed for the first time in the framework of the WIPO negotiations on certain questions on copyright and related rights. The WIPO Performances and Phonograms Treaty 1996 (WPPT) and the WIPO Copyright Treaty 1996 (WCT) contain parallel provisions on "technological measures" and on "obligations concerning rights management information". The first prohibits the circumvention of technical measures that are used by holders of copyright or related rights in connection with the exercise of their rights, the latter prohibits the removal and altering of certain electronic rights management information attached to a work or other subject matter.

These obligations have been implemented and subsequently extended in Art. 6 of the Directive. This article entitles rightholders to protect their works against the circumvention of any effective technological measures. However, where right holders have not taken voluntary measures to give the beneficiaries of certain exceptions access to their protected works, the government can take appropriate measures to enable users to benefit from the exceptions concerned.

The expression "technological measures" is broadly defined in Article 6 of the Directive and refers to any technology, device or component that, in the normal course of its operation, is designed to prevent or restrict acts, in respect of works or other subject matter, which are not authorised by the right holder. Technological measures shall be deemed "effective" where the use of a protected work is controlled by the rightholders through application of an access control or protection process, such as encryption, scrambling or other transformation of the work or other subject matter or a copy control mechanism, which achieves the protection objective.

Art. 6.4 of the Directive is very important to the library community as it balances the potential technical monopoly of information by rightholders. Several doubts have been raised concerning the effectiveness of this article as Art. 6.4 does not provide an outright permission

to circumvent a technical block for lawful uses by a lawful user (a user exercising an exception). The provision puts the obligation on the right holder to make available the means of benefiting from that exception through the use of voluntary measures or agreements which accommodate such exceptions. If they fail to do so, the government is entitled to step in and take 'appropriate measures'.

This protection mechanism only applies to the exceptions provided for in Article 5.2a, 2c, 2d, 2e, 3a, 3b or 3e. It is worrying that they have not been extended to the exceptions in 5.3.f, i and j. The legal protection of technical measures is retrospective, but only for the Directive on the legal protection of databases which was implemented in most of the EU copyright legislations in 1998.

According to Article 6.4 fourth paragraph, the circumvention by lawful users will not be allowed if the work was made available on demand on agreed contractual terms. In other words, where content is delivered on-line subject to contractual terms rightholders will be permitted to block technically any copying of such content, irrespective of whether such copying is allowed by law or not. Recital 53 tries to clarify that this provision only applies to interactive on-demand services, in such a way that members of the public may access works or other subject-matter from a place and at a time individually chosen by them.

Besides the protection of technical measures in Art. 6, Art. 7 requests Member States to provide adequate legal protection against any person who, without authority, removes or alters electronic rights management information or distributes, imports, communicates with the public or makes available copies to the public or other subject matter from which electronic rights management information has been removed or altered without authority.

Exceptions and Limitations

The balance in copyright proposed by the European Commission can be found in Art. 5 of the draft Copyright Directive. This article gives an exhaustive list of exceptions, which means that no other exceptions are allowed at a national level apart from the ones given in Art. 5.

1. Temporary acts of reproduction referred to in Article 2, which are transient or incidental [and] an integral and essential part of a technological process and whose sole purpose is to enable:

- a) a transmission in a network between third parties by an intermediary or
- b) a lawful use of a work or other subject-matter to be made, and which have no independent economic significance, shall be exempted from the reproduction right provided for in Article 2.

2. Member States may provide for exceptions or limitations to the reproduction right provided for in Article 2 in the following cases:

- a) in respect of reproductions on paper or any similar medium, effected by the use of any kind of photographic technique or by some other process having similar

- effects, with the exception of sheet music, provided that the rightholders receive fair compensation;
- b) in respect of reproductions on any medium made by a natural person for private use and for ends that are neither directly nor indirectly commercial, on condition that the rightholders receive fair compensation which takes account of the application or non-application of technological measures referred to in Article 6 to the work or subject matter concerned;
 - c) in respect of specific acts of reproduction made by publicly accessible libraries, educational establishments or museums, or by archives, which are not for direct or indirect economic or commercial advantage;
 - d) in respect of ephemeral recordings of works made by broadcasting organisations by means of their own facilities and for their own broadcasts; the preservation of these recordings in official archives may, on the grounds of their exceptional documentary character, be permitted;
 - e) in respect of reproductions of broadcasts made by social institutions pursuing non-commercial purposes, such as hospitals or prisons, on condition that the rightholders receive fair compensation;

