

Developing a Model License: A Canadian Consortium's Experience (OCUL)

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I) Overview of Model Licenses

Introduction

Model licenses arose out of the circumstances of consortial and individual library licensing of electronic resources in the 1990s. Prior to this period, consortia had been focused on resource sharing activities such as interlibrary loans cooperation and the creation of bibliographic utilities for shared cataloguing, such as OCLC. Reciprocal borrowing privileges and rationalization of collection development were also important features of the collaborative landscape. Sharon Bostick notes that "For academic libraries, consortia are becoming an increasingly important part of the culture, particularly because the cost of library collections has soared."¹ As the rise of the Web dominated the 1990s and transformed the research landscape, publishers made efforts to offer their content in dual formats (print and electronic), and later in unbundled options. The profusion of new resources and knowledge, novel forms of teaching and radically new expectations for access to research, has made consortial participation an essential element of library acquisitions and collection development.

The transition from print to electronic resources meant a paradigm shift in how libraries acquire and manage these resources in terms of access and appropriate use. Copyright and intellectual property issues that were reasonably clear in the print environment could not be applied to digital licensed content. Research and teaching have been profoundly impacted by the widespread availability of digital resources. Several of the key drivers are remote access 24/7; collaborative team-based learning; the rise of web-based teaching technologies; the

interdisciplinarity of research; and the integration of materials from various formats (digital, print, audio, image, etc).

Publishers developed license agreements in order to protect their intellectual property and to define the acceptable uses of their content. Existing copyright law didn't provide any definitive guidelines or jurisprudence. The statement of principles by six major US library associations, "Principles for Licensing Electronic Resources", cautions that: "...libraries need to be aware that licensing arrangements may restrict their legal rights and those of their users. The time spent on licensing became increasingly onerous and complex. As responsible agents for an institution, librarians must negotiate licenses that address the institution's needs and recognize its obligations to the licensor."² This need to articulate the rights and interests of the academic community was one of the key factors behind the development of a concerted approach to licensing.

A new type of resource-sharing was needed – one that focused on knowledge and expertise regarding licensing issues. It became important to acquire digital resources and make them available to patrons as rapidly as possible. Lengthy delays due to license negotiations were not in anyone's interest. It was in this environment that model licenses were developed. John Cox indicates that, "The driving force behind generic licenses is recognition of the need for a predictable environment in which model language can be found and used to express the outcome of most negotiations, whatever that outcome may be."³ The movement in the 1990s to develop various model licenses was borne out of the need to create a template that could be applied in most settings and contexts, to achieve predictable and efficient outcomes to license negotiations. This was in everyone's interest – librarians, publishers, and vendors – in order to move forward with new partnerships and new acquisitions in a timely manner.

Milestones

There are several initiatives to be highlighted here. In 1999, following two years of meetings, a working group of publishers and librarians in the UK created a model license that could be used by higher education institutions. This was done under the auspices of the Publishers Association (PA) and the Joint Information Systems Committee (JISC) of the Higher Education Funding Councils. The National Electronic Site License Initiative (NESLI) grew out of a national strategy to increase and improve access to e-journals in higher education institutions and to extract better value for money in agreements with vendors. It is based on the PA/JISC license, but has since been updated to reflect new issues and procedures. For example, collaborative archiving and author self-archiving are now included, as well as new provisions for dissemination of research.

With funding by JISC, NESLI commenced operations in January 1999 and since then has offered e-journal deals from numerous major publishers to the British post-secondary market. Jacqueline Borin states that, "The managing agent [of NESLI] also encourages the widespread acceptance by publishers of a standard model site license, one of the objectives of this being to reduce the number and diversity of site definitions used by publishers. Other important provisions of the model site license addressed the issues of walk-in use by clients and the need for publishers to provide access to materials previously subscribed to when a subscription is cancelled."⁴ The model license has provided for a standard definition of a client 'site' as well as ensuring access for walk-in users and post-cancellation rights for library subscriptions. These examples illustrate how model licensing language can define the library community's interests by supporting the broadest possible access to content. The provisions of the license, being

common for all sites, can present an effective means of negotiating terms that work to the advantage of the user community.

In 1999-2000, John Cox and Associates were commissioned by four major subscription agents (EBSCO, Harrassowitz, RoweCom, and SwetsBlackwell) to develop standard license models that could be used in various contexts. There are models for public libraries, corporate libraries, single academic institutions, and academic consortia, available at:

<http://www.licensingmodels.com>. Legal and library terms are defined. Alternative options are given for various issues and clauses, in order to allow for flexibility in how the license is customized for local requirements and circumstances. The models are organized into categories similar to other models, e.g. 'Publisher's Undertakings, Consortium's Undertakings, Term and Termination, but the content would by definition need to be reviewed and adapted by any consortium interested in using it. The fact that many clauses, such as withdrawal of content, prohibited uses, and usage data and collection, look similar to existing clauses elsewhere, is an indication of the commonality of many standard license agreements, despite having been prepared from the publishers' perspective.

In May 2000 the Canadian National Site Licensing Project (CNSLP) approved its "Principles for Licensing Electronic Resources." This was in anticipation of the national site licensing initiative that eventually led to agreements for seven major resources for Canadian universities. The principles were embodied in the creation of a CNSLP model license agreement. Deb de Bruijn informs us that:

The document was based on an international model developed for academic consortia by John Cox Associates and revised to reflect CNSLP's operating principles and organizational structure as well as the Canadian legal context. Inclusion of the draft model license agreement with the RFP requirements allowed CNSLP to evaluate bidders on how closely they would comply with terms and

conditions advantageous to Canadian universities, to anticipate potentially complex license issues, and to shorten the negotiations period following RFP evaluation.⁵

The principles - which included capacity building for research, transformation of the content environment, and influencing the marketplace - were integrated into in the model license as an embodiment of purpose. This meant that any vendor or publisher who wished to be involved in the competitive procurement process would understand the consortium's basic vision by reading and understanding the model license. A dual purpose was served – to provide a comprehensive position on terms and conditions, and to simplify and shorten the negotiation process.

