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Contractual Solutions in Electronic Publishing Industry: A Comparative study of License Agreements

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Abstract

Information Technology (IT) revolution has brought global change and has impact on electronic publishing industry also. In the digital and networked environment, publishers are concerned about protecting their products from illegal use. Copyright has been proclaimed as an important weapon by the publishers to safeguard their products. In view of the increasing importance that is gained by contract law in electronic publishing, more and more libraries are engaged in signing License Agreements for getting access to all types of electronic information products. It has become imperative on the part of librarians to have knowledge of License agreements and their clauses. The body of the license agreements differs from publisher to publisher and is product dependent too. Since there is a difference between the license agreements of societal publishers and commercial publishers, an attempt is made here to carry out a comparative study of the clauses of the license agreements among commercial publishers at the first level and societal publishers at the second level. It is observed that the licensors' rights are well protected compared to that of licensees' rights.

Keywords

Intellectual Property Rights, Copyright, License Agreements, Databases

Introduction

Industrial revolution brought about changes in the economy of the world. Just as that, Information Technology (IT) revolution is bringing about global changes. IT includes any computer technology by means of which information may be recorded in documentary form ([Ramaraju](#), 2001). One of the benefits of the electronic technology is its capability to produce, store, manipulate and distribute information of all kinds. This capability has its impact on the 'publishing industry' in recent times. 'Electronic publishing' has gained a lot of recognition and is being increasingly adopted by most of the publishers. Various societies and organizations (non-commercial) that are part of publishing industry are also moving towards electronic publishing. The user community also for the reason of 'speed of communication' increasingly proclaims electronic publishing.

In the publishing process, though the creator is the primary owner of 'Intellectual property', it is the publisher who claims the benefits of 'Intellectual Property Rights'. This is the economic aspect of publishing. In this age of networks and digital libraries, publishers are

worried about the capabilities of Information Technology in transmitting millions of illegal, perfect copies across the globe with just a few keystrokes ([Cornish](#), 1997).

The digital and networked environment has posed several problems for the copyright law. They are:

1. In digital medium 'Literary works' are more equivalent. All copyrighted works such as pictures, text, music or movies comprise of strings of bits, fitting definitions of 'Literary works'.
2. The plasticity nature of digital work allows them to easily transform from one form to another without a change in the character of the work. It also permits editing in a manner, which cannot be easily detected.
3. Automatic generations of works in digital form, permitting new works to be created for which no responsibility (creator) can be designated.
4. Replication of documents is a problem posed by digital technology to copyright law, permitting generation of multiple copies and distribution in digital form. This is observed more so in a networked environment ([Anuradha](#), 2000; [Pameela](#), 1994).

The digital environment raises economic and ethical issues linked to the flow of information. United States of America and European countries are speculating these issues of digital environment with little modification in their respective copyright laws.

Copyright Law in Digital Environment

Intellectual Property Laws were originally laid down by the main convention popularly known as 'Berne Convention' in 1886. To ensure and maintain balance between the rights of the users and the rights of the owners, many copyright guidelines and practices have been constructed for copyrighted materials. This balance should remain in the digital environment. These are extensively revised since first meeting, increasing the scope of the copyright and protection.

The World Intellectual Property Organization (WIPO) manages the major intellectual property rights including copyright conventions. Under these conventions each nation has provided special privileges for librarians to copy and distribute copyrighted material on request for academic and research purpose in print environment and this is referred as "Fair dealing" (in Australia, Canada and UK) or "Fair use" (in USA) in different countries. This privilege of librarians should be protected in digital environment also, as more and more information is becoming available only in electronic formats and the users legitimate rights to use the copyrighted material must be protected ([Norman](#), 1997).

American Scenario

Fair use doctrine is critically an important doctrine in US copyright law. What it seems to be saying is that there may be good reasons for limited copying or distribution of published works without the permission of the copyright owner so long as the copying does not harm the copyright owner but nevertheless benefits either the individual or society generally. Examples of fair use of copyrighted materials include quotation of excerpts in a review or critique, or use of a portion of material for educational purposes, literary criticism or news reporting ([LLL](#), 2004; [USCO](#), 2005). Duane E. Webster is of the opinion that, a liberal interpretation of the fair use doctrine, which is an integral part of the print environment, should be applicable to electronic environment also. This law allows users of copyrighted materials -teachers, students, scholars, and artists- to use these materials without seeking permission from the creator or publisher and without paying copyright fees. Fair use allows users to draw on the work of others. It allows scholars to advance a new argument, reviewers to criticize, artists to parody and teachers to acquaint students with fresh insights