3. Member States may provide for exceptions and limitations to the rights referred to in Articles 2 and 3 in the following cases:

- a) use for the sole purpose of illustration for teaching or scientific research, as long as the source, including the author's name, is indicated unless this turns out to be impossible and to the extent justified by the non-commercial purpose to be achieved;
- b) uses, for the benefit of people with a disability, which are directly related to the disability and of a non-commercial nature, to the extent required by the specific disability;
- c) reproduction by the press, communication to the public or making available of published articles on current economic, political or religious topics of broadcast works or other subject matter of the same character, in cases where such use is not expressly reserved, and as long as the source, including the author's name, is indicated, or use in connection with the reporting of current events, to the extent justified by the informatory purpose and as long as the source, including the author's name, is indicated, unless this turns out to be impossible;
- d) quotations for purposes such as criticism or review, provided that they relate to a work or other subject-matter which has already been lawfully made available to the public, that, unless this turns out to be impossible, the source, including the author's name, is indicated, and that their use is in accordance with fair practice, and to the extent required by the specific purpose;
- e) use for the purposes of public security or to ensure the proper performance or reporting of administrative, parliamentary or judicial proceedings;
- f) use of political speeches as well as extracts of public lectures or similar works or subject-matter to the extent justified by the informatory purpose and provided that the source, including the author's name, is indicated, except where this turns out to be impossible;
- g) use during religious or official celebrations organised by a public authority;

- h) use of works, such as works of architecture or sculpture, made to be located permanently in public places;
- i) incidental inclusion of a work or other subject-matter in other material;
- j) use for the purpose of advertising the public exhibition or sale of artistic works, to the extent necessary to promote the event, excluding any other commercial use;
- k) use for the purpose of caricature, parody or pastiche;
- l) use in connection with demonstration or repair of equipment;
- m) use of an artistic work in the form of a building or a drawing or plan of a building for the purposes of reconstructing the building;
- n) use by communication or making available, for the purpose of research or private study, to individual members of the public by dedicated terminals on the premises of establishments referred to in paragraph 2(c) of works or other subject matter not subject to purchase or licensing terms which are contained in their collections;
- o) use in certain other cases of minor importance where exceptions already exist under national law, provided that they only concern analogue uses and do not affect the free circulation of goods and services within the Community, without prejudice to the other exceptions and limitations contained in this Article.

4. Where the Member States may provide for an exception to the right of reproduction pursuant to paragraphs 2 and 3 of this Article, they may provide similarly for an exception or limitation to the right of distribution as referred to in Article 4 to the extent justified by the purpose of the authorised act of reproduction.

5. The exceptions and limitations provided for in paragraphs 1, 2, 3 and 4 shall only be applied in certain special cases that do not conflict with a normal exploitation of the work or other subject matter and do not unreasonably prejudice the legitimate interests of the rightholder.

Somewhat surprisingly, the draft Copyright Directive aims to harmonise the exceptions and limitations for the digital as well as for the paper environment. This implies that existing exceptions might cease to exist. Only the exception in Art.5.1 is mandatory. All the other exceptions in Art. 5 are optional. In other words it will be up to the national governments to implement these into national legislation or not.

Fair compensation

Several exceptions require the payment of a fair compensation. The Council of Ministers agreed after extensive discussions on the words 'fair compensation' instead of 'equitable remuneration', which is the basis for many existing remuneration schemes in the EU. 'Equitable remuneration' implies that in return for the exception there must be a payment. 'Fair compensation' not only requires that the compensation must be 'fair' but must compensate for real loss. Indeed, compensation need not be financial. These concepts are reflected in Recital 35, which makes the following important statements:

1. that where rightholders have already received payment in some other form, such as part of a licence fee, no specific or separate payment may be due.
2. that the level of fair compensation should take full account of the degree of use of technological protection measures.
3. that in certain situations where the prejudice to the right holder would be minimal, no obligation for payment may arise.