In April 2001, the US Council on Library and Information Resources (CLIR) and the Digital Library Federation (DLF) released the Liblicense Standard License Agreement. This was prepared from a librarian's perspective, and is geared towards the needs and interests of the academic library community. Croft notes that "It is considered by its writers to be a policy statement about the licensing needs of academic libraries in the electronic era as much as a model license."⁶ It is available on the Yale website⁷ and provides a rich resource for licensing digital information, such as terms and descriptions, publishers and author's licenses, national site licenses, a bibliography, and a discussion list.

The CLIR/DLF model has been adapted by various consortia and individual libraries, such as NERL (Northeast Research Libraries Consortium) and NELINET (New England Library and Information Services Network). The California Digital Library was established in 1997 to "support[s] the assembly and creative use of the world's scholarship and knowledge for the UC libraries and the communities they serve."⁸ The CLIR/DLF license served as the model for developing the CDL license, with particular additions in the areas of fiscal contingency and

evolving technologies. The MIT (Massachusetts Institute of Technology) borrowed this license to create pilot project for the licensing of individual ejournals. The goal was to streamline the process as much as possible. At the end of the pilot (January 2003), fifty nine percent of the publishers had accepted the standard license in some form, either outright or with minor modifications.⁹ Moreover, the library was able to reduce its work backlog. Sally Richter of MIT says that "This experiment has allowed us to save staff time and response time for new e-journal access, to improve consistency in e-journal license terms, and to participate in an important professional effort to encourage standards in licensing."¹⁰ Here we see how standardized licensing for an acquisitions workflow can be successful on multiple levels.

Impacts on Policy

There is a close relationship between the articulation of policy statements and the development of model licenses. The ICOLC (International Coalition of Library Consortia) was established in 1998 to promote collaboration and resource-sharing among library consortia worldwide. Subsequently the "Statement of Current Perspective and Preferred Practices for the Selection and Purchase of Electronic Information" was drafted. Its "primary intention is to define the current conditions and preferred practices for pricing and delivering scholarly information within this emerging electronic environment."¹¹ Some of the key issues addressed were recognized key library issues related to licensing, e.g. the dysfunctionality in the scholarly communications system, pricing strategies, archival rights, copyright issues, measures of effectiveness, data confidentiality, and the obligations of the library or consortia in relation to the obligations of the provider. Couched in the format of current problems and future needs, it was an important contributor to the development of model licenses that followed.

In Europe, LIBER (Ligue des Bibliothèques Européennes de Recherche) adopted licensing principles in 1999 that recognized many of the same issues for licensing digital resources : the need for consortial action; cost-effective access to digital content; the removal of publisher's barriers to appropriate use for research purposes; maintaining a balance between rights holders and the public interest in the use of intellectual property; archival rights; user anonymity; and legal safeguards such as indemnification.

These thematic threads are woven into the various model licenses developed in North America and Europe. As charter principles they were instrumental in the drafting of standard licenses that gave concrete expression to these ideas. Model licenses can be seen as the practical 'translation' or application of various statements of principles emanating from the research library community. While each model license has a specific context which ultimately shapes its development, it is the core principles that are key to its genesis and formulation. Model licenses were born out of a need to license commercial content in a cost-effective manner, but alternatives are emerging, such as open access approaches. This will have fundamental implications for the production and dissemination of research, both within and outside of the academy. How model licenses can be adapted to handle consortial licensing of non-traditional content and business models will be a major challenge.

Consortial dynamics

Model licenses also need to be considered in light of consortial dynamics. Each consortium brings its unique mix of priorities to the table, based on the size, type and direction of its members. There can be unrealistic expectations that the consortium will benefit all members equally. Rather, it is a matter of achieving certain common strategic goals by leveraging the

collective resources of the group – not all members will participate in each initiative. Issues such as cost-sharing, leadership, negotiation priorities and tradeoffs, are never simple. There will always be tensions between large and small institutions, or between institutions that don't share the consensus in the establishment of priorities. Atkinson speaks to the paradox of cooperation: "The purpose of cooperation will and can never be to make all libraries within the cooperative group equal: their differential relationship to each other must be maintained, for cooperation to be possible."¹² A consortium functions as a creative tension between the demonstrated benefits of cooperation and the innate organizational need to compare and assess performance. We are by turns competitive and cooperative, depending on the perspective and the audience. Without this tension, a consortium would not be an effective organization.

Can a model license embody the collective vision of the consortium members? This requires a thorough involvement of the members, a consensus on the key practices and interests of the group, and a commitment to developing language that can express the principles on which the consortium is operating. Research and scholarly communications are being transformed, new forms of knowledge are being created, and patrons of educational and other institutions are expecting resources to be available whenever and wherever the need occurs. At the same time, library administrations are increasingly concerned about the ownership, durability, and portability of information resources and above all, cost sustainability. Ensuring that licensed access to digital resources does not erode any permitted uses under copyright legislation is another key issue. In this environment, it is essential for model licenses to be dynamic, iterative documents that remain consonant with the policies and practices of the member institutions, and that there be a consensus between the various institutions that form a consortium. Institutions

both large and small, represent a variety of curricula and stakeholders, and need to feel that their interests are taken into consideration.

II) Consortium Background

OCUL

The Ontario Council of University Libraries (OCUL) is an active consortium of twenty university libraries in Ontario, Canada which was founded in 1967. It represents a wide diversity of schools, from small undergraduate to comprehensive doctoral, from single campus institutions with a modest curriculum of programs to multi-campus schools offering a full range of professional and traditional academic programs. The total number of full-time students is about 350,000 as of July 2005. There is a significant history of collaboration and cooperation among its members. Some of the consortium's noteworthy initiatives include: an interlibrary loan agreement to provide books at no charge to the requesting institution and photocopies at a nominal flat fee; a union catalogue of all serials held in Ontario libraries; a map group that negotiates consortium purchases of maps and geospatial data; and a health sciences group that negotiates consortium purchases and resource sharing for schools with health sciences programs.