([Webster](#), 1997). The law lists the following four factors as the ones to be evaluated in determining whether a particular use of a copyrighted work is a permitted "fair use," rather than an infringement of the copyright ([Pameela](#), 1994; [SUL](#), 2004):

- 'Purpose' and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- 'Nature' of the copyrighted work;
- 'Amount' and substantiality of the portion used in relation to the copyrighted work as a whole; and
- 'Effect' of the use upon the potential market or upon value of the copyrighted work.

The National Information Infrastructure (NII), an initiative by the Clinton administration was instrumental in setting up a working group of intellectual property rights in the electronic environment in 1995 convening all the stakeholders to negotiate guidelines for the fair use of electronic materials in a variety of nonprofit educational contexts. The conference on Fair use ([CONFU](#)) proposed guidelines in 1997 and failed to achieve consensus support. The NII proposed 'White Paper' legislation, which is silent on "fair use". Experts in education and library arena believe that without a clearly stated understanding of what constitutes fair use in digital environment, the proposed white paper will upset the balance between owners and users of information ([Webster](#), 1997).

There may be negotiations over the permitted use and the price. This is where "The Licensing" process has gained its entry in the digital environment in libraries, moving towards "Pay-per-view" attitude of publishing industry.

European Scenario

In Europe, few countries are recognized as "Copyright countries", where the creator releases almost all his rights to the rights holder who is usually an investor, responsible for the distribution of the work and often this is a "Corporate body". Few others are recognized as "Droit d'auteur" countries, where the creator is an individual who retains the initial rights. S/he can never transfer the economic rights. This is intended to protect the work of the mind, not permitting free use by third parties.

Keeping these two sectors in mind, European court of justice is trying to harmonize their legislation. Europe is clearly moving towards contractual solutions. France views the principle of "Fair use" of USA as foreign concept. The two systems 'Copyright' and "Droit d'auteur" are advantageous in their own way. Copyright gives more weights to users. Touching the rights of the producer is justified if it is for common good, which is quite similar to the theory of "Fair dealing". Droit d'auteurs allows creator to control the use made of his/her work through the right of paternity and the right of the integrity of his works. It is highly unlikely that any one system is good enough to manage documents in digital form. Several systems could co-exist to manage the copyright crisis of digital publishing ([Battisti](#), 2001).

The European Commission (DGXIII) organized a meeting in November 1993 in Luxembourg to raise many issues concerning libraries with respect to copyright in digital environment. European Copyright User Platform (ECUP) was started in 1994 under the libraries program and to conduct a copyright awareness campaign. Activities were permitted to extend for three more years as a concerted action (ECUP+). The goals of ECUP+ were to increase awareness and to stimulate discussion on copyright issues amongst librarians and with rights holders, to draw up model license clauses for the acquisition and use of electronic information and to establish a copyright focal point. European Countries are also moving towards "license agreements", thereby curtailing the benefits of new technology to the libraries and public at large. Europe also has proposed a

"Green paper" ignoring the needs of librarians and thereby upholding the role of "license agreement" in digital environment ([Giavarra](#), 1997; 2001).

At this juncture the use of licenses and therefore the introduction of contract law to regulate the use of digital resources is viewed as a solution to help publishers, aggregators and libraries in protecting copyright in the present electronic environment ([Meera](#), 2000).

Need and Objective

The license is the vehicle that sets out the circumstances -- terms and conditions -- relating to the perimeter of permitted uses. Librarians, as content owners, require a license agreement, whenever someone else wants to use the content. As a user of digital content, librarians need a License agreement whenever they use the content of others. A librarian spends more time negotiating license agreements, as acquiring digital content is different from product to product. In fact, often they pay for content, which they do not physically acquire. At present, there are no standard digital license agreements in any industry and each license has its own clauses defined.

Under these circumstances, librarians should educate themselves regarding license agreement by discussing with their peers. Also very helpful is to review as many license agreements as possible. Hence it is a combination of copyright law, technology, education and licenses, which help librarians to license their own content, as well as ensure access to the digital content of others ([Anuradha](#), 2000; [Harris](#), 2000b). It is felt important at this point that the curriculum of Library and Information Science schools should incorporate courses related to copyright and license agreement.