The last of these statements is very important as it creates an opportunity to challenge future levy or other remuneration legislation.

Less positive is Recital 36 which gives the government the free hand to extend the provisions for fair compensation for rightholders to the exceptions in the Directive which at the moment do not require such compensation.

Licensing

The legal solution for activities other than the ones listed as an exception can be found in the Explanatory Memorandum to the Directive. The Memorandum states ‘with respect to the use of digitised material by libraries, on-line as well as off-line, initiatives are on-going in a number of Member States, notably the UK, where library privileges are most developed, to arrive at more flexible contractual solutions’.

This shift in focus of attention from a bundle of exceptions which has developed over many years in the print-on-paper environment towards contractual licensing solutions, especially accompanied with a broad protection of (new) rights of the rightholders is one that should make HE and FE institutions wary.

Contract law is dominated by the concept of freedom of contract - that is to say the parties to a contract are free to negotiate the terms of use of copyrighted materials. Negotiations with a holder of an exclusive right could turn out to have a harsh result for the information purchaser. Especially for these cases, the copyright exceptions (statutory rights) provide an essential tool to guarantee access to information and library services. In order to safeguard these rights, the following clause should be included in a licence:

“This Licence shall be deemed to complement and extend the rights of the Licensee under the National Copyright Act and nothing in this Licence shall constitute a waiver of any statutory rights held by the Licensee from time to time under that Act or any amending legislation.”

Implementation

The Directive allows the EU governments to implement the Directive into their national copyright law within a period of 18 months. Once implemented, the Directive will be enforceable. The implementation of this Directive will change the copyright environment as we know it. The adopted Directive is undoubtedly a vast improvement on the original proposals and their initial amendment by the European Parliament. Only through a continuous

dialogue with your government in the coming months, the library community will be able to influence the future of copyright and the impact of it upon its services.

LICENSING OF ELECTRONIC RESOURCES

I would like to turn now to licensing. Licensing electronic resources has become the preferred business method of copyright owners. This should not come as a surprise. Licences are governed by contract law. The basic notion of contract law is contractual freedom. This means that parties to a contract are free to negotiate the terms and use of copyright material or indeed waive rights that the copyright law grants them. The level of access and use of electronic resources depends heavily on the terms and conditions of the licence. In other words a licence creates a clear and controllable environment for the parties.

When a publisher sends a licence agreement, it should be kept in mind that he is actually sending an invitation to negotiate the terms and conditions under which his products can be used. Usually a model licence is sent, which should be read and amended if necessary. Most of the licences are written by lawyers and the formal language used puts many librarians off reading it. Still, each word is important and the terms can be used to restrict uses of electronic material you might previously have been allowed under copyright law. The problem does not go away if you ignore it. Ignoring the terms and conditions of the licence will not be enough to avoid such terms applying. Using the product or service after the terms and conditions have been notified to you will often be construed as acceptance of those terms and conditions.

The negotiation of licences can be a very time consuming process, especially for the librarian who has to deal with many different products from many different suppliers. Not one licence is the same, each licence represents the business model and the terms and conditions of that specific supplier. However, there is consistency in the structure of the licences on the market at present.

Generally a licence agreement consists of the clauses that deal with:

- recitals;
- interpretation of the agreement;
- definitions;
- choice of law;
- the agreement:
- the rights granted under the licence;
- usage restrictions;
- term and termination;
- delivery and access to the licensed materials;
- licence fee;
- licensee's (library) undertakings;
- implementation and evaluation;
- warranties, undertakings, indemnities;
- force majeure;
- assignment;
- notices;

- dispute settlement;
- schedules;
- signatures.

Not all of the clauses will be discussed in detail. Some of them speak for themselves.

Recitals

After the details of the parties, a set of paragraphs called recitals will usually appear. The recitals give a brief overview of what is intended to be achieved by the contract. Strictly speaking it is not really part of the contract. Its role is to form a brief record of the parties objectives and the factual context in which the contract was originally written for use when, at some date in the future, the contract comes to be interpreted when disputed.