Starting in the late 1990s, the consortium made significant strides in cooperative acquisitions and licensing of electronic resources through one of its committees, the OCUL Information Resources Group (OCUL IR). As of 2005, consortial acquisitions totaled more than \$13 million (CAD) dollars, making OCUL a significant player in the academic information marketplace. There are currently in excess of 120 agreements for ejournal collections, abstract and index (A&I) databases, reference tools, eBook collections and auxiliary resources such as

citation management software (RefWorks). The group determines its strategy on a consensual basis, and participation in individual license agreements is voluntary.

All OCUL libraries were participants in the Canadian National Site Licensing Project (CNSLP) site licensing initiative and participate to a significant degree in its successor initiative, the Canadian Research Knowledge Network (CRKN). While the original project was focused on STM electronic resources, CRKN aims to further content expansion through a focus on humanities and social sciences electronic resources. At the infrastructure level, Ontario provincial grants through the Ontario Innovative Trust fund were instrumental in enabling the development of the Ontario Information Infrastructure program. Within this framework, OCUL libraries have sought to ensure both rapid access to and long term preservation of licensed electronic resources through a local digital repository known as the Ontario Scholars Portal (<http://www.scholarsportal.info/>).

Scholars Portal

Scholars Portal is an integrated suite of collections and services which form an online portal for users. It includes several components: a user interface (CSA Illumina) for searching and browsing a range of research databases and ejournal collections across disciplines; an ejournal server for locally hosting the licensed content and allowing for digital preservation; a document delivery service (RACER) that supports end-user requesting as well as Z39.50 searching of all OCUL library catalogues; a citation management software (RefWorks) that enables management of bibliographic data; and an OpenURL link resolver (SFX) to facilitate linking from citations to full-text and alternative services. An electronic government publications

repository for Ontario provincial documents is being developed, and other digital content such as eBooks and geospatial data are being tested for feasibility for inclusion in Scholars Portal.

The key goals of this project are to provide Ontario researchers with an environment which provides:

- access to scholarly digital resources to support research, teaching, and learning across a wide variety of disciplines
- simplified searching of electronic resources by incorporating content into a single platform
- a wealth of high quality, trusted resources in one space
- researchers the ability to explore relationships between various types of digital content
- users with the tools to manage resources more effectively

After only several years in existence, the Ontario Scholars Portal is transforming the ways in which students, faculty, and others in the university community access, use and manage their information needs. In 2005, OCUL was awarded the Innovation Achievement Award by the Canadian Association of College and University Librarians (CACUL) for its exceptional achievement in the development of the Scholars Portal.

III) Developing the OCUL Model License

It was not surprising, given the scope of these resources and services, that it was deemed important for the consortium to develop a home grown, generic model license that would suit a broad range of licensing needs. As mentioned previously, OCUL member institutions have been active participants within Canadian national licensing initiatives. There was and continues to be a significant degree of overlap between licenses at the national and provincial levels, where the national agreement could potentially be a 'scaled-up' version of an existing license from a

regional library consortia such as OCUL. Given these linkages, OCUL had instituted an interim solution of informing vendors on the consortium's website that they should be willing to sign a model license similar to the CNSLP license agreement.

The catalyst for starting work on writing the model license came about as a result of the authors attending an ARL Licensing Workshop in the summer of 2004. Having examined the existing model licenses documents, and having had an opportunity to discuss the issues and risks presented by various license clauses, it was resolved that the Ontario university community would in fact benefit from a standardized licensing approach. The authors began with a close reading of several key model licenses, including: the CNSLP license; the JISC/NESLi (UK) license; the DLF/CLIR LibLicense; the British Columbia Electronic Library Network License (BC ELN), and the California Digital Library license. From these documents and selected secondary sources, it was comparatively straightforward to devise a framework for incorporating the basic elements of an Electronic Resources License agreement.¹³ From the outset, permission was sought from each consortia or appropriate body to authorize the reproduction and use of specific language within the new OCUL license.

Many areas such as the definitions in Section 1 were relatively straightforward and, as such, were copied verbatim from a source that met local standards. The source in the case of definitions turned out to be the BC ELN license. In a slightly different approach, Section 3 on Usage Rights (Authorized Uses) was developed from a mixture of two licenses: the CNSLP and CLIR/LibLicense language. In this case, it was deemed essential, however, to select the more detailed clauses on Course Packs/Electronic Reserve and Interlibrary Loan from the CNSLP language as these were specifically written with Canadian standards and laws in mind.

Grouping and naming of sections in the license took on an importance that was not initially anticipated. Perhaps it was some perverse librarian obsession with order and organization, but it was considered quite important as to how each section was titled and what the constituent clauses would be. A case in point was how to name the clauses on the contractual obligations of the parties (Sections 5, 6 and 7). Among the model licenses examined, there were three viable alternatives which paradoxically divided along national lines: the CNSLP/BC ELN licenses titled these sections as "Undertakings"; the JISC/NESLi License referred to these sections as "Responsibilities"; and finally the CLIR LibLicense and California Digital Licenses referred to the sections as "Performance Obligations". Despite our patriotic inclinations, the authors settled on "Responsibilities" as cutting the best balance between descriptiveness and the ability to convey a sense of requirement. Furthermore, the authors attempted to use section naming to impart a sense of equity and commonality through the ordering of these sections. Thus, the OCUL license placed the section on mutual responsibilities ahead of both the Licensor and Licensee Responsibilities. Another area where organization played a central role was in singling out various key 'boilerplate' clauses on Representation, Warranties, and Indemnification into one separate section (Section 8). This idea, adopted from the JISC License framework, signaled that these clauses are important enough to set them apart from the more generic boilerplate clauses (such as Assignment and Transfer, Severability etc.) found in all license agreements.