In this article an attempt has been made to identify and analyze different clauses, which needs to be included in the site license agreements. In order to get access to e-content, signing these licenses has become an order of the day in most of the scientific and academic libraries. Also, the legal implications and the legal language have necessitated the present day librarians to get them equipped with the knowledge of site license agreements. There has been no comprehensive study carried out comparing different license agreements in recent times except for a preliminary study done during 2000 ([Meera](#), 2000).

The main objective of the study is to make a comprehensive, comparative study of three commercial and three societal license agreements and to investigate the differences and similarities among themselves in digital environment from librarian's point of view.

What is a License Agreement?

A license agreement is a written contract between a user and a content owner that sets out the terms and conditions under which a user can use the content ([Harris](#), 2000a). According to Kaye, licenses are a fact of life in conducting business in the electronic environment. Electronic information providers have considered licenses as a legal means of controlling the use of their products ([Kaye](#), 1999). A license agreement is a legally binding contract between two parties. In the process of licensing digital materials like books, periodicals and databases, the licensing agreement will set out the conditions of use of the digital content -- at a specific price for a specified period of time ([Harris](#), 2001a).

Types of License Agreements

License agreement can be classified into different categories based on their purpose and content such as:

1. Societal/Commercial

License agreement generated by a society, which is a non-profit making organisation such as American Mathematical Society to protect their intellectual property rights, are societal in nature. They are not stringent in their approach. Whereas, commercial publishers seem to be giving more importance for license agreement, keeping financial gain as their motive.

2. Negotiable/non-negotiable

License agreements may be negotiable or non-negotiable. A negotiable agreement is one where the parties to the agreement discuss and agree upon what terms and conditions should be included in the agreement. A non-negotiable agreement is one where the terms and conditions in the agreement are set forth by one party and must be accepted by the other party if s/he wants the goods/services supplied ([Harris, 2001b](#)).

3. Single user/Consortia

When an institution enters into a contract with the publisher, it is called as single user license. If a group of institutions (either based on geographical locations or like-mindedness) join together and negotiate with the publishers then it is called as consortia license agreement.

4. License for bibliographic database and full text database

In a digital environment, license agreements are observed for various products. But librarians usually deal with licenses for either bibliographic or full text databases whose terms and conditions vary marginally.

Comparative study

The site license agreements differ from one another and in this case it is from publisher to publisher. Authorized signatory to the site license agreements should be an administrative head of the Institution since it involves legal aspects. Before signing these licenses, terms and conditions should be carefully studied. An exhaustive list of 40 clauses is prepared for this comparative study ([Harris, 2001b](#); [Kaye, 1999](#); [YUL, 2004](#)). In [Table 1](#) and [Table 2](#), marked differences and similarities among the different clauses of contract law as executed by the three major commercial publishers at first level and three societal publishers at the second level are traced out. The three scales used are 'Well defined', 'Defined' and 'Not defined' with values 10, 5 and 0 respectively. However, clauses 1-5 are general in nature hence do not carry any ranking during analysis.

Analysis and Conclusions

It is observed that some of the clauses such as country of origin, database type, agreement contents, access mode, authentication, governing law, which are general in nature are very well defined in all the agreements. However, some of the important clauses such as archiving, technical support and usage report are not clearly defined in most of the agreements. An important clause like trial access is not considered for inclusion in any of these licenses, though some of these publishers offer trial access on request.

Web of Science (WoS) from the Institute for Scientific Information (ISI) has well defined some clauses such as user rights, governing law and early termination but has left out clauses like technical support and training. WoS has scored 160 points (27.58%). Engineering Village (EIV) from Elsevier Science (ES) has well defined clauses such as Authorized users, and Confidentiality of the agreement but not defined clauses like technical support, training, and governing law. EIV has scored 180 points (31%). Springer Journals (SJ) from Springer Verlag (SV) appears to be the most comprehensive among the three commercial licenses, scoring 240 points (43.37%). The clauses such as unauthorized

use, and security protocol are well defined but a few clauses such as trial access, and documentation are unattended by Springer Verlag.