Definitions

Legal drafting requires the use of precise wording. Thus where concepts are complex, or it might take some time to explain, a short phrase or word is chosen as shorthand to signify them. Often people skim over the interpretation clauses but it is important not to overlook these clauses; a subtle change in meaning for a definition can have a significant impact throughout the whole licence. Also if an unpleasant surprise is going to be slipped into the contract this is where it is most likely to be introduced. Important definitions are the ones that deal with the qualifications of authorised users and the places from where the Licensed Materials can be accessed.

Choice of law

A fundamental clause is the law chosen for the interpretation of the licence and the court chosen for submitting a claim against the publisher or the library. In most licences you will find the law that is most suitable for the publisher. This clause is often a sticky point in the negotiations between a publisher in country X and a library in country Y. When a librarian refuses to agree to a foreign law applying to the licence, this is usually not a matter of stubbornness from the side of the librarian, but more often one of institutional policy or State regulation. Even if the librarian would agree to a foreign law, the legal department of the institution could refuse to sign the contract. This is a common situation for universities in Europe. On the other hand, from a perspective of cost, a publisher that operates internationally with representatives in the countries it operates in, would be much better suited and often gains goodwill if it agrees to the local law and courts of the country where the library is established.

The Rights granted under the Licence

The clauses under this header determine what is allowed with the Licensed Materials. These clauses should list every activity the librarian would wish to do or would like its users to be

able to do with the Licensed Materials. Matters not mentioned will not be allowed, unless the librarian either renegotiates the licence or buys extra rights later under a further licence. The librarian should not be expected to negotiate over the statutory rights that are already granted to him by his national copyright law or international Treaties. These rights should not even be listed in the licence, but many librarians seem to prefer to list them as an “aide mémoire” in the licence for convenience purposes.

At the moment, the legal world is divided over the status of copyright exceptions in relation to licences. I would advise anybody negotiating information licences to incorporate the following clause:

"This Licence shall be deemed to complement and extend the rights of the Licensee under the National Copyright Act and nothing in this Licence shall constitute a waiver of any statutory rights held by the Licensee from time to time under that Act or any amending legislation."

At least this will safeguard that the statutory rights granted by your national copyright act cannot be overridden by the licence.

Termination - Perpetual access

In a paper environment, the library buying a book owns and can use it forever. In a digital environment the library only buys access and usage of electronic resources for a specific period of time instead of owning it. After the licence has expired, the question of perpetual access is a vital issue for libraries, especially if access to the electronic journal is only allowed via the server of the publisher. Perpetual access is not something that is automatically granted. The library should negotiate with the publisher to provide continuing access to the Licensed Material under that licence either from the publisher's server, or through a third party, or by supplying electronic files to the library.

Whether the licence terminates on the default of the publisher or the library, perpetual access should be granted to that part of the Licensed Material to which the library was lawfully entitled until the breach occurred. Usually, perpetual access will only be granted by the publisher on the condition that the library continues to observe the obligations as negotiated under the licence with respect to restriction on usage, alterations and security.

Library Undertakings

This section is very important to publishers. You will find here provisions where the library promises that it or its users will not infringe copyright or any other proprietary rights by for example modifying, adapting, transforming, translating and creating derivative works of the Licensed Materials or parts of it.

The library also promises here that it will use or let its users use the Licensed Materials in accordance with the terms and conditions as laid down in the licence. Libraries should watch out for clauses that place too heavy a responsibility on the library for acts that are not

performed in accordance with the licence, e.g. for acts which are not within its direct control. In the event of an infringement, it should be perceived reasonable, to ask the library to notify the publisher of any infringement that comes to the library's notice and that the library will co-operate with the publisher to stop further abuse should it occur. Though the library should not be made responsible for an infringement by an authorised user, it is reasonable for the library to be made liable if it condoned or encouraged a breach to continue after being notified of the infringement by the publisher.

Warranties and Indemnities

In general publishers do not like to give warranties, especially in an electronic environment. The warranty that is needed by the library is that the publisher is the owner of the intellectual property rights in the Licensed Material and has the authority to grant the licence. If a licence has no warranty clause or a warranty clause that is ambiguous, the library could end up paying twice, once to the publisher and once to the person that claims to own the intellectual property rights instead of the publisher. Most commonly this would be the author.