Determining what model language from the available licenses would eventually be incorporated into the OCUL license presented significant challenges, since each section required the authors to consider changes in the library environment and the information industry, the consortium's core licensing principles, and any unique local needs that were not met by existing

language. In the end, the authors were able to use what fit our consortium's needs and had to invent everything else.

IV) Features of the OCUL Model License

Model licenses are interesting documents that, when scrutinized and compared, reveal many nuances and variations. Part of what accounts for these differences are varied ways of describing and addressing similar items or events. Other differences arise out of a revision that represents a 'sharpening' of understanding about concepts and terminology based on practical experience and feedback over time. Still other changes represent new additions that reflect the unique local licensing needs of the library or consortium; such particularities often help libraries and consortia to verbalize what they perceive to be their core principles. It is on this last group of changes that the distinctive features of the OCUL Model License will be examined. In the interest of brevity and to better illustrate the underlying issues being addressed by a clause, topics have been arranged thematically and not according to any strict adherence to sequential order.

Before proceeding, it is worth noting here the revision and vetting process that was adopted by the consortium. First, formal feedback and discussion was solicited from various stakeholders from within the consortium using the OCUL Information Resources committee as the sounding board. The responses received ranged from informal email comments to more exhaustive clause-by-clause legal opinions from university counsel. Next, an extensive review was completed by Sam Trosow, a law professor, librarian and expert on copyright issues at the University of Western Ontario.¹⁴ Finally, drafts were sent to CRKN for any final comments. In all, the drafting

of the OCUL Model License entailed eight major revisions for the main document and three major revisions for the appendix on Local Hosting and Archiving of Licensed Materials.

Changes to Licensed Materials

One of the more difficult areas to manage within a consortium license are changes to content in large publisher's bundles of ejournals. While the consortium negotiates in advance of the commencement of the license, changes can and most often do occur within an ongoing multi-year license. Changes to electronic resources content typically occur for a number of reasons: when new journals are created (often as 'spin-off' titles from existing established journals); or where smaller publishers holdings are acquired and incorporated into the larger publisher's suite, or when individual titles are acquired/lost to other publishers or vendors. Within our Ontario consortium, we have tried to maintain the general principle, arrived at through both experience with successive licenses and by consensus of the members, that content should exist within a +/- 10% envelope of change during the lifespan of a license agreement (typically 3 years in duration).

In order to codify this principle, the authors crafted three clauses, 6.8 Notification of Modifications of Licensed Materials, 6.9 Withdrawal of Licensed Materials and 6.10 Addition to Licensed Materials. The base text of the first clause on notification was derived from the LibLicense model license, with the only change being to the stipulation of 60 day time period. The basis for Section 6.9 was wording found in the revised NESLi2 license of 2005. The definition of what constituted a 10% change was handled quite skillfully by the NESLi authors as it compelled the Licensor to "... make a pro rata refund of part of the Fee, taking into account the amount of material withdrawn and the remaining unexpired portion of the Subscription

Period."¹⁵ This places the onus on the Licensor to quantify the change based on both the volume of material removed and the remaining period of the subscription period which would be particularly important for changes occurring in the early stages of a multi-year agreement. The other modification which was made to the original language was the removal of the word 'obscene' from the text outlining when a Licensor may make a determination as to whether material ought to be removed from their servers. Notwithstanding the long tradition of fighting censorship within the library profession, it would be entirely unacceptable to allow a publisher, who could be headquartered in the United States or Great Britain, to apply a different set of laws to a Canadian contract. In the end, the authors decided to simply delete the offending term and revise the phrasing such that the Licensor is permitted to remove material if it: "...has reasonable grounds to believe it infringes copyright or is defamatory, or otherwise unlawful in nature..."¹⁶

The unique aspect of the OCUL Model license was the development of the additional clause on the Licensor adding materials and handling this issue separately from the loss of content. For OCUL negotiators, the key point here was to force the vendor to the negotiation table if the addition of new content constituted a significant change (again a 10% threshold). It was important to recognize that a vendor has the right to add materials to enhance their product in a way that is beneficial for both parties. What would not be acceptable would be for the same vendor to unilaterally impose significant price increases as a result of such action without subsequent negotiations and agreement on the part of the consortium. As an obvious example, the type of price inflation that would result from one publisher acquiring another publisher could result in subscription costs inflating on an exponential basis. In crafting this section, the authors wished to communicate that a multi-year consortium license should not become a 'back door' through which significant price increases could be *de facto* imposed upon the member

institutions. A cross-reference to the Section on notice 6.8 was deemed important to include as content changes could be disruptive to the operation of the OCUL Scholars Portal repository.

Protection from Unauthorized Use

One of the main conundrums of a Model License is how to strike the fine balance between the needs of user, specifically on maximizing the usefulness of the Licensed Materials, while at the same time protecting the interests of the copyright holder and the Licensor (not always the same). A key problem area, experienced by virtually all research libraries of any size, is the occurrence from time to time of 'unauthorized use'. Without cataloguing the possible iterations of how various parties might define such activity, let us assume that such activity occurs. The authors addressed this question by adopting the existing language in Section 10 of the CNSLP license. While the general thrust of the text of Section 7.3 on Unauthorized Use is the same, the text itself was shortened and simplified, with the specific exclusion of text describing the sanctions each institution imposes for failing to abide by the agreement. There are two further important alterations to the original CNSLP language, born out of direct experiences of the authors and the consortium. First, it was determined that one of the most significant obstacles to assisting vendors in the identification of unauthorized use was the absence of a proper exchange of information. It was felt that such language should not be overly prescriptive, instead it should emphasize the positive manner in which the two parties should ideally cooperate: "Both parties agree to cooperate in good faith and provide sufficient exchange of information to prevent any further unauthorized use."¹⁷ The key is to encourage the Licensor to provide enough information as to allow the Licensee to actually fulfill their obligations under the

previous part of the paragraph. As a further anticipated benefit, it is hoped that this clause will help create a better understanding of what vendors consider to be unauthorized use.

