Licensing access

This article considers the practical effect on the library and its patrons of licensing access to digital resources. It poses questions you should ask yourself as you review proposed license agreements and the terms and conditions you should question or request, as the case may be.

Many contracts contain provisions that are objectionable and should be deleted; on the other hand, they may also fail to provide assurances that libraries should reasonably expect. Your legal office probably reviews such licenses and makes specific recommendations for modifications. Online resources are available too: check Licensing resources. Keep in mind that rarely will vendors refuse to negotiate their terms.

Protecting expected uses

Protecting expected uses is one of the most important issues in library licensing. Once acquired, electronic access invites a wide range of uses. For example, faculty may assign course readings by simply pointing to them from a departmental Web server or from within a course management system (CMS) such as Blackboard. This, in turn, will mean that students will wish to download, store and print licensed works. We must acquire enough rights to eliminate the need to ask for additional permission to make customary and expected uses of licensed resources.

This may not be easy. Database publishers are very concerned about their legal protections under copyright law and often try to obtain the security they feel they need with restrictive contract provisions. They may be unwilling to give open-ended rights to use their data. It is possible to define more specifically what users need, but it is important to avoid too narrow a definition. For example, limiting portions that can be copied, etc., to one article or one chapter from a defined unit of some sort is not realistic. Course readings often exceed these limitations. If we expect our database licenses to really meet our patrons’ needs, we must be sure we have acquired the rights to accomplish that objective.

Before placing a limit on amounts that can be transmitted, downloaded and printed, discuss the question with the campus Copy Center, then choose an amount that is based on actual use, rather than abstract ideals.

Indemnification

This is one of the most difficult issues. Vendors can indemnify Customers, and Customers can be asked to indemnify Vendors, or both. We will discuss each party’s indemnification separately.

Vendor’s requirement that Customer indemnify Vendor

There is little basis for our being asked to indemnify the Vendor of a database for anything. The Vendor chooses the data, has the responsibility to obtain all needed rights to distribute the data, and will profit from the use of the data; thus the Vendor should bear financial responsibility for harms caused by the use of the data in accordance with the terms of the Agreement.

Software is more complicated. We may use licensed software in a way that could harm innocent bystanders, in situations where the Vendor can do little to limit those risks. For example, if we license account tracking software, we could fail to enter data into the program resulting in a faulty record that hurts someone’s credit rating. If the software Vendor had to accept responsibility for harms that result from our use of its product, the Vendor probably could not sell the product for a reasonable price.

For state institutions like the University of Texas, when it makes sense to accept responsibility for harms to third parties resulting from our use of a Vendor’s software, we must be sure to limit our liability in accordance with Texas law by prefacing our Customer indemnity with the words, "To the extent authorized by the Constitution and laws of the State of Texas,.”

Vendor’s indemnification of Customer for intellectual property infringement

We should expect that Vendors will develop their products without infringing the intellectual property rights of others, that is, without appropriating others’ protected ideas (patents) or expression (copyrights). There are two common ways to address this concern in a contract. The first is to ask the Vendor for a warranty. A warranty is the Vendor’s guaranty that the software or database does not infringe. Many Vendors are not willing to make such a guaranty, especially in the case of software, because it requires that they perform patent searches to make sure that no one has a patent on the idea embodied in their software. If someone has patented the idea of the Vendor’s software, it does not matter whether the Vendor independently
developed its software; even completely unaware, the Vendor would be an infringer.

For many reasons we do not insist on a warranty. Nevertheless, even in the absence of a warranty, we do expect that if the software or database infringes someone else’s rights, the Vendor will take care of any expenses we might incur were we to be sued or asked to stop using the software or database because of alleged infringement. This is a fairly reasonable request and should normally be made in any software or database license. In the following situations, however, we are not very likely to get such an indemnity:

- **Beta test software**
- **Free, steeply discounted or very low cost software**
- **Software or databases provided by nonprofit vendors (examples: research institutions, scholarly societies)**
- **Databases whose source data is public information**

Usually a Vendor’s agreement to indemnify means acceptance of substantial risk of financial loss. The first three situations above illustrate circumstances where the Vendor may not make enough money on the product to justify assuming this risk. In effect the Vendor is saying, "If you want this software or database at this price, you'll have to accept the risk that it might infringe. If you want us to accept that risk, it would cost you a lot more money.”

The fourth example illustrates the circumstance where the risk of harm to a third party is so unlikely that we can comfortably agree to take the risk.

In these and analogous circumstances, the fact that the Vendor has a reasonable basis for refusing to indemnify us weighs in favor of our accepting a contract even though it falls short of our normal expectations. Other times, however, such refusal would be unreasonable, as where the product is being developed especially for us (and we would be a prime target of an infringement suit), or is commercially successful and widely available, in which case the Vendor is making enough on the product to accept the risk.

It is the role of counsel to advise university personnel who review contracts of the terms that should be included or avoided and of the implications of accepting nonstandard terms. Ultimately, it is a business decision whether to accept a contract that does not meet normal expectations.

The subjects in this series include:

**Fair Use (Section 107)**

- Reserving works for limited use, generally
- Print copies in the reserve room
- Reserve rooms for images, audio and audiovisual works
- Providing access to electronic copies
- Library copying for patrons and for the library's collection

**Library reproduction and distribution (Section 108)**

- Archiving
- Patron requests
- Unsupervised copying, news programs and contractual limitations on acquisitions
- Interlibrary loan

**Other**

- Scholarly communication
- The digital library
- Licensing access
- Is your library an Internet service provider under the DMCA?