An ambiguous warranty is one that says that the publisher is "to the best of its belief" the owner of the copyright in the Licensed Material. The words "best to its belief" create a heavy burden of proof on the library. How can the library know what is in the head of the publisher? The fact that the publisher honestly but misguidedly believed he was entitled to grant the licence can provide little comfort to the library who has to face an angry author demanding compensation. That is why a clear warranty is so important. You would not buy a car from someone who was not prepared to say whether or not he owned the very car he is selling.

Tied in with the provision of the warranty is an indemnity from an action by a third party over the intellectual property rights licensed. The indemnity should be drafted to cover all the losses, damages, costs, claims and expenses and not be restricted to, for example, the costs of the licence. The potential claims for infringement of intellectual property rights and the costs of defending such claims can far exceed the amount the library originally paid for using those rights in the first place.

An example of a sufficient warranty and indemnity clause is as follows:

"The Publisher warrants to the Library that it has full rights and authority to grant the Licence to the Library and that the use by the Library of the Licensed Material in accordance with this Agreement will not infringe the rights of any Third Party. The Publisher undertakes to indemnify the Library against all loss, damage, costs, claims and expenses arising out of any such actual or alleged infringement. This indemnity shall survive the termination of this Licence however terminated. The indemnity shall not apply if the Library has modified the Licensed Material in any way not permitted by this Licence."

Force Majeure

A force majeure is a condition beyond the control of the parties such as war, strikes, floods, power failures, destruction of network facilities, etc that was not foreseen by the parties and which prevented performance under the contract. Most licences build in provisions that any party's failure to perform any term of condition under the licence due to a force majeure will be excused and the failure to perform in those circumstances will not be deemed a breach of the Agreement.

Dispute Settlement

There are several ways to settle a dispute. Apart from the going to the courts parties could decide to include an additional Expert Determination clause in the licence.

Expert Determination is an informal procedure where the parties agree by contract to refer a dispute of fact to an expert appointed by the parties for his resolution. It is a quicker and cheaper means of dispute resolution than court proceedings and enables the parties to choose an expert they both agree on to resolve the dispute for them. It is not really suitable for any dispute where issues of law are likely to be canvassed. The expert's fees are usually shared by both parties. It is binding on both parties and determinations may be enforced by the court.

The Expert Determination clause does not remove the need for a proper law clause, specifying the legal system that will govern the contract and its performance and interpretation, and for a clause deciding which court shall have jurisdiction in the case of legal disputes.

Guidance

I have tried to show that negotiating the price of the licence is not the sole issue at stake. It is of great importance that librarians read and negotiate the licences that they receive from publishers. Legal advice should be sought before licences are signed. Examples of model licences that have been drawn up after extensive consultation between the library community and publishers can be found at:

- the model licence used for the UK National Electronic Site Licence Initiative (NESLI) (<http://www.nesli.ac.uk>);
- the model licences drafted by John Cox on behalf of subscription agents (<http://www.licensingmodels.com>).

I would also like to draw you attention to some important library initiatives in the area of licensing. Several library associations and groups of universities in the US and Europe have put a lot of effort in drafting licensing principles. The most recent are:

- statement of Current Perspective and Preferred Practices for the Selection and Purchase of Electronic Information, International Coalition of Library Consortia (ICOLC), 25 March 1998 (<http://www.library.yale.edu/consortia/statement.html>);

- licensing principles of the Dutch scientific libraries and a number of German university libraries, 27 October 1997 (<http://cwis.kub.nl/~dbi/cwis/licprinc.htm>);

Two useful publications on licensing issues are:

- contracts and Copyright Exemptions by Lucy Guibault, IMPRIMATUR, 1997 (<http://www.imprimatur.alcs.co.uk/imprimatur/legal.htm>);
- licensing Digital Resources: How to avoid the legal pitfalls by Emanuella Giavarra on behalf of EBLIDA for ECUP+, 1998. ECUP stand for the European Copyright User Platform which published this licensing warning list to assist librarians in negotiating licence agreements. The ECUP+ project was a Concerted Action funded by the European Commission, DGXIII/E-4, and supported by the European Bureau of Library, Information and Documentation Associations (EBLIDA). More information on the ECUP project and a full copy of the licensing warning list (ecup-doc) can be found at: <http://www.eblida.org/ecup>.

Good luck!