The third paragraph which covers the actions to be taken when unauthorized use occurs was modeled on language in the LibLicense Model. The main change to the base language was in section (b): "...Licensor may terminate the access of the Internet Protocol ("IP") address(es) from which such unauthorized use occurred *limited to the specific IP address or subnet from which the use occurred.*"¹⁸ Here, real world experience again acted as a guide as to how to recognize and properly facilitate the Licensor's legitimate concern to protect their content in a timely manner. The OCUL license stipulates that the Licensor may cut off the offending IP address/user immediately (that is immediately prior to or concurrent with appropriate notice), in so doing however, it must provide for the least amount of disruption. Recognizing the technological constraints inherent in most IP monitoring software, the licensor must nevertheless accept a responsibility to accurately target problem users and not penalize other users in the process. Section 10.3 on Suspension of Access reiterates the Licensor's scope of action to protect, and emphasizes that the offending action(s) must be substantial in nature and the corresponding remedy will be temporary and short-lived in duration. In no case would a vendor be permitted under either Section 7.3 or 10.3 to cut off access to an entire campus IP range for protracted periods of time.

Jurisdiction

Jurisdictional clauses or Governing Law provisions have become one of the most malleable sections in vendor licenses.¹⁹ These clauses represent a positive step forward in mutual understanding between vendors and libraries, as most vendors are now open to discussing and

making changes to such sections. Being a Canadian based consortium, OCUL decided to use the existing language in the CNSLP license. Harris argues that constructing a proper jurisdiction clause involves a threefold structure: it must specify a) the governing law, b) jurisdiction of the court for submitting a claim, and c) place of litigation.²⁰ The wording for Section 9.10 met all of these standards.

One of the principles of a Model License should be that such documents are written in non-technical language for the library layman. Holding true to this principle, the authors decided to remove a reference that was part of the original CNSLP language to a clause known as "forum non conveniens". This provision comes under a wider type of law about Conflict of Laws and typically involves an argument or application to the initial court for a change of venue based on certain specific criteria such as financial considerations or expediency.²¹ It was felt that such a clause was unduly cumbersome and went against the prevailing ideal of an agreement written for both clarity and simplicity. Moreover, the likelihood of any formal action was judged to be slim given the history of litigation between libraries and vendors. As a final deciding factor, the OCUL license incorporates an additional clause in Section 9.11 which obliges parties to seek mediation and other informal means to resolve disputes where they arise.

Funding Contingency and Financial Exigency

One of the universal realities in the higher education sector is the prospect of uncertain funding. Indeed, the need to include a 'blow-up clause' or escape hatch for a consortium in case of dire financial exigency is identified in the literature as integral to sound consortium management.²² Ontario institutions have, for the most part, remained insulated from large scale cancellations due to improving currency exchange rates with the US dollar. However, the lessons

learned from observing the more acute budgetary problems experienced by some state institutions south of the border helped to reinforce the authors' conviction that such language should be included in the model license. There was a second factor in electing to include Section 10.6 and that was its importance to the future management of consortium business: at present, no detailed exit strategy from large consortium deals has as yet been formulated by OCUL. This could be of concern where some critical level of participation could be lost midway through a license subscription and where no successful renegotiation of terms with the vendor is possible. Typically, there is no direct outside funding for OCUL licenses, and the voluntary nature of the participation leaves OCUL with a potential risk, however minor, of having to disband a consortium license as a result of non-payment on the part of member institutions. The language that was adopted for the OCUL license in Section 10.6 was the CNSLP language. This specific language was selected for its brevity over other existing alternatives (CDL License), and its appropriateness to the Canadian geographic and legal context.

Continued Access and Archiving of Licensed Materials

Over the past five years, OCUL has adopted a multi-tiered strategy to ensuring continued and persistent access to the materials the consortium licenses and acquires. The cornerstone to this strategy has been to negotiate the local hosting and archiving of Licensed Materials (often referred to as 'local load'). Unlike the Dutch National Library, the OCUL Scholars Portal is not a formal archiving agent for the vendors involved, though the intent and general aims of preservation and perseverance remain the same. One publisher describes this arrangement as a *de facto* archive in which there is no archiving commitment beyond the consortium's members.²³ Scholars Portal is not intended to supplant the publisher's archiving efforts, and in virtually all

cases, OCUL has maintained the contractual obligation for the vendor to provide perpetual access via their site as a necessary redundancy. The primary aim of the portal is to provide local access for Ontario institutions and to archive content (as distinct from either format or functionality); Scholars Portal does not intend to replicate every feature or functionality available on the vendor's site. At present, the OCUL Scholars Portal archives and hosts in excess of 10 million articles from over 7,600 full text journals and hosts more than 20 abstract and index databases. In order to facilitate local load, the consortium has employed a number of ad hoc instruments over the years. Such licenses have typically involved using vendor supplied agreements as a basis for negotiation and adapting these licenses to meet local standards.

One of the primary goals of a model license for OCUL is the regularization and standardization of contract language as it relates to local hosting and archiving. Without having any model license language to work from, the authors combined existing language from vendor supplied licenses and added to this home grown text covering technical issues of format and structure. From the outset, the question was raised as to whether this instrument should be included in the body of the license or whether it should be a separate appendix. The former would surely send a strong message to vendors about the value the consortium placed on local load. However it was conceded that the license had to cover more than just locally loaded electronic journal content and that some vendors are not yet amenable to granting a license to locally archive digital content. Therefore, the authors decided to construct this section as an appendix to the main license, making it 'detachable' from the main document.