MathSci Net (MSN) from American Mathematical Society (AMS) as a publisher is more considerate towards the licensee. The clauses such as unauthorized use, and technical support are well defined whereas confidentiality of the agreement, and dispute resolution are not defined. MSN has scored 200 points (29.41%). SciFinder Scholar (SFS) from American Chemical Society (ACS) has well defined clauses such as confidentiality of agreement, and early termination but not defined training and amendment clauses. SFS has scored 180 points (26.47%). ACM Journals (AJ) from American Computing Machinery (ACM) appears to be the most comprehensive scoring 300 (44.11%) among societal license agreements. AJ has well defined confidentiality of user data and documentation clauses. However they have not defined clauses such as confidentiality of agreement and disclaimer.

We have observed that the societal licenses are not stringent in their approach but the commercial publishers seem to be giving more importance in terms of protecting their own rights as market beneficiaries. Also, the licensors' rights are well protected compared to that of licensees' rights.

In this study license clauses of commercial publishers and societal publishers are carried out at two different levels. Comparison is done among homogeneous groups. Similar study can be done between commercial publisher and societal publisher who have top ranked in this study, leading to comparison among heterogeneous sets. Such a study may be fruitful in identifying pin pointedly the difference in commercial approach and non-commercial approach in publishing industry. Also, similar study can be done to evaluate the situation in single user setup and consortia set up. Such a study would enable librarians to identify the advantages and disadvantages of joining a consortia depending upon the variable factors of individual libraries.

The role of the legislation is to secure the interests of the individuals. In doing so, it should not neglect the interests of the general public. It must bring a balance between the two. In digital environment, rights holders can exercise tight control over the use made of their works through a combination of technological measures, contractual practices and copyright law principles. This will jeopardize the role of librarians in the free flow of information. Keeping all these constraints in mind, site license agreements should be constructed so as to not infringe too much upon the privileges given to Librarians with respect to copyright in print environment.

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Appendixes

Web sites of License Agreements consulted:

1. <http://www.isinet.com/products/citation/wos>
2. <http://www.engineeringvillage2.org/controller/servlet/controller>
3. <http://link.springer.de/>
4. <http://www.ams.org/>
5. <http://www.cas.org/SCIFINDER/SCHOLAR>

6. <http://www.acm.org/>**Table 1. Comparative Account of Commercial Site License Agreements**

SI No	Clauses	ISI (WOS)	ES (EIV)	SV (SJ)
1	Country of Origin	USA	USA	Germany
2	Database Type	Bibliographic	Bibliographic (Service Provider)	Full Text
3	Agreement Contents	Grants License to access Web of Science database and third party content to licensee	Grants License to access Compendex, INSPEC and CEC Press ENGnetBASE databases and third party content to licensee	Grants License to access Springer digital library collection and services
4	Delivery/Access Mode	Online	Online	Online
5	Authentication/Access type	IP Authentication	IP Authentication	IP Authentication
6	Concurrent Users	Not Defined	Not Defined	Defined
7	Period/Term	Well Defined	Well Defined	Well Defined
8	Renewal	Defined	Well Defined	Well Defined
9	Payments	Well Defined	Well Defined	Well Defined
10	Archiving	Defined	Not Defined	Well Defined
11	Authorized Use	Well Defined	Well Defined	Well Defined
12	Authorized User	Defined (Walk-in users not defined)	Well Defined including walk-in users	Well Defined including walk-in users
13	User Rights (Access, browse, search, view, download, print)	Well Defined	Well Defined	Well Defined
14	Technical Support	Not Defined	Not Defined	Defined
15	Training	Not Defined	Not Defined	Mentioned (Not Defined)
16	Usage Report	Not Defined	Defined	Well Defined
17	Licensee Undertaking	Defined	Defined	Defined
18	Unauthorized Use	Well Defined (legends, promotion/advertising)	Well Defined (Usage restrictions, alteration, Notice, Recompilation)	Well Defined (Commercial, redistribution, reselling, sublicensing, archiving, Interlibrary Loan, Legends, promotion, advertising)
19	Confidentiality of Access	Not Defined	Not Defined	Well Defined