Several linkages were made to the main license in the appendix, most importantly to the withdrawal of content from the Licensed Materials. This was deemed a crucial section in that one of the key objectives of Scholars Portal is to archive as much licensed content as possible and to

protect the integrity of the archive once established. What is more, because the archive is not an official mirror of the vendor site, Scholars Portal is not necessarily constrained in having to follow every change made to the vendor site. While it is simply not feasible to guarantee against the loss of content, Section 5 of the Appendix does require the vendor to comply with the provisions of section 6.9 and to provide a detailed rationale 60 days prior to removal of content to justify withdrawing archived materials. Moreover, the consortium does ultimately retain the right to archive content removed from the vendor's site: "...Consortium retains the right to archive and continue to provide access to the withdrawn materials provided that a permanent note, mark or URL link is made indicating that the article has been removed from the Licensor's servers."²⁴

The next hurdle in constructing the appendix was how to include the University of Toronto. The University of Toronto supports Scholars Portal through the allocation of physical space and networking infrastructure as well as through seconded staff positions key to the running of the operation. While the strategic directions, policies and funding derive from the OCUL consortium (in which Toronto is also a significant participant), many of the issues related to the physical location and infrastructure must be governed by the host institution. This issue was addressed within Section 1.10 of the Definitions in that Toronto was authorized to administer the terms of the appendix on behalf of the Consortium and its Members where Appendix 1 is appended to the License Agreement. Moreover within the appendix itself, it is made clear that the University is executing its duties in relation to the license solely as the service provider and that its scope of action is limited to the functioning of the Scholars Portal.

It is worth mentioning that there was a constant tinkering of the related clauses in the main body of the license to strengthen wherever possible language that ensures long term access

and archiving. Thus, a sentence tying in the local load appendix to the clause on Perpetual Access (Sec. 2.2) was inserted to reinforce the importance of both mechanisms to OCUL's long term strategy. For the vendor, another section was inserted obliging them to use reasonable efforts to maintain their own digital archive (Sec. 6.7). Existing licenses such as the CNSLP and LibLicense did not contain language covering such good faith efforts on the part of the publisher. Without any specific existing language, the authors attempted the novel and turned to the only available alternative, seeking permission to incorporate portions of text from the Elsevier Archival Access appendix into the model license. While this section represents moral suasion at best, it nonetheless sends a clear signal to vendors about the core values of our consortium.

To further bolster archival provisions within the document, two other sections were added covering key trigger events. These included where the vendor experienced a loss of ownership of the Licensed Material (Section 6.11) and where the vendor was not otherwise able to continue to operate its business (Section 10.7 Continued Access to Licensed Materials). The loss of ownership question is tackled by compelling the vendor to use best efforts to retain a non-exclusive copy of all materials and is essentially taken verbatim from the NESLi license. Section 10.7 contains new language that builds and enlarges on 6.11, and provides for two courses of action: either transferring the material to one or more trusted parties (again with a nod to a similar provision in the Elsevier agreement with the essential change being that the decision as to which Third Party would have to be reached through a discussion between the vendor and the consortium); or transfer of a copy for local hosting and archiving. The latter option provides an obvious hook back to the appendix and helped complete what was intended to be a complete circle of access and archival permanency – at least from a licensing perspective.

Though the future of digital library collections will likely remain unclear for some time, having multiple redundant repositories constitutes an important first step in addressing concerns over digital preservation. The library community is gradually coming to understand the fundamental distinction between perpetual access rights and archiving rights for collection management and the growing implications inherent in these two propositions.²⁵ The obvious downside of the local archiving solution is the cost associated with technical infrastructure and staff time. Despite these challenges, the local load provision is viewed as the heart of why OCUL needed its own distinct model license agreement. Moreover, as the future of various publisher-library preservation partnerships, such as LOCKSS and Portico, is far from certain and vendor assurances of perpetual access are viewed with some skepticism by librarians,²⁶ a local solution still provides the most reliable, responsible and utilitarian option for digital archiving.

V) Uses for Model Licenses

The sceptic at this point may reasonably ask why any librarian, institution or consortia would undertake such an admittedly onerous task as developing their own model license, particularly when vendor licenses appear to be offering ever more favourable terms to libraries and their users.²⁷ Aside from the foregoing discussion of the specific consortial needs and requirements that gave rise to the OCUL Model License, several broader principles can be identified to justify such effort.

Aid for Negotiations

While it would be obvious to state that having a library-friendly license at hand should make negotiations easier for the library, it should also serve the interests of information

providers. This is a point of singular importance worth repeating: such documents are intended to save time for both vendor and librarian through the development of more uniform 'industry standard' licensing language that is both stable and predictable. Bosch's seminal article enunciated this point best when he called on all sides to develop both a common set of terms and a common set of principles that would be agreeable to both parties in an effort to move the licensing agenda forward.²⁸ While there have been solid gains in this area, there still exist areas of tension and lack of clarity; digital rights management technology, provisions for electronic reserves and digital interlibrary loan delivery to mention but three issues.

Even where a vendor is not agreeable to using the entire model license or will not sign such documents, it can still provide an invaluable resource in that it can provide alternative language to existing vendor contract language. This piecemeal approach, whereby certain key clauses are transplanted into another contract, can permit enough flexibility to allow libraries to hold true to certain core principles. All of these advantages should provide material cost savings for both the libraries and vendors engaged in negotiations.

Statement of Principles

Model licenses can also act as a statement of principles for the consortia and its member institutions. Libraries should clearly enunciate what we and our constituent users want from vendors and their products; there is nothing wrong with being proactive in this regard - indeed librarians have too often been passive consumers of information. A vendor wishing to do business with a library or a consortium should be able to easily determine what their customers value and what they expect. The model license then should be properly viewed by vendors as a yardstick by which their products, services and business model can and will be measured.

Clauses such as changes to the content of the licensed materials or compliance with standards such as Project Counter or OpenURL inform Licensors that libraries have specific standards that we expect will be met. Even where a vendor is unable to comply with a given provision, there is an education process from which the most astute companies will learn and eventually move to a more mutually agreeable position. Current model licenses and many vendor licenses bear witness to this evolutionary process.

In the case of library consortia, licenses convey both a sense of collectivism, in that the members signal their wish to be administered under common equitable licensing terms, and also a sense of professionalism. On this latter point, the presence of a model license informs the vendor that consortia staff and their constituent libraries are knowledgeable about legal and licensing issues and that the group is willing to enter into serious negotiations to obtain what we view to be acceptable terms. In OCUL's case, the vendor would come to the table knowing that we are a regional electronic resource repository and that our license reinforces our collective concern and desire to host and preserve electronic journals through a centralized provincial site. Moreover, our members are serious enough about digital archiving and persistence issues that even where we cannot secure our 'local load' provision, we still desire that the vendor commit to maintaining their own archive in perpetuity.

Reduction of Legal Risk and Liability

Despite the widespread efforts of the library profession to promote training on licensing issues, none of us would lay claim to being a legal expert. In our continued relations with information providers, many of whom are large commercial entities with legal counsel on staff, we must recognize the limits of our skills. A model license is a means to help provide an

additional level of security and certainty that we ourselves cannot always necessarily ensure. Indeed, such licenses reduce legal liability through the incorporation of advantageous 'library-friendly' language in key areas such as indemnification.²⁹ Many vendor licenses on the other hand contain language that ranges from the obscure though benign to downright hostile to the rights of our institutions and users. While there is a steep curve involved in learning to decipher legal contracts, model licenses typically employ plainer more transparent contract language that is more user friendly. Such contracts can be used with a greater degree of certainty by libraries precisely because most, if not all, have been vetted in advance by legal experts.³⁰ Finally, if used widely by a consortium, it is possible that the use of a model license would have the cumulative advantage of making licenses easier to manage as a whole. One could imagine a situation where only the atypical licenses would need to be identified and handled as an exception; all else falling under the common umbrella of the model license.

Educational Tool

One of the most interesting applications of model licenses is their potential use for educational purposes. This education process begins with the developers of the license who through the process of building the license invariably must define what they feel are core principles that need to be expressed in a legal document. In so doing, those involved with the development of such licenses have the opportunity to both broaden and deepen their understanding of contracts and licensing. This process then moves beyond the developers to other stakeholders, whether within a single institution or across a number of organizations as in a consortia. As was the case in the OCUL experience, there was a large degree of agreement on many topics across the member schools; yet there were still subtle nuances and differences of

opinion on various aspects that surfaced during the various iterations of the document. Surprisingly, the process of scrutinizing every aspect of the document had the unintended consequence of forcing the authors to contemplate the perceptions of vendors on numerous issues. Such an exercise was enlightening for those involved and resulted in a more equitable document.

Model licenses can also assist in providing an educational tool for end users. Precisely because such documents are cast in simpler language they can provide a ready basis for derivative documents such as acceptable use guidelines for electronic resources.³¹ Again, the increased use of model licenses could provide a more uniform set of guidelines to be followed by users. Finally, model licenses provide a convenient teaching tool for both professional librarians in the field and LIS students. The model license can provide a highly structured roadmap to licensing and contract issues, and collection development and electronic resource management issues more generally. If there is an area that librarians have not been well prepared for to date it is in the area of contracts and negotiations. Model licenses provide a 'best practices template' to help guide new professionals in what can be a bewildering environment. The OCUL Model License has been used in such a manner as part of a vendor relations course in one of Ontario's Library and Information Science programs.

VI) Future of Model Licenses in Libraries

In an attempt to summarize the current chapter, it would be helpful to question what remains to be done to advance model licenses further. To revisit Bosch's questions on the future of the model license, one area in particular remains unrealized to date: the notion of a single, 'blanket license', whereby a single instrument governs multiple products.³² Particularly as

vendors move into large scale licensing of non-journal digital content (electronic books, electronic reference works, etc.), the ideal of a flexible document becomes increasingly attractive; the need to review and sign numerous documents for each specific new resource could be mitigated by such an approach. One 'parent' agreement could govern several 'dependent' amending agreements which in turn need only spell out the unique aspects pertaining to business terms and technical specifications. Elsevier is currently following this pattern in its approach to licensing of electronic reference books.

Any such single agreements will need to be flexible enough to cover the addition or inclusion of backfiles and archival content to the existing current subscription agreement. Moreover, such documents will have to be broad and detailed, yet flexible enough to cover off a wide spectrum of concerns that may be different when the focus shifts from one resource to another or from one consortium to another. It could be that there are limits beyond which model licenses cannot be stretched. Certainly beyond the national level, a model license requires significant alteration to take into account the legal, political, ethical and even linguistic differences of multiple licensing constituencies. Compounding this complexity by making a license flexible enough to handle multiple resource types may not be possible. Despite this uncertainty, the pay off for even minor efforts at re-using model licenses will likely yield additional efficiencies that will benefit both vendors and libraries.

A second avenue of exploration could include a broader research survey of various Libraries and Consortia on the current and future use of model licenses. The study envisioned here could follow the lines of the recent ARL Survey on the state of the Large Publisher Bundle.³³ Further, such a survey instrument would be lacking if it did not also ask vendors about their perspectives on model licenses. A study of this scope should be able to determine if

Libraries' perspectives on the relative advantages and disadvantages of model licenses are shared by our counterparts in the information provider sector. Differences identified in such a study could provide a pathway toward further development and acceptance of model licenses.

As dynamic, evolving documents, the library community will nonetheless adopt future iterations of model licenses as it adapts to the shifting landscape of information resources. It can only be hoped that there will be a point in the future where a relative degree of convergence exists between model licenses and those supplied by vendors such that one would be virtually indistinguishable from the other. This would be a clear win/win situation for all players and would help to build bridges between the library and vendor communities.

¹ Bostick, Sharon L., and Robert E. Dugan. "The History and Development of Academic Library Consortia in the United States: An Overview." *Journal of Academic Librarianship* 27, no. 2 (2001): 129.