20	Confidentiality of user data	Not Defined	Not Defined	Not Defined
21	Confidentiality of agreement	Not Defined	Well Defined	Well Defined
22	Security Protocol	Not Defined	Not Defined	Well Defined
23	Early Termination	Well Defined	Defined	Defined
24	Perpetual License	Not Defined	Not Defined	Not Defined
25	Warranty	Well Defined	Well Defined	Well Defined
26	Disclaimer (with respect to database content)	Defined	Well Defined	Well Defined
27	Liability	Well Defined	Defined	Defined
28	Indemnities	Not Defined	Well Defined	Well Defined
29	Copyright	Proprietary rights Defined	Proprietary rights Defined	Proprietary rights Defined
30	Governing Law/Attorney Fees	Well Defined	Not Defined	Defined
31	Dispute Resolution	Defined	Not Defined	Well Defined
32	Force Majeure	Defined	Well Defined	Well Defined
33	Entire Agreement	Defined	Well Defined	Not Defined
34	Taxes	Defined	Well Defined	Defined
35	Amendment	Not Defined	Defined	Not Defined
36	Severability	Defined	Well Defined	Well Defined
37	Notices	Defined	Not Defined	Well Defined
38	Third Party Rights	Well Defined	Not Defined	Not Defined
39	Trial Access	Not Defined	Not Defined	Not Defined
40	Documentation (with respect to database content)	Not Defined	Not Defined	Not Defined

Table 2. Comparative Account of Societal Site License Agreements

SI No	Clauses	MSN (AMS)	SFS (ACM)	AJ (ACM)
1	Country of Origin	USA	USA	USA
2	Database Type	Bibliographic	Bibliographic	Full Text
3	Agreement Contents	Grants License to access Mathematical reviews, Current Mathematical Publications	Grants License to Chemical Abstracts and MEDLINE	Grants License to access ACM digital Library collection and services
4	Delivery/Access Mode	Online	Online	Online
5	Authentication/Access type	IP Authentication - Well Defined	IP Authentication - Well Defined	IP Authentication - Well Defined
6	Concurrent Users	Well Defined	Well Defined	Well Defined
7	Period/Term	Well Defined	Well Defined	Well Defined

8	Renewal	Well Defined	Well Defined	Well Defined
9	Payments	Well Defined (including fee raise)	Well Defined (including fee raise)	Well Defined
10	Archiving	Defined (archival access denied)	Not Defined	Defined
11	Authorized Use	Well Defined	Well Defined (making users aware of terms and conditions of the license agreement)	Well Defined
12	Authorized User	Well Defined (Walk-in users not defined)	Well Defined (Walk-in users not defined)	Well Defined (Walk-in users not defined)
13	User Rights (Access, browse, search, view, download, print)	Well Defined	Well Defined	Well Defined (display, digital copy, print copy, recover copying costs)
14	Technical Support	Well Defined	Not Defined	Well Defined
15	Training	Not Defined	Not Defined	Well Defined
16	Usage Report	Not Defined	Not Defined	Well Defined
17	Licensee Undertaking	Well Defined	Well Defined	Well Defined
18	Unauthorized Use	Well Defined (Robots restricted, Interlibrary Loan is permitted, recompilation, republication not allowed)	Well Defined (terminating Access to unauthorized users, non commercial use of data)	Well Defined (Notification of licensed materials, removal of copyright notices, robots allowed, interlibrary loan permitted, non commercial use)
19	Confidentiality of Access	Not Defined	Not Defined	Not Defined
20	Confidentiality of user data	Not Defined	Not Defined	Well Defined
21	Confidentiality of agreement	Not Defined	Well Defined	Not Defined
22	Security Protocol	Defined	Not Defined	Well Defined
23	Early Termination	Well Defined (from licensee as well as Licensors point of view)	Well Defined (from licensee as well as Licensors point of view)	Well Defined
24	Perpetual License	Not Defined	Not Defined	Well Defined
25	Warranty	Well Defined	Well Defined	Well Defined
26	Disclaimer	Well Defined	Well Defined	Not Defined
27	Liability	Well Defined	Well Defined	Defined
28	Indemnities	Not Defined	Not Defined	Well Defined
29	Copyright	Well Defined	Well Defined	Well Defined
30	Governing Law/Attorney Fees	Defined	Defined	Well Defined

31	Dispute Resolution	Not Defined	Not Defined	Well Defined
32	Force Majeure	Not Defined	Not Defined	Well Defined
33	Entire Agreement	Well Defined	Well Defined	Well Defined
34	Taxes	Not Defined	Not Defined	Well Defined
35	Amendment	Defined	Not Defined	Well Defined
36	Severability	Well Defined	Not Defined	Well Defined
37	Notices	Not Defined	Well Defined	Well Defined
38	Third Party Rights	Defined	Defined	Well Defined
39	Trial Access	Not Defined	Not Defined	Not Defined
40	Documentation (with respect to database content)	Defined	Not Defined	Well Defined

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