² American Association of Law Libraries & others. "Principles for Licensing Electronic Resources." ARL. <http://www.arl.org/scomm/licensing/principles.html> (accessed 22 February, 2006): 1.

³ John Cox. "Model Generic Licenses: Cooperation and Competition." *Serials Review* 26, no. 1 (2000): 3.

⁴ Jacqueline Borin. "Site License Initiatives in the United Kingdom: The PSLI and NESLI Experience." *Information Technology & Libraries* 19, no. 1 (March 2000): 44.

⁵ Deb deBruijn. "The Canadian National Site Licensing Project." *Journal of Library Administration* 35, no. 1/2 (2001): 195.

⁶ Janet Brennan Croft. "Model Licenses and Interlibrary loan/document Delivery from Electronic Resources." *Interlending & Document Supply* 29, no. 4 (2001): 167.

⁷ Yale University Library and Council on Library & Information Resources. "Licensing Digital Information: A Resource for Librarians" <http://www.library.yale.edu/~llicense/standlicagree.html> (accessed 10 July 2006).

⁸ California Digital Library. "At a Glance" <http://www.cdlib.org/glance/index.html> (accessed 6 June 2006): 1.

⁹ Ellen Finnie Duranceau. "Using a Standard License for Individual Electronic Journal Purchases: Results of a Pilot Study in the MIT Libraries." *Serials Review* 29, no. 4 (2003): 304.

¹⁰ *Ibid.* 304.

¹¹ International Coalition of Library Consortia International Coalition of Library Consortia. "Statement of Current Perspective and Preferred Practices for the Selection and Purchase of Electronic Information." <http://www.library.yale.edu/consortia/statement.html> (accessed Feb 22, 2006): 1.

¹² Ross Atkinson. "Uses and Abuses of Cooperation in a Digital Age," *Collection Management* 28, no. 1/2 (2003): 5.

¹³ For a comprehensive description of clauses in a license agreement written for librarians, see: Lesley Ellen Harris. *Licensing Digital Content: A Practical Guide for Librarians*. (Chicago and London: American Library Association, 2002); especially Chapter 4 "Key Digital Licensing Clauses," 41-76. See also: Stephen Bosch, et al. *Guide to Licensing and Acquiring Electronic Information*. (Lanham, MD: Scarecrow Press, 2005); especially Appendix C "Licensing Electronic Information Resources," 83-88.

¹⁴ The authors gratefully acknowledge and thank Dr. Trosow for his many invaluable comments on the draft of the OCLC model license.

¹⁵ Joint Information Systems Committee (JISC). "Model NESLi2 License for Journals." http://www.nesli2.ac.uk/NESLi2_Licence_NEW_final_vers_041005.htm (accessed June 19, 2006). Section 5.2.

¹⁶ Ontario Consortium of University Libraries. *OCLC Electronic Products License Agreement* p.8.

¹⁷ *Ibid.* p.9.

¹⁸ *Ibid.*

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- ¹⁹ David C Fowler, "Licensing: An Historical Perspective," in *Licensing in Libraries: Practical and Ethical Aspects*, edited by Karen Rupp-Serrano (Binghamton, NY.: Haworth, 2005), 191.
- ²⁰ Lesley Ellen Harris. *Licensing Digital Content: A Practical Guide for Librarians*. (Chicago and London: American Library Association, 2002) 81.
- ²¹ Daphne A. Dukelow. *The Dictionary of Canadian Law*. Third Edition. (Scarborough, Ont.: Thomson Carswell, 2004), 501.
- ²² Anne E McKee, "Consortial Licensing Issues: One Consortium's Viewpoint," in *Licensing in Libraries: Practical and Ethical Aspects*, edited by Karen Rupp-Serrano (Binghamton, NY.: Haworth, 2005), 138-139.
- ²³ Joep Verheggen, "Digital Archiving at Elsevier" (presentation, International Council for Scientific and Technical Information Public Conference: Technical and Economic Challenges of Scientific Information [STM Content Access, Linking and Archiving], London, May 17, 2004), http://www.icsti.org/forum/46/Joep_Verheggen.ppt (accessed June 21, 2006).
- ²⁴ Ontario Consortium of University Libraries. *OCUL Electronic Products License Agreement Appendix 1* p.16.
- ²⁵ Jim Stemper and Susan Barribeau, "Perpetual Access to Electronic Journals: A Survey of One Academic Library's Licenses," *Library Resources & Technical Services* 50, no. 2 (April 2006): 92.
- ²⁶ *Ibid.* 94.
- ²⁷ David C Fowler, "Licensing: An Historical Perspective," in *Licensing in Libraries: Practical and Ethical Aspects*, edited by Karen Rupp-Serrano (Binghamton, NY.: Haworth, 2005), 194.
- ²⁸ Stephen Bosch, "Licensing Information: Where Can We Go From Here?," *Library Acquisitions: Practice & Theory* 22, no. 1: 46.
- ²⁹ Stephen Bosch, "Using Model Licenses." In *Licensing in Libraries: Practical and Ethical Aspects*, edited by Karen Rupp-Serrano (Binghamton, NY.: Haworth, 2005), 70.
- ³⁰ Lesley Ellen Harris, *Licensing Digital Content: A Practical Guide for Librarians*. (Chicago and London: American Library Association, 2002), 9-10.
- ³¹ Jill Emery, "Is Our Best Good Enough? Educating End-Users About Licensing Terms." In *Licensing in Libraries: Practical and Ethical Aspects*, edited by Karen Rupp-Serrano (Binghamton, NY.: Haworth, 2005), 29-32.
- ³² Bosch, "Licensing Information," 46.
- ³³ Karla Hahn, "The State of the Large Publisher Bundle: Findings from an ARL Member Survey," *ARL Bimonthly Report*, no. 245 (April 2006). <http://www.arl.org/newsltr/245/bundle.